AL

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

JEFFREY EISENBERG,
individually and as representative of a Class
of similarly-situated persons and entities,

Plaintiff,

v.

GEORGE W. KUHN DRAINAGE DISTRICT,
a component unit of Oakland County with a separate
legal existence, and CITY OF ROYAL OAK,
MICHIGAN, a municipal corporation.

Defendants.

Honorable David M. Cohen

Case 2023-200422-CZ

KICKHAM HANLEY PLLC
Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Attorneys for Plaintiff
32121 Woodward, Suite 300
Royal Oak, MI 48073
(248) 544-1500
ghanley@kickhamhanley.com
jwarrow@kickhamhanley.com
ekickhamjr@kickhamhanley.com

DICKINSON WRIGHT PLLC
Peter H. Webster (P48783)
Scott A. Petz (P70757)
Alma Sobo (P81177)
Attorneys for George W. Kuhn Drainage District
2600 West Big Beaver Road, Suite 300
Troy, MI 48084
(248) 433-7200
pwebster@dickinsonwright.com
spetz@dickinsonwright.com
asobo@dickinsonwright.com

MILLER, CANFIELD,
PADDOCK AND STONE, P.L.C.
Sonal H. Mithani (P51984)
Caroline B. Giordano (P76658)
Sarah C. Reasoner (P85573)
Attorneys for City of Royal Oak
101 North Main Street, 7th Floor
Ann Arbor, MI 48104
(734) 663-2445
mithani@millercanfield.com
giordano@millercanfield.com
reasoner@millercanfield.com

GEORGE W. KUHN DRAINAGE DISTRICT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7) AND MCR 2.116(C)(8)

FEE

George W. Kuhn Drainage District ("Drainage District") moves pursuant to MCR 2.116(C)(7) and (C)(8) for dismissal of Plaintiff Jeffrey Eisenberg's ("Plaintiff") Complaint. In support of its motion, the Drainage District relies upon the facts, argument, and authority in the accompanying Brief. Counsel for the Drainage District sought, but did not obtain, Plaintiff's concurrence in the relief requested, requiring this Motion and Brief.

WHEREFORE, the Drainage District respectfully requests that this Court enter an Order: 1) granting its Motion and Brief; 2) dismissing Plaintiff's Complaint with prejudice pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8); and 3) granting any further relief that the Court deems just under the circumstances.

Respectfully Submitted,

DICKINSON WRIGHT PLLC

/s/Peter H. Webster
Peter H. Webster (P48783)
Scott A. Petz (P70757)
Alma Sobo (P81177)
Attorneys for the George W. Kuhn Drainage District
2600 W. Big Beaver Road, Suite 300
Troy, MI 48084
(248) 433-7200
pwebster@dickinsonwright.com
spetz@dickinsonwright.com
asobo@dickinsonwright.com

Dated: July 25, 2023

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

JEFFREY EISENBERG,
individually and as representative of a Class
of similarly-situated persons and entities,

Plaintiff,

v.

GEORGE W. KUHN DRAINAGE DISTRICT,
a component unit of Oakland County with a separate
legal existence, and CITY OF ROYAL OAK,
MICHIGAN, a municipal corporation.

Defendants.

Honorable David M. Cohen

Case 2023-200422-CZ

KICKHAM HANLEY PLLC
Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Attorneys for Plaintiff
32121 Woodward, Suite 300
Royal Oak, MI 48073
(248) 544-1500
ghanley@kickhamhanley.com
jwarrow@kickhamhanley.com
ekickhamjr@kickhamhanley.com

DICKINSON WRIGHT PLLC
Peter H. Webster (P48783)
Scott A. Petz (P70757)
Alma Sobo (P81177)
Attorneys for George W. Kuhn Drainage District
2600 West Big Beaver Road, Suite 300
Troy, MI 48084
(248) 433-7200
pwebster@dickinsonwright.com
spetz@dickinsonwright.com
asobo@dickinsonwright.com

MILLER, CANFIELD,
PADDOCK AND STONE, P.L.C.
Sonal H. Mithani (P51984)
Caroline B. Giordano (P76658)
Sarah C. Reasoner (P85573)
Attorneys for City of Royal Oak
101 North Main Street, 7th Floor
Ann Arbor, MI 48104
(734) 663-2445
mithani@millercanfield.com
giordano@millercanfield.com
reasoner@millercanfield.com

BRIEF IN SUPPORT OF GEORGE W. KUHN DRAINAGE DISTRICT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7) AND MCR 2.116(C)(8)

TABLE OF CONTENTS

INDEX OF AUTHORITES

Cases

Rules

I. INTRODUCTION

Plaintiff, through his attorneys Kickham Hanley PLLC, brings this putative class action against the Drainage District and City of Royal Oak ("Royal Oak") asking for Millions based on claims that Royal Oak residents have allegedly paid more than their fair share for stormwater disposal services since May 18, 2017 forward ("Alleged Stormwater Overcharge"). This case is Kickham Hanley PLLC's latest attack on the Drainage District involving Royal Oak. The prior case against the Drainage District was dismissed by the trial court, unanimously affirmed by the Court of Appeals, and the Michigan Supreme Court denied leave.

More specifically, in 2014, Kickham Hanley PLLC filed a class action against Royal Oak, only, on two topics: (1) the "Kuhn Facility Debt Charge;" and (2) the "Alleged Stormwater Overcharge." *Schroeder v City of Royal Oak*, Oakland County Circuit Court Case 2014-138919-CZ (J. Kumar) ("2014 Action"). Royal Oak filed a motion for summary disposition. The trial court granted the motion and dismissed the action with prejudice. Kickham Hanley PLLC moved for reconsideration. While the motion for reconsideration was pending for well over 1 year, Royal Oak, for some reason, settled the 2014 Action. The settlement terms included a $2 Million payment by Royal Oak as to the Kuhn Facility Debt Charge theory, with almost half of the funds going to Kickham Hanley PLLC as class counsel. As to the Alleged Stormwater Overcharge theory, plaintiffs received an assignment from Royal Oak of "any and all claims" (if any) Royal Oak "has or may have" against non-party Oakland County and its related affiliates "arising out of or relating to the [Alleged] Stormwater Overcharge." Additionally, the settlement provided that the class "will **dismiss the Class claims relating to the [Alleged] Stormwater [Over][c]harge with prejudice**," and that Royal Oak "**may continue to include the [Alleged] Stormwater [Over][c]harges in its calculation of the Rates.**" (**Exhibit 1**, Agreement, ¶¶15-

16) (emphasis added). The Named Plaintiff, in this case, – Jeffrey Eisenberg was a class member, and received $6,032.18 as part of the settlement.

In 2017, based on the above-referenced assignment, Kickham Hanley PLLC brought Alleged Stormwater Overcharge claims against Oakland County and the Drainage District for the purported benefit of the certified class from the 2014 Action, and Kickham Hanley PLLC. *Kickham Hanley PLLC v George W Kuhn Drainage District et al*, Oakland County Circuit Court Case 2017-159351-CZ (J. O'Brien) ("2017 Action"). The trial court dismissed the 2017 Action with prejudice, and the Court of Appeals unanimously affirmed. *Kickham Hanley PLLC v Oakland Co*, unpublished opinion *per curiam* of the Court of Appeals, issued May 2, 2019 (Docket No. 341076), 2019 WL 1965891 (**Exhibit 2**). Kickham Hanley PLLC tried the same scheme on the Drainage District involving Oak Park. The trial court dismissed the case, and the Court of Appeals also unanimously affirmed. *Kickham Hanley PLLC v George W Kuhn Drainage District*, unpublished opinion *per curiam* of the Court of Appeals, issued Jan 14, 2021 (Docket No. 351317), 2021 WL 137773 (**Exhibit 3**).

Now, Kickham Hanley PLLC is, once again, trying to assert Alleged Stormwater Overcharge claims, under circumstances which have been rejected by two different trial court judges in this circuit and six different appellate judges. In this 2023 Action, Plaintiff's Complaint alleges the Great Lakes Water Authority ("GLWA") "charges the Drainage District" to dispose of sewage flows (which include a sanitary and a stormwater component) "based on a formula" that includes a percentage allocated "to the costs to treat stormwater flows" from the Drainage District's service area, and the Drainage District, "in turn, allocates" it "among all of the municipalities in the district," including Royal Oak. (Complaint, ¶¶16-17, ¶20). Plaintiff's Complaint then asserts that, instead of "allocating" GLWA's bills to the Drainage District's

communities (e.g. Royal Oak, Troy) in the same way that Kickham Hanley PLLC theorizes that GLWA allocated its charges to its approximately 20 sewer communities (e.g. Drainage District (GWKDD), Highland Park, OMID, Detroit), the Drainage District "improperly reallocate[s]" to Royal Oak "a higher percentage of the storm water disposal charges[.]" (*Id.* at ¶¶ 25-26, ¶28). In short, according to Plaintiff's Complaint, Drainage District communities like Royal Oak whose storm (pollution) percentage is greater than their sewage (sanitary) percentage pay too much toward the Drainage District's GLWA bills which benefits Drainage District communities like Troy whose storm (pollution) percentage is less than their sewage (sanitary) percentage which such communities, in turn, pay too little toward the Drainage District's GLWA bills.

In their latest effort, Kickham Hanley PLLC's Plaintiff asserts two counts against the Drainage District: (1) Assumpsit (Count I); and (2) Unjust Enrichment (Count II). Neither count withstands scrutiny and should be dismissed for the following summary reasons:

1. Assumpsit is no longer a recognized cause of action;
2. There is no unjust enrichment because Plaintiff does not allege that the Drainage District retained any alleged overpayment;
3. Plaintiff's claims are barred by claim and issue preclusion; and
4. Plaintiff's claims are barred by release.

First, Michigan does not recognize an independent cause of action for assumpsit. See, e.g., *Midwest Valve & Fitting Co v City of Detroit*, unpublished opinion *per curiam* of the Court of Appeals, issued March 9, 2023 (Docket No. 358868), 2023 WL 2436483, at *5 (affirming dismissal of putative class action brought by Kickham Hanley PLLC alleging, among other causes of action, assumpsit based on certain annual charges assessed by the city, and reasoning that "Michigan no longer recognizes an independent cause of action for assumpsit.").

Second, Plaintiff's Complaint fails to state a claim against the Drainage District because it does **not** allege the Drainage District retained a benefit as to the Alleged Stormwater Overcharge, and, thus, Plaintiff's requested disgorgement remedy is unavailable. See, e.g., *Liggett Rest Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003) (requiring plaintiff asserting an unjust enrichment claim to plead facts to show the defendant "**received a benefit from plaintiff, and that an inequity resulted to plaintiff *as a consequence of defendant[]'s retention of that benefit***.") (emphasis added); *AFT Michigan v Michigan*, 303 Mich App 651, 677; 846 NW2d 583 (2014) ("Unjust enrichment of a person occurs when he **has and *retains money or benefits which in justice and equity belong to another.***") (emphasis added).

Additionally, claim preclusion (res judicata) and issue preclusion (collateral estoppel) bar Plaintiff from relitigating the Alleged Stormwater Overcharge, which Kickham Hanley PLLC, who is in privity with Plaintiff, unsuccessfully pursued in the 2017 Action. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12-13; 672 NW2d 351 (2003); *Monat v State Farm Ins Co*, 469 Mich 679, 683-84; 677 NW2d 843 (2004); (see also **Exhibit 2**). Moreover, Plaintiff's Complaint is also barred by release because Plaintiff was a class member in the 2014 Action. For these reasons, and as articulated more fully below, summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8) is appropriate.

II. BACKGROUND

A. In the 2014 Action, Kickham Hanley PLLC Represented a Class Asserting Alleged Stormwater Overcharge Claims Against Royal Oak.

On February 14, 2014, Plaintiff Andrew Schroeder, through his attorneys Kickham Hanley PLLC, filed a class action complaint against Royal Oak on two topics: (1) the "Kuhn Facility Debt Charge;" and (2) the "Alleged Stormwater Overcharge." Royal Oak filed a motion for summary disposition. The trial court granted the motion and dismissed the action with

prejudice. Kickham Hanley PLLC moved for reconsideration. While the motion was pending, Royal Oak settled the 2014 Action.

The settlement terms included a $2 Million payment by Royal Oak as to the Kuhn Facility Debt Charge theory, with almost half of the funds going to Kickham Hanley PLLC as class counsel. (**Exhibit 1**, Agreement, ¶3). As to the alleged Stormwater Overcharge theory, Plaintiff received an assignment of purported claims from Royal Oak. Specifically, the settlement agreement stated:

> Plaintiff believes that Oakland County has overcharged the City for the stormwater component of the total flow from the City that enters the Oakland County system for many years (the "Stormwater Overcharge"). As part of the settlement, the City will assign any and all claims it has or may have against Oakland County arising out of or relating to the Stormwater Overcharge to the Class or an entity formed for the benefit of the Class, and Class Counsel will pursue those claims through litigation and/or negotiation (the "Oakland County Action"). [(*Id.* at ¶17)].

The settlement included a release "from the beginning of time through January 31, 2017" related to Royal Oak's rates or charges and its water and sewer fund balance. (*Id.* at ¶29). Additionally, the settlement provided that the class "will **dismiss the Class claims relating to the [Alleged] Stormwater [Over][c]harge with prejudice**," and that Royal Oak "**may continue to include the [Alleged] Stormwater [Over][c]harges in its calculation of the Rates."** (*Id.* at ¶¶15-16) (emphasis added). The Named Plaintiff, in this case, – Jeffrey Eisenberg was a class member, and received $6,032.18 as part of the settlement. (See **Exhibit 5**, Mortgage dated June 30, 1995); (**Exhibit 6,** Redacted Excerpt Account Service Listing dated May 4, 2015) (Account Ending 0301 for Plaintiff's property); (**Exhibit 7**, Redacted Excerpt Notice of Filing of Proposed Distribution Report, p 7 of 224) (Account Ending 0301).

The trial court entered a Final Judgment and Order dated June 14, 2017. (**Exhibit 8**). As to the assignment, the Final Judgment and Order states:

> Pursuant to the Agreement, ***[the City] will assign to the Class members or for their benefit any and all claims for refund of the [Alleged Stormwater] Overcharges*** that it has or may have against Oakland County Michigan and its affiliates . . . , including, but not limited to . . . the George W. Kuhn Drainage District[], and any other entity that imposed or imposes the Overcharges. ***Kickham Hanley PLLC is hereby appointed trustee of a litigation trust hereby established for the benefit of the Class members.*** As trustee, Kickham Hanley PLLC is authorized to pursue the claim for a refund of the [Alleged Stormwater] Overcharges by lawsuit against Oakland County or its aforesaid agencies. [(*Id.* at ¶6 (emphasis added)].

B. In the 2017 Action, Kickham Hanley PLLC Attempted to Assert the Alleged Stormwater Overcharge Claims Against Oakland County and the Drainage District.

In 2017, Kickham Hanley PLLC brought the Alleged Stormwater Overcharge claims against Oakland County and the Drainage District for the purported benefit of the certified class from the 2014 Action and, of course, Kickham Hanley PLLC as class counsel. Kickham Hanley PLLC alleged that, as "part of the settlement agreement in a related case," the 2014 Action, "the City assigned its claims against the County to Plaintiff to achieve a refund of the [Alleged] Stormwater [] Overcharges owed by the County to Royal Oak for disbursement to the Class members who submitted claims for refunds in the Royal Oak Class Action . . . ." (**Exhibit 9**, 2017 Action Complaint, ¶5).

Kickham Hanley PLLC alleged it was the "Trustee for the Class defined in the Final Judgment and Order approving Class Settlement Dated June 14, 2017, entered in" the 2014 Action, and that the Final Judgment and Order in the 2014 Action "authorized Plaintiff to institute and prosecute this action on behalf of the Class." (*Id.* at ¶7). Kickham Hanley PLLC's claims sought "a refund" of the Alleged Stormwater Overcharges. (See *id.* at p 2, pp 7-9).

In the 2017 Action, Kickham Hanley PLLC claimed that the Drainage District's April 19, 2015 Resolution "creates an express contract between the County and the City[,]" and that the "County has breached the terms of the Resolution by failing to charge the City its proportionate share of 'DWSD charges to the George W. Kuhn Drain to treat the total storm water flow.'" (*Id.* at ¶25, ¶34, ¶36). In the alternative, Kickham Hanley PLLC alleged that, "in the event that the Court finds that there was no express contract between the City and the County governing stormwater charges, the County is still legally obligated to refund the [Alleged] Stormwater [] Overcharges." (*Id.* at ¶39).

Oakland County was dismissed by stipulation, and the Drainage District moved for dismissal of the case including on the following basis: (1) The Resolution did not constitute a contract; (2) Chapter 20 of the Drain Code, MCL 240.83, prohibited challenging the Resolution; and (3) Kickham Hanley PLLC, standing in the shoes of Royal Oak, suffered no damages. After receiving the Drainage District's motion, Kickham Hanley PLLC tried to amend its complaint.

On October 25, 2017, the trial court granted the Drainage District's motion and denied Kickham Hanley PLLC's attempt to amend. (**Exhibit 10**, Hearing Transcript); (**Exhibit 11**, October 27, 2017 Order). Exhaustively considering the legal and factual issues underlying the Drainage District's motion and, relatedly, Kickham Hanley PLLC's surreptitious scheme purporting to serve as the basis for the 2017 Action, the trial court concluded that Kickham Hanley PLLC's unconventional lawsuit was legally and factually improper. As to Kickham Hanley PLLC's purported breach of contract claim, the trial court held "the case does not sound in contract[.]" (**Exhibit 10**, Tr. at 91, 1-4). As to the assumpsit claim, the trial court "recognizing that it is in equity," and "excusing the arguments that the Court specifically found unpersuasive by the Defendant," "otherwise adopt[ed] the Defendant's arguments and f[ound]

the case not viable in assumpsit." (*Id.* at 91, 6-12). The trial court dismissed the 2017 Action with prejudice.

Kickham Hanley PLLC appealed, and the Court of Appeals unanimously affirmed. (**Exhibit 2**). The Court of Appeals ruled that Kickham Hanley PLLC's breach of contract claim failed because "[t]he language of the Drainage Board's resolution and its Final Order of Apportionment plainly establish that these two documents, neither individually, nor combined, constituted a binding contract between the [Drainage District] and Royal Oak." (*Id.* at *8). The Court of Appeals also ruled that Kickham Hanley PLLC failed to state an assumpsit claim because it is unable to demonstrate that it suffered any damages:

> Plaintiff did not dispute that Royal Oak passed through the alleged overcharges to its water and sewer ratepayers. The trial court ruled that plaintiff, as Royal Oak's assignee, could not maintain the assumpsit claim because Royal Oak suffered no recoverable loss. The trial court did not err in this regard. [(*Id.* at *5)].

The Supreme Court denied leave to appeal. (**Exhibit 12**, April 29, 2020 Order).

C. In this 2023 Action, Plaintiff's Complaint Asserts Alleged Stormwater Overcharge Claims, Once Again, Against the Drainage District and Royal Oak.

Plaintiff's Complaint alleges GLWA "charges the Drainage District" to dispose of sewage flows (which include a sanitary and a stormwater component) "based on a formula" that includes a percentage allocated "to the costs to treat stormwater flows" from the Drainage District's service area, and the Drainage District, "in turn, allocates" it "among all of the municipalities in the district," including Royal Oak. (Complaint, ¶¶16-17, ¶20). Plaintiff's Complaint then asserts that, instead of "allocating" GLWA's bills to the Drainage District's communities (e.g. Royal Oak, Troy) in the same way that Kickham Hanley PLLC theorizes that GLWA allocated its charges to its approximately 20 sewer communities (e.g. Drainage District (GWKDD), Highland Park, OMID, Detroit), the Drainage District "improperly reallocate[s]" to

Royal Oak "a higher percentage of the storm water disposal charges[.]" (*Id.* at ¶¶25-26, ¶28).

Plaintiff's Complaint includes an "example" of Kickham Hanley PLLC's version of how the Drainage District should determine sewage (sanitary) and storm (pollution) portions from Kickham Hanley PLLC's version of GLWA's "rate methodology" "for the fiscal year ending June 30, 2021." (*Id.* at ¶¶25-32). Specifically, Plaintiff asserts that "[b]ecause the Drainage District allocated to the City [Royal Oak] a higher percentage of the storm water disposal charges ([which is subject to] 29.7%) than sanitary sewage disposal charges ([which is subject to] 19.3%), the more of the total Water Authority Charges [GLWA bills] that the Drainage District allocates to storm water charges, the more the City's [Royal Oak's] end-users pay in the aggregate." (*Id.* at ¶28). For the 29.7% and the 19.3%, Plaintiff is relying on Exhibit 6. (Exhibit 6 to Complaint, pp 8-9 of 13) (providing "29.7028%" as Royal Oak's storm (pollution) percentage and providing "19.306%" as Royal Oak's sewage (sanitary) percentage for FY 2021). In short, Plaintiff's theory is that Royal Oak pays too much of the Drainage District's GLWA bills because Royal Oak's storm (pollution) percentage is greater than Royal Oak's sewage (sanitary) percentage and too much of GLWA's bills are allocated to storm (pollution).

Thus, under Kickham Hanley PLLC's version of the only reasonable way for the Drainage District to interpret GLWA's bills and then to distribute GLWA's bills to the Drainage District's customer communities, the Drainage District undercharges its customer communities whose storm (pollution) percentage is less than their sewage (sanitary) percentage, for example, like Troy. (Exhibit 6 to Complaint, pp 8-9 of 13) (providing "2.4799%" as Troy's storm (pollution) percentage and providing "31.431%" as Troy's sewage (sanitary) percentage for FY 2021). Bottom-line, according to Plaintiff's Complaint, Drainage District communities like Royal Oak (where the storm (pollution) percentage is greater than the sewage (sanitary)

percentage) pay too much toward the Drainage District's GLWA bills which necessarily benefits Drainage District communities like Troy (where the storm (pollution) percentage is less than the sewage (sanitary) percentage) who, in turn, pay too little.[1]

Importantly, and logically so, Plaintiff's Complaint does **not** allege the Drainage District retained a benefit as to the Alleged Stormwater Overcharge. Yet, Plaintiff's Complaint seeks from the Drainage District at least $1,332,275 for FY 2021, and in excess of $7 Million from May 18, 2017 forward, for the benefit of Kickham Hanley PLLC. In so doing, Kickham Hanley PLLC's Plaintiff asserts two counts against the Drainage District: (1) Assumpsit (Count I); and (2) Unjust Enrichment (Count II).

D. This 2023 Action is Kickham Hanley PLLC's Latest Attack on Governmental Agencies and Their Constituents.

This case is another example of Kickham Hanley PLLC's attempts to extract funds needed for the operation, maintenance, and administration of critical public infrastructure from financially strapped governmental agencies, for Kickham Hanley PLLC's gain in the form of attorney fees. Kickham Hanley PLLC has brought "unsuccessful" attacks, including related to Alleged Stormwater Overcharges, which still come at a great cost to governmental agencies' and

---

[1] Regardless, and not at issue to dispose of this lawsuit, "Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable[,]" and have declined to second-guess governmental agencies' municipal utility rates and ratemaking practices. *Trahey v Inkster*, 311 Mich App 582, 594; 876 NW2d 582 (2015); *Youmans v Charter Twp of Bloomfield*, 336 Mich App 161, 218; 969 NW2d 570 (2021) (reversing judgment awarding over $9 Million in monetary and equitable relief to plaintiff and plaintiff class, and remanding for entry of a judgment of no cause of action in favor of the Township in a class action styled-complaint challenging certain municipal utility rates and ratemaking practices, and reasoning, among other things, that plaintiff "bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a *whole*.") (emphasis in original).

their constituents' limited resources.[2] To be sure, the Drainage District has already spent substantial resources in successfully defending the Drainage District in the 2017 Action related to Royal Oak. See *supra*. Similarly, in a 2019 Action related to Oak Park, Kickham Hanley

---

[2] See, e.g., (1) *Midwest Valve & Fitting Co,* 2023 WL 2436483 (affirming dismissal of putative class action brought by Kickham Hanley PLLC as plaintiff's counsel, alleging, among other causes of action, assumpsit and unjust enrichment, based on certain annual charges assessed by the city, and reasoning, among other things, that the charges were reasonable); (2) *Greenfield v City of Farmington Hills*, unpublished opinion *per curiam* of the Court of Appeals, issued Jan 12, 2023 (Docket No. 357579), 2023 WL 174810 (affirming summary disposition of class action styled-complaint brought by Kickham Hanley PLLC challenging certain municipal utility rates and ratemaking practices, where, among other things, plaintiff failed to establish that the City collected the funds at issue for any improper purpose, and failed to rebut the presumption regarding reasonableness of the rates); (3) *Brunet v City of Rochester Hills*, unpublished opinion *per curiam* of the Court of Appeals, issued Dec 2, 2021 (Docket No. 354110), 2021 WL 5750616 (affirming summary disposition of class action styled-complaint brought by Kickham Hanley PLLC challenging, among other things, certain municipal utility rates and ratemaking practices, where, among other things, plaintiff failed to overcome the presumption of reasonableness of the rates); (4) *Kickham Hanley PLLC,* 2021 WL 137773 (affirming dismissal of litigation trust styled-complaint claiming millions in damages brought against the Drainage District by Kickham Hanley PLLC as trustee for the purported benefit of a class in a prior action against the city of Oak Park for alleged overcharges for storm water disposal services); (5) *Youmans*, 336 Mich App 161 (reversing judgment awarding monetary and equitable relief to plaintiff and plaintiff class in a lawsuit brought by Kickham Hanley PLLC, and remanding for entry of a judgment of no cause of action in favor of the Township in a class action styled-complaint challenging certain municipal utility rates and ratemaking practices, where, among other things, plaintiff failed to establish the "'arbitrary, capricious, and unreasonable' nature of those rates and the underlying ratemaking processes[]" and ordering a judgment against plaintiff, including statutory costs and interest to the Township); (6) *Bohn v City of Taylor*, unpublished opinion *per curiam* of the Court of Appeals, issued Jan 29, 2019 (Docket No. 339306), 2019 WL 360730, at *4 (affirming summary disposition of class action styled-complaint brought by Kickham Hanley PLLC challenging the city of Taylor's water and sewer rates as unreasonable, disguised taxes under the Headlee Amendment, where, among other things, plaintiffs failed to establish that any of the City's ratemaking practices were "improper or unreasonable"); (7) *Deerhurst Condo Owners Ass'n Inc v City of Westland*, unpublished opinion *per curiam* of the Court of Appeals, issued Jan 29, 2019 (Docket No. 339143), 2019 WL 360725 (affirming summary disposition of class action styled-complaint brought by Kickham Hanley PLLC alleging that the city of Westland's water and sewer rates allocated charges for "grossly inflated" administrative costs and unspecified future capital improvements, where, among other things, plaintiffs failed to establish that "the [c]ity's overall allocation of administrative costs to the water and sewer department is unreasonable[,]" or that the creation of a reserve fund for future capital improvements to the city's water and sewer systems is "an improper ratemaking procedure.") (**Exhibit 4**).

PLLC unsuccessfully pursued millions of dollars from the Drainage District based on the Alleged Stormwater Overcharge. *Kickham Hanley PLLC*, 2021 WL 137773. Like in the 2017 Action, in the 2019 Action, Kickham Hanley PLLC's case was dismissed on motion in the trial court, affirmed unanimously in the Court of Appeals, and the Michigan Supreme Court denied leave.

III. ARGUMENT

A. Standards of Review under MCR 2.116(C)(7) and MCR 2.116(C)(8).

Summary disposition under MCR 2.116(C)(7) is appropriate on the basis of a "prior judgment" – including based on release, res judicata, and collateral estoppel. MCR 2.116(C)(7); *Minicuci v Scientific Data Mgmt, Inc*, 243 Mich App 28; 620 NW2d 657 (2000) (res judicata); *King v Munro,*329 Mich App 594; 944 NW2d 198 (2019) (collateral estoppel).

Under MCR 2.116(C)(8), summary disposition is appropriate where plaintiff "has failed to state a claim on which relief can be granted." *Morden v Grand Traverse Co*, 275 Mich App 325, 331; 738 NW2d 278 (2007). In addition to the pleadings, Michigan courts may examine documents referenced in the pleadings when construing a motion under MCR 2.116(C)(8). *Woody v Tamer*, 158 Mich App 764, 770; 405 NW2d 213 (1987). Moreover, the court may consider matters of public record. *Dalley v Dykema Gossett*, 287 Mich 296, 301 n 1; 788 NW2d 679 (2010). A motion pursuant to MCR 2.116(C)(8) should be granted where the plaintiff's claims are unenforceable as a matter of law, regardless of any possible factual development. See *Rathburn v State Commonwealth For Boys*, 145 Mich App 303, 307-308; 377 NW2d 872 (1985).

B. Plaintiff Fails to State an Assumpsit Claim.

Plaintiff's assumpsit claim against the Drainage District must be dismissed because Michigan does not recognize an independent cause of action for assumpsit. See, e.g., *Midwest Valve & Fitting Co*, 2023 WL 2436483, at *5 (affirming dismissal of putative class action

brought by Kickham Hanley PLLC as counsel, alleging, among other causes of action, assumpsit based on certain annual charges assessed by the city, and reasoning that "**Michigan no longer recognizes an independent cause of action for assumpsit**.") (emphasis added); *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013) (noting that "[w]ith the adoption of the General Court Rules in 1963, **assumpsit as a form of action was abolished**.") (emphasis added).

C. Plaintiff Fails to State an Unjust Enrichment Claim.

For unjust enrichment claim, a plaintiff must allege the defendant "received a benefit from plaintiff, and that **an inequity resulted to plaintiff *as a consequence of defendant[]'s retention of that benefit***." *Liggett Rest Group, Inc*, 260 Mich App at 137 (emphasis added); *AFT Michigan*, 303 Mich App at 677 ("Unjust enrichment of a person occurs when he has and ***retains* money or benefits which in justice and equity belong to another**.") (internal citation omitted and emphasis added). See also *Ganson v Detroit Pub Sch*, unpublished opinion *per curiam* of the Court of Appeals, issued Jan 21, 2021 (Docket No. 351276), 2021 WL 219225 (**Exhibit 4**).

Plaintiff's Complaint seeks "disgorge[ment]" of "revenues attributable to the [Alleged] Stormwater [] Overcharges imposed or collected by the Drainage District . . . ." (Complaint, p 13). Yet, based on Plaintiff's Complaint, Drainage District communities like Royal Oak (where the storm (pollution) percentage is greater than the sewage (sanitary) percentage) pay too much toward the Drainage District's GLWA bills which necessarily benefits Drainage District communities like Troy (where the storm (pollution) percentage is less than the sewage (sanitary) percentage) who, in turn, pay too little. Importantly, and logically so, Plaintiff's Complaint does **not** allege the Drainage District retained a benefit as to the Alleged Stormwater Overcharge. See, e.g., *Youmans*, 336 Mich App at 213 (reasoning, in a Kickham Hanley PLLC led case, that

such an action "will not lie against one who has not been personally *enriched* by the transaction" because the fundamental "basis" of the action "is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same.") (citation omitted).

In short, Plaintiff's requested disgorgement remedy is unavailable. See, e.g., *Ganson* 2021 WL 219225, at *3 (affirming summary disposition of unjust enrichment claim based on defendant former employer's alleged retention of incentivized retirement benefits where, among other issues, plaintiff failed to allege "defendant retained a benefit – when defendant was not the holder of plaintiff's retirement funds[,]" which were instead maintained by the state); *McLemore v Regions Bank*, 682 F3d 414, 426-27 (6th Cir 2012) (affirming dismissal of disgorgement claim where the district court found there were no specifically identifiable funds in defendant's possession).

D. The 2023 Action Is Also Barred by Res Judicata, Collateral Estoppel, and Release.

1. Plaintiff's Claims Are Barred By Res Judicata (Claim Preclusion).

Res judicata, which "Michigan courts have broadly applied[,]" bars a claim if: (1) there has been a prior decision on the merits, (2) the issue was either actually resolved in the first case or could have been resolved in the first case if the parties, exercising reasonable diligence, had brought it forward, and (3) both actions were between the same parties or their privies. See *Paige v Sterling Heights*, 476 Mich 495, 521-22 n 46; 720 NW2d 219 (2006) (citing *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002)); *Dart v Dart*, 460 Mich 573, 586-87; 597 NW2d 82 (1999) (citations omitted). As to the first element, res judicata can be satisfied by summary disposition decisions. *Detroit v Nortown Theatre, Inc*, 116 Mich App 386, 392; 323 NW2d 411 (1982). The second element is satisfied by showing that "the claims in the instant

case arise as part of the same transaction" as the claims in the first case. *Adair v Michigan*, 470 Mich 105, 125; 680 NW2d 386 (2004). Finally, as to the third element, privity between a party to the first case and a "non-party" exists where there is "a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." *Phinisee v Rogers*, 229 Mich App 547, 553-54; 582 NW2d 852 (1998) (internal quotations omitted); *Mecosta Cnty Med Ctr v Metro Group Prop & Cas Ins Co*, 509 Mich 276, 283-84; 983 NW2d 401 (2022) ("In its broadest sense, privity has been defined as 'mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right.'"); *Peterson Novelties, Inc*, 259 Mich App at 12-13; ("[A] privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent . . . ."); see also, e.g., *Nelson v Consumers Power Co*, 198 Mich App 82; 497 NW2d 205 (1993) (applying principles of agency law to attorney-client matters).

Plaintiff's claims are barred by res judicata based on the 2017 Action. The 2017 Action was decided by dispositive motion, which the Court of Appeals affirmed. *Nortown Theatre, Inc*, 116 Mich App at 392; (**Exhibit 2**). Plaintiff's Complaint seeks Millions based on the same Alleged Stormwater Overcharge at issue in the 2014 Action, and the 2017 Action. (See, e.g., **Exhibit 1**, Agreement, ¶15) ("For settlement purposes, the Plaintiff and [Royal Oak] agree that the Final Judgment in this matter will dismiss the Class claims relating to the [Alleged] Stormwater [Over][c]harge with prejudice and thus, this portion of the Final Judgment . . . is a judgment on the merits."); (**Exhibit 9**, 2017 Action Complaint, ¶24) ("For a number of years, the County has charged the City substantially more than the amount that DWSD/GLWA charges the County for the disposal of the portion of the County's stormwater flow that originates in the

City. The County has therefore overcharged the City for stormwater disposal service for a number of years.").

With the first two elements satisfied, as to the last element – privity, the 2017 Action also involved the Drainage District, and Kickham Hanley PLLC. To be sure, Kickham Hanley PLLC is in privity with Plaintiff. In the 2017 Action, Kickham Hanley PLLC attempted to bring claims against the Drainage District for the purported benefit of the certified class from the 2014 Action. The Named Plaintiff, in this 2023 Action – Jeffrey Eisenberg was part of the certified class in the 2014 Action. In this 2023 Action, Kickham Hanley PLLC on behalf of Plaintiff Eisenberg is now attempting to assert, once again, Alleged Stormwater Overcharge claims. The allegations in Plaintiff's 2023 Action are not new, and Plaintiff's instant lawsuit is simply an attempt to relitigate the Alleged Stormwater Overcharges from the 2017 Action against the Drainage District, and is, hence, barred by res judicata. *Peterson Novelties, Inc*, 259 Mich App at 12-13; *Nelson*, 198 Mich App 82.

2. Plaintiff's Claims Are Barred by Collateral Estoppel (Issue Preclusion).

Collateral estoppel precludes relitigation of an issue in a subsequent action when the proponent shows that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) a party or its privity had a full and fair opportunity to litigate the issue, and (3) there is mutuality of estoppel. *Monat*, 469 Mich at 683-84. Mutuality of estoppel is not required when collateral estoppel is used defensively. *Id.* at 691.

Plaintiff's instant claims are barred by collateral estoppel. First, the question essential to this case[3] is identical to the question from the 2017 Action – that is, whether the Alleged

[3] Notably, courts have held that the circumstances surrounding the two actions (i.e., the parties involved and the procedural posture) do not need to be identical for collateral estoppel to apply. See, e.g., *Thomas v Miller Canfield Paddock & Stone*, unpublished opinion *per curiam* of the

Stormwater Overcharge at issue results in the Drainage District being enriched. The 2017 was dismissed with prejudice and constitutes a "valid and final judgment." *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417-16; 733 NW2d 755 (2007).[4]

Second, Kickham Hanley PLLC, who is in privity with Plaintiff (see *supra* Section III.D.1.), had a full and fair opportunity to litigate the Alleged Stormwater Overcharge in the 2017 Action, and the trial court, and three appellate judges dismissed its lawsuit with prejudice. (**Exhibit 11**, October 27, 2017 Order); (**Exhibit 2**). Because the Drainage District is asserting collateral estoppel defensively, mutuality of estoppel is not required. *Monat*, 469 Mich at 691. Collateral estoppel bars Plaintiff's claims.

3. Plaintiff's Claims Are Barred by Release.

A claim is barred where a valid release of liability exists. See, e.g., *Xu v Gay*, 257 Mich App 263, 266; 668 NW2d 166 (2003); MCR 2.116(C)(7). Plaintiff's Complaint alleges "Plaintiff has been assessed, and has paid, the [Alleged] Stormwater [] Overcharge at issue in this case . . . ." (Complaint, ¶4). Yet, Plaintiff's Complaint ignores that Plaintiff was a class member in the 2014 Action, which included a release "dismiss[ing] the Class claims relating to the [Alleged] Stormwater [Over][c]harge with prejudice," and provided that Royal Oak "may continue to include the [Alleged] Stormwater [Over][c]harges in its calculation of the Rates." (**Exhibit 1**, Agreement, ¶¶15-16); see also MCR 3.501(D)(5) ("**A judgment entered in an**

Court of Appeals, issued Oct 21, 2014, 2014 WL 5358392, at *11 (Docket No 314374) (barring plaintiff in a legal malpractice action from relitigating an issue of fraud adjudicated in a prior arbitration where the "findings in that regard were actually litigated at arbitration," and those "facts [wer]e relevant to determine whether defendant's alleged malpractice was the proximate cause of plaintiff's injury, which is a $2.8 million arbitration award against it.") (**Exhibit 4**).

[4] The Alleged Stormwater Overcharge aspect of the 2014 Action was also a judgment on the merits. (See **Exhibit 1**, Agreement, ¶15) ("For settlement purposes, the Plaintiff and [Royal Oak] agree that the Final Judgment in this matter will dismiss the Class claims relating to the [Alleged] Stormwater [Over][c]harge with prejudice and thus, this portion of the Final Judgment . . . is a judgment on the merits.").

action certified as a class action binds all members of the class who have not submitted an election to be excluded, except as otherwise directed by the court.") (emphasis added).[5] Plaintiff's 2023 Action is barred by release.

[5] In an effort to circumvent the release, Plaintiff's Complaint claims that "[t]he Court of Appeals has explicitly recognized that end-users of the County System are the 'actual ratepayers of the alleged overcharge[,]'" and "*[a]bsent a release*, those end-users are 'entitled to recover the overcharges' from Drainage District and/or the City." (*Id.* at ¶6) (emphasis added) (citing *Kickham Hanley PLLC v George W Kuhn Drainage District*, 2021 WL 137773). To be sure, Plaintiff's Complaint misconstrues the Court of Appeals' decision, which affirmed the dismissal of Kickham Hanley PLLC's scheme against the Drainage District involving Oak Park – the 2019 Action. (**Exhibit 3**). Plaintiff's Complaint does not reference the Court of Appeals' decision in *Kickham Hanley PLLC v George W Kuhn Drainage District*, 2019 WL 1965891 (**Exhibit 2**), related to Kickham Hanley PLLC's failed scheme involving Royal Oak in the 2014 Action. Regardless, neither decision "explicitly recognize[s]" or supports Kickham Hanley PLLC's most recent scheme – this 2023 Action.

IV. CONCLUSION

The Drainage District respectfully requests that this Court grant its Motion pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8).

Respectfully Submitted,

DICKINSON WRIGHT PLLC

/s/Peter H. Webster
Peter H. Webster (P48783)
Scott A. Petz (P70757)
Alma Sobo (P81177)
Attorneys for the George W. Kuhn Drainage District
2600 W. Big Beaver Road, Suite 300
Troy, MI 48084
(248) 433-7200
pwebster@dickinsonwright.com
spetz@dickinsonwright.com
asobo@dickinsonwright.com

Dated: July 25, 2023

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2023, I electronically filed the foregoing paper with the Clerk of the Court using the MiFile TrueFiling system which will send notification of such filing to counsel of record.

/s/Peter H. Webster
Peter H. Webster (P48783)
Attorney for Defendant George W. Kuhn
Drainage District
pwebster@dickinsonwright.com

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

JEFFREY EISENBERG,
individually and as representative of a Class
of similarly-situated persons and entities,

Plaintiff,

v.

GEORGE W. KUHN DRAINAGE DISTRICT,
a component unit of Oakland County with a separate
legal existence, and CITY OF ROYAL OAK,
MICHIGAN, a municipal corporation.

Defendants.

Honorable David M. Cohen

Case 2023-200422-CZ

INDEX OF EXHIBITS TO BRIEF IN SUPPORT OF GEORGE W. KUHN DRAINAGE DISTRICT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7) AND MCR 2.116(C)(8)

Exhibit 1	Settlement Agreement in 2014 Action
Exhibit 2	*Kickham Hanley PLLC v George W Kuhn Drainage District*, unpublished opinion *per curiam* of the Court of Appeals, issued May 2, 2019 (Docket No. 341076), 2019 WL 1965891
Exhibit 3	*Kickham Hanley PLLC v George W Kuhn Drainage District*, unpublished opinion *per curiam* of the Court of Appeals, issued Jan. 14, 2021 (Docket No. 351317), 2021 WL 137773
Exhibit 4	Unpublished Authority
Exhibit 5	Mortgage dated June 30, 1995
Exhibit 6	Redacted Excerpt Account Service Listing dated May 4, 2015 in 2014 Action
Exhibit 7	Redacted Excerpt Notice of Filing of Proposed Distribution Report in 2014 Action

Exhibit 8	Final Judgment and Order dated June 14, 2017 in 2014 Action
Exhibit 9	2017 Action Complaint
Exhibit 10	Hearing Transcript in 2017 Action
Exhibit 11	October 27, 2017 Order in 2017 Action
Exhibit 12	April 29, 2020 Order in 2017 Action

Exhibit 1

SCHROEDER V. ROYAL OAK

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

ANDREW SCHROEDER,
individually, and as representative
of a class of similarly-situated persons
and entities,

Plaintiff,

v.

CITY OF ROYAL OAK,
a municipal corporation,

Defendant.

Case No. 2014-138919-CZ
Hon. Shalina Kumar

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff

Ray M. Toma (P48840)
Ray M. Toma PC
2550 South Telegraph Road, Suite 255
Bloomfield Hills, Michigan 48302
248-594-4544
Co-Counsel for Plaintiff

Sonal Hope Mithani (P51984)
Caroline B. Giordano (P76558)
Miller, Canfield, Paddock and Stone, P.L.C.
101 North Main Street, Seventh Floor
Ann Arbor, MI 48104
(734) 668-7786
Attorneys for Defendant

CLASS ACTION SETTLEMENT AGREEMENT

This Class Action Settlement Agreement ("Agreement") is made this 22nd day of March, 2017, by and between the following (all of which are hereinafter collectively referred to as the "Parties"): Plaintiff Andrew Schroeder ("Named Plaintiff"), individually, and on behalf of a class of similarly situated persons and entities (as more specifically defined in Paragraph 2 below, the

"Class"), acting by and through its counsel, Kickham Hanley PLLC and Ray M. Toma PC ("Class Counsel"), and Defendant City of Royal Oak (the "City").

WHEREAS, Plaintiff commenced the above captioned lawsuit (the "Lawsuit") in Oakland County Circuit Court challenging a mandatory debt service charge (the "Kuhn Facility Debt Charge") and a mandatory stormwater disposal charge (the "Stormwater Charge") (collectively the "Charges") imposed by the City on users of its water and sanitary sewage disposal services. Plaintiff alleges that the inclusion of such Charges in the City's water and sewer rates ("Rates") are motivated by a revenue-raising and not a regulatory purpose, that they are disproportionate to the City's actual costs of providing stormwater disposal services, and that (1) the Charges are therefore unlawful under the Headlee Amendment to the Michigan Constitution and (2) by collecting the Charges the City has been unjustly enriched.

WHEREAS, the Complaint alleges that the Lawsuit should be maintained as a class action on behalf of a class consisting of persons or entities who/which have paid the City for water and sanitary sewage disposal services after February 14, 2008. .

WHEREAS, on April 1, 2015, the Court entered an Opinion and Order granting Plaintiff's Motion for Class Certification.

WHEREAS, on December 17, 2015, the Court entered an Opinion and Order granting the City's Motion for Summary Disposition and dismissing each of the two claims in the Lawsuit with prejudice.

WHEREAS, on January 5, 2016, Plaintiff filed a Motion for Reconsideration of the December 17, 2015 Opinion and Order, which Motion remains pending before the Court.

WHEREAS, the City denies that the Charges are improper; denies that it has intentionally or negligently committed any unlawful, wrongful or tortious acts or omissions, violated any constitutional provision or statute, or breached any duties of any kind whatsoever; denies that it is in any way liable to any member of the Class; and states that the claims asserted in the Lawsuit have no substance in fact or law, and the City has meritorious defenses to such claims; but, nevertheless, has agreed to enter into this Agreement to avoid further expense, inconvenience, and distraction and risks of burdensome and protracted litigation, and to obtain total and final peace, satisfaction and protection from the claims asserted in the Lawsuit.

WHEREAS, the Named Plaintiff in the Lawsuit and Class Counsel have been provided with discovery and have conducted investigations into the facts of the Lawsuit, have made a thorough study of the legal principles applicable to the claims in the Lawsuit, and have concluded that a class settlement with the City in the amount and on the terms hereinafter set forth (the "Settlement") is fair, reasonable, and adequate, and is in the best interest of the Class.

WHEREAS, the Parties desire to compromise their differences and to resolve and release all of the claims asserted by the Named Plaintiff and the Class in the Lawsuit.

NOW, THEREFORE, in consideration of the covenants and agreements herein, and intending to be legally bound, the Parties hereby agree as follows:

IMPLEMENTATION OF AGREEMENT

1. The Parties agree to cooperate in good faith, to use their best efforts, and to take all steps necessary to implement and effectuate this Agreement and the Settlement provided for herein.

CLASS CERTIFICATION

2. On April 1, 2015, the Court entered an order certifying a class of plaintiffs (the "Class") consisting of all persons or entities who/which paid the City of Royal Oak (the "City") for Water and Sanitary Sewer Service since February 14, 2008 (the "Class"). For settlement purposes, the Class shall include all persons or entities who/which paid the City for Water and Sanitary Sewer Service between February 14, 2008 and January 31, 2017. This Agreement is intended to settle all of the claims of the members of the Class ("Class Members").

SETTLEMENT FUND

3. The City will create a Settlement Fund (the "Settlement Fund") in the amount of Two Million Dollars ($2,000,000) in order to resolve the claims relating to the Kuhn Facility Debt Charge. Within 14 days after entry of an order preliminarily approving this settlement, the City shall deposit One Million Dollars ($1,000,000) of the Settlement Fund into the IOLTA Trust Account of Class Counsel, Kickham Hanley PLLC. No later than 7 calendar days before the hearing for final approval of this settlement, the City shall deposit the remaining One Million Dollars ($1,000,000) of the Settlement Fund into the IOLTA Trust Account of Class Counsel. Such funds, upon final Court approval of this settlement, will be used to pay refunds to the Class and compensation and cost reimbursement to Class Counsel, as determined by the Court. The Settlement Fund shall be administered by Kickham Hanley PLLC (the "Claims-Escrow

Administrator") with the assistance of the Garden City Group ("GCG"). The expenses the Claims-Escrow Administrator incurs to GCG shall be recoverable by the Claims-Escrow Administrator as a cost of the litigation under Paragraphs 30-33 of this Agreement (subject to Court approval) and payable out of the Settlement Fund. The Claims-Escrow Administrator may from time to time apply to the Court for instructions or orders concerning the administration of the Settlement Fund and may apply to the Internal Revenue Service for such rulings with respect thereto as it may consider appropriate. Disbursements from the Settlement Fund by the Claims-Escrow Administrator and the City shall be expressly conditioned upon an order of the Court permitting such disbursements.

4. Except as set forth in Paragraphs 30 through 33 of this Agreement, the Class and Class Counsel shall not claim any attorneys' fees or costs.

5. Subject to Paragraph 34, distribution of the Settlement Fund shall occur no later than seven (7) days after the completion of the last of all of the following (the "Settlement Date"):

a. entry of an order of final judicial approval by the Court approving this Agreement pursuant to Michigan Court Rule 3.501(E);

b. entry of an order adjudicating Class Counsel's motion for an award of attorneys' fees and costs;

c. entry of a final judgment of dismissal of the Lawsuit with prejudice with respect to the claims of the Named Plaintiff and all Class Members, except those putative Class Members who have requested to be excluded from the Class pursuant to MCR 3.501(D);

d. the City's deposit of the Settlement Fund described in Paragraph 3 above;

e. the Court's entry of the Distribution Order described in Paragraph 11 below; and

f. the expiration of the 21-day time for appeal of all of the aforementioned orders and judgments and final resolution of any and all appeals of such orders and judgments, but only if any Class Member files a timely objection to any of the aforementioned orders and judgments.

6. As more specifically discussed below, and as provided in Paragraph 5, the Settlement Fund shall be distributed only pursuant to and in accordance with orders of the Court, as appropriate.

7. In the event that this Settlement fails to be consummated pursuant to this Agreement or fails to secure final approval by the Court for any reason or is terminated pursuant to Paragraph 34, the Settlement Fund shall immediately be returned to the City.

DISTRIBUTION OF SETTLEMENT FUND

8. The "Net Settlement Fund" to be distributed to the Class is the Settlement Fund less the combined total of: (a) attorneys' fees and any incentive award to the Class representative awarded pursuant to Paragraphs 30-33; and (b) Class Counsel and Claims-Escrow Administrator expenses reimbursed pursuant to Paragraphs 30-33.

9. Each Class Member's share in the Net Settlement Fund shall be referred to herein as his, her or its "Pro Rata Share," and each Class Member's Pro Rata Share of the Net Settlement Fund will be distributed via a refund payment. The Pro Rata Share to be allocated to each Class Member shall be determined according to Paragraph 10.

10. All Class Members may participate in the Settlement by receiving from the Net Settlement Fund a cash distribution Payment (as defined in Paragraph 10.b). The Net Settlement Fund shall be distributed as follows:

a. Within 7 days after the Court's entry of an order preliminarily approving this Settlement, the City shall provide the Claims-Escrow Administrator with billing and payment records in electronic form that, at a minimum, provide for the Class Period (February 14, 2008 through January 31, 2017) the service address, account number, and billing and payment history for each water and sewer customer account. The Claims-Escrow Administrator will provide notice to the Class Members through first-class mail. The Claims-Escrow Administrator is authorized to utilize the services of GCG in disseminating notices to the Class. Such forms of notice will not be required to be exclusive and the Claims-Escrow Administrator will be allowed to use any appropriate means to give notice to Class Members of the Settlement and the opportunity to obtain a refund.

b. To qualify to receive a distribution of cash via check (a "Payment") from the Net Settlement Fund, Class Members will be required to submit sworn claims (the "Claims") which identify their names, addresses, and the periods of time in which they paid the Charges in order to participate in the Settlement. Class Members who submit Claims will hereafter be referred to as the "Claiming Class Members." The Claiming Class Members will be required to submit those claims no later than 30 days prior to the hearing on the final approval of this settlement, as described in Paragraph 28 (the "Claims Period"). The Claiming Class Members also will be required to provide a unique identifying number printed on the Class notice, as an additional verification of their identity. The foregoing is a general outline. GCG will assist in

implementing a process designed to minimize fraud and maximize dissemination of the refunds to the appropriate parties. In the event that two or more parties claim to have paid or incurred Charges for the same water and/or sewer account, the Claims-Escrow Administrator shall have the absolute discretion to determine which party or parties are entitled to participate in the settlement, and the City shall cooperate by providing information in its possession concerning the disputed property.

c. The Claims-Escrow Administrator shall calculate each Claiming Class Member's pro rata share of the Net Settlement Fund (the "Pro Rata Share"). Only those Class Members who paid for water and/or sewer service during the Class Period and submit a timely Claim are entitled to distribution of a Pro Rata Share of the Net Settlement Fund. The Claims-Escrow Administrator is authorized to utilize the services of GCG to calculate the Pro Rata Shares distributable to the Claiming Class Members. The size of each Claiming Class Member's Pro Rata Share shall be determined by (1) calculating the total amount of Charges the Claiming Class Member paid during the Class Period and then (2) dividing that number by the total amount of Charges the City assessed during the Class Period against all Claiming Class Members and then (3) multiplying that fraction by the amount of the Net Settlement Fund. An example appears below:

Total Charges paid by Claiming Class Member during the Class Period -- $2,000

Total Charges paid during the Class Period by all Claiming Class Members -- $4,000,000

Net Settlement Fund -- $1,300,000

Claiming Class Member's Pro Rata Share – 2,000/4,000,000 x 1,300,000 = $650

11. No later than fourteen (14) days prior to the hearing on the final approval of this settlement (as described in Paragraph 28), the Claims-Escrow Administrator shall submit to the

Court a report setting forth the proposed disposition of the Net Settlement Fund including, without limitation, a list of Claiming Class Members and the percentage of the Net Settlement Fund to be paid to each such Claiming Class Member (the "Distribution Report"). Upon filing of the Distribution Report, the Claims-Escrow Administrator shall serve copies of the Distribution Report on Counsel for the City.

a. The City shall have seven (7) days to object to the Distribution Report. All objections shall be resolved by the Court at or before the final approval hearing.

b. Class Counsel and Counsel for the City, within five (5) days after the resolution of any objections to the Distribution Report, or within five (5) days after the deadline for submission of objections if no objections are submitted, whichever is later, shall submit to the Court a stipulated Distribution Order authorizing distribution from the Settlement Fund to the Claiming Class Members entitled to a Pro Rata Share distribution of the Net Settlement Fund ("Stipulated Distribution Order") in accordance with the Distribution Report, subject to the Court's final approval of this Settlement.

d. The Parties acknowledge that, because Class Members may have moved or ceased doing business since February 14, 2008, complete and current address information may not be available for all Class Members. The City, Named Plaintiff, counsel for any Parties, the Claims-Escrow Administrator and GCG shall not have any liability for or to any member of the Class with respect to determinations of the amount of any distribution of the Settlement Fund to any Class Member or determinations concerning the names or addresses of the Class Members.

12. At a time consistent with Paragraph 5, following the entry of the Stipulated Distribution Order, the Claims-Escrow Administrator shall distribute from the Net Settlement

Fund the Pro Rata Share of each Claiming Class Member. The Claims-Escrow Administrator is authorized to send checks reflecting Payments due to Claiming Class Members to the address provided by each Claiming Class Member. The Claims-Escrow Administrator is further authorized to transfer its held portion of the Net Settlement Fund to GCG so that GCG can distribute Payments in accordance with this Agreement.

13. The amounts of money covered by checks distributing the Payment of the Pro Rata Shares which: (a) are returned and cannot be delivered by the U.S. Postal Service after the Claims-Escrow Administrator (i) confirms that the checks were mailed to the identified addresses, and (ii) re-mails any checks if errors were made or it becomes aware of an alternative address or payee; or (b) have not been cashed within six (6) months of mailing, shall be refunded to the City within thirty (30) days after the expiration of the six (6) month period; and the Class Members to whom such checks were mailed shall be forever barred from obtaining any payment from the Settlement Fund. The City shall deposit any refund in its water and sewer fund and utilize any refund monies solely for the operation, maintenance and improvement of its water and sewer system.

14. Within thirty (30) days after the date on which the remaining Net Settlement Fund is distributed back to the City, the Claims-Escrow Administrator shall file with the Court and serve on counsel for the Parties a document setting forth the names and addresses of, and the amounts paid to, each distributee of funds from the Settlement Fund together with a list of Claiming Class Members entitled to receive a Pro Rata Share but whose distribution checks have been returned or have not been cashed.

SCHROEDER V. ROYAL OAK

JUDGMENT ON THE MERITS AS TO CLAIMS FOR STORMWATER CHARGES

15. For settlement purposes, the Plaintiff and the City agree that the Final Judgment in this matter will dismiss the Class claims relating to the Stormwater Charge with prejudice and thus, this portion of the Final Judgment (along with this portion of the December 17, 2015 Opinion and Order) is a judgment on the merits.

16. As a result of the dismissal of the claims relating to the Stormwater Charges, and as part of the settlement, the Plaintiff and the City agree that the City may continue to include the Stormwater Charges in its calculation of the Rates.

ASSIGNMENT OF CLAIMS AGAINST OAKLAND COUNTY

17. Plaintiff believes that Oakland County has overcharged the City for the stormwater component of the total flow from the City that enters the Oakland County system for many years (the "Stormwater Overcharge"). As part of the settlement, the City will assign any and all claims it has or may have against Oakland County arising out of or relating to the Stormwater Overcharge to the Class or an entity formed for the benefit of the Class, and Class Counsel will pursue those claims through litigation and/or negotiation (the "Oakland County Action"). Within five (5) days after the Settlement Date, the City shall execute an Assignment of Claims in the form attached hereto as Exhibit "A."

18. Any monetary recovery in the Oakland County Action will be distributed, after counsel fees and costs, to the Class based upon the same methodology for distributing the Settlement Fund. In the event the Oakland County Action is resolved through a settlement, that settlement, and any request by Class Counsel for an award of fees and expenses, will be subject to the same Court approval processes as those applied to the Settlement Fund. In the event that

there is a monetary recovery in Oakland County Action by way of a litigated judgment, any request by Class Counsel for an award of fees and expenses will be subject to the same Court approval processes as those applied to the Settlement Fund.

PROSPECTIVE RELIEF

19. The City shall utilize its current methodology for setting Rates charged by the City through June 30, 2018. Beginning July 1, 2018, and ending December 31, 2024 or any date thereafter at the City's election (the "Prospective Relief Period"), the City shall adjust its Rates so that the amount Oakland County charges the City for the City's share of the cost of the Kuhn Facility Infrastructure Improvements (i.e., the Kuhn Facility Debt Charge) is not a component of cost that is included in the Rates. During the Prospective Relief Period, the Parties agree that the City otherwise retains its discretion to adjust the Rates in accordance with Michigan law

20. The City may not levy a tax or other assessment against property owners or water or sewer customers to finance, in whole or in part, the Settlement Fund (unless such tax or assessment receives voter approval), nor may the City increase its Rates to finance, in whole or in part, the Settlement Fund. The Settlement Fund shall be financed solely from current assets of the City's Water and Sewer Fund. The City shall not include as a recoverable cost in the setting of the Rates any amounts that it has contributed to the Settlement Fund.

21. The Class Members shall release the City as provided in Paragraph 29 below. In addition to the release set forth in Paragraph 29 below, if the City complies with the prospective relief described above for the duration of the Prospective Relief Period, the Class Members who receive refunds as part of the settlement shall then release and waive any and all claims which arise during the FY 2017 (July 1, 2016 through June 30, 2017) and FY 2018 (July 1, 2017 through June

30, 2018) Periods that could be brought challenging the City's inclusion of the Kuhn Facility Debt Charge in establishing the Rates for the FY 2017 and FY 2018 Periods.

22. The Lawsuit will be dismissed with prejudice, subject only to the Court's continuing jurisdiction to enforce the terms of the settlement agreement. As stated in Paragraph 15, the December 17, 2015 Opinion and Order dismissing the claims in the Lawsuit will for all purposes relating to the Lawsuit and this Settlement Agreement constitute a judgment on the merits of the claims relating to the Stormwater Charge only.

CLAIMS-ESCROW ADMINISTRATOR

23. The Claims-Escrow Administrator shall not receive a separate fee for its services as Claims-Escrow Administrator. Because Class Counsel is acting as the Claims-Escrow Administrator, the fee awarded to Class Counsel shall be deemed to include compensation for its service as Claims-Escrow Administrator. The Claims-Escrow Administrator, however, shall be entitled to be reimbursed for its out-of-pocket expenses incurred in the performance of its duties (including but not limited to GCG's charges), which shall be paid solely from the Settlement Fund.

24. The Claims-Escrow Administrator, with the assistance of GCG, shall have the responsibilities set forth in this Agreement, including, without limitation, holding the Settlement Fund in escrow, determining the eligibility of Class Members to receive Payments, determining the Pro Rata Shares, distributing the Payments to Class Members receiving a Pro Rata Share, filing a Distribution Report consistent with Paragraph 11 and overseeing distribution of the remainder of the Net Settlement Fund as required by Paragraph 13. The Claims-Escrow Administrator, with the assistance of GCG, shall also be responsible for: (a) recording receipt of all responses to the notice; (b) preserving until further Order of the Court any and all written communications from

Class Members or any other person in response to the notice; and (c) making any necessary filings with the Internal Revenue Service. The Claims-Escrow Administrator may respond to inquiries, but copies of all written answers to such inquiries will be maintained and made available for inspection by all counsel in this Lawsuit. The Claims-Escrow Administrator may delegate some or all of these responsibilities to GCG.

25. Any findings of fact of the Claims-Escrow Administrator and/or GCG shall be made solely for the purposes of the allocation and distribution of the Pro Rata Shares, and, in accordance with Paragraph 38, shall not be admissible for any purpose in any judicial proceeding, except as required to determine whether the claim of any Class Member should be allowed in whole or in part.

NOTICE AND APPROVAL OF SETTLEMENT

26. As soon as practicable, but in no event later than five (5) days after the execution of this Agreement, Class Counsel and Counsel for the City shall submit this Agreement to the Court, pursuant to Michigan Court Rule 3.501, for the Court's preliminary approval, and shall request an Order of the Court, substantially in the form attached as Exhibit "B," including the following terms:

a. scheduling of a Settlement approval hearing to be held as soon as practicable after the entry of such Order but in no event later than ninety (90) days thereafter to determine the fairness, reasonableness, and adequacy of this Agreement and the Settlement; whether the Agreement and Settlement should be approved by the Court; and whether to award the attorneys' fees and expenses requested by Class Counsel;

b. directing that notice, substantially in the form of Exhibit "C," be given to the members of the Class advising them of the following:

i. the terms of the proposed Settlement consented to by the Named Plaintiff and the City;

ii. the scheduling of a hearing for final approval of the Agreement and Settlement;

iii. the rights of the members of the Class to appear at the hearing to object to approval of the proposed Settlement or the requested attorneys' fees and expenses, provided that, if they choose to appear, they must file and serve written objections at least fourteen (14) days prior to the hearing that set forth the name of this matter as defined in the Notice, the objector's full name, address and telephone number, an explanation of the basis upon which the objector claims to be a Class Member, all grounds for the objection including any known legal support for the objection, the number of times in which the objector has objected to a class action settlement in the past five years and a caption of each case in which an objection was filed, the identity of all counsel representing the objector at the hearing, a statement confirming whether the objector intends to appear and/or testify at the hearing (along with a disclosure of all testifying witnesses) and the signature of the objector (not just the objector's attorney);

iv. the nature of the release to be constructively entered upon approval of the Agreement and Settlement;

v. the binding effect on all Class Members of the judgment to be entered should the Court approve the Agreement and Settlement; and

vi. the right of members of the Class to opt out of the Class, the procedures for doing so, and the deadlines for doing so, including the deadline with respect to filing and/or serving written notification of a decision to opt out of the Class (such deadline must be at least fourteen (14) days prior to the hearing);

c. providing that the manner of such notice shall constitute due and sufficient notice of the hearing to all persons entitled to receive such notice and requiring that proof of such notice be filed at or prior to the hearing;

d. appointing Kickham Hanley PLLC as Claims-Escrow Administrator; and

e. appointing the Claims-Escrow Administrator as trustee of a litigation trust for the benefit of the Class Members with authority to pursue the Stormwater Overcharge claim and approving Kickham Hanley PLLC as counsel to the trust.

27. Notice to Class Members of the proposed settlement shall be the responsibility of Class Counsel pursuant to orders of the Court. Class Counsel shall be entitled to be reimbursed for the cost of such notice from the Settlement Fund, and Class Counsel shall make application for costs of notice to the Court at least seven (7) days before the Settlement approval hearing with the Court approving any costs at the time of the Settlement approval hearing. Such notice shall be substantially in the form attached hereto as Exhibit "C," and mailed by Class Counsel (or GCG) to the Class Members at the addresses provided by the City within fourteen (14) days of entry of the Order Regarding Preliminary Approval of this Agreement. Class Counsel will also provide publication notice to the Class, which shall be substantially in the form attached hereto as Exhibit "D" and shall be published in the Oakland Press and the Royal Oak Tribune newspapers on three occasions prior to April 5, 2017.

28. After the notice discussed in Paragraphs 26 and 27 has been mailed, the Court shall, consistent with Paragraph 26, conduct a hearing at which it rules on any objections to this Agreement and a joint motion for entry of a Final Order approving of this Settlement and Agreement. If the Court approves this Agreement pursuant to Michigan Court Rule 3.501(E), a final judgment, substantially in the form of Exhibit "E," shall be entered by the Court: (a) finding that the notice provided to Class Members is the best notice practicable under the circumstances and satisfies the due process requirements of the United States and Michigan Constitutions; (b) approving the Settlement set forth in this Agreement as fair, reasonable, and adequate; (c) dismissing with prejudice and without costs to any Party any and all claims of the Class Members against the City, excluding only those persons who in timely fashion requested exclusion from the Class; (d) awarding Class Counsel attorneys' fees, costs and expenses; (e) reserving jurisdiction over all matters relating to the administration of this Agreement, including allocation and distribution of the Settlement Fund; and (f) retaining jurisdiction to protect and effectuate this judgment.

RELEASE AND COVENANT NOT TO SUE

29. On the Settlement Date, each Class Member who has not timely requested exclusion therefrom shall be deemed to have individually executed, on behalf of the Class Member and his or her heirs, successors and assigns, if any, the following Release and Covenant Not To Sue, and the Final Order and Judgment to be entered by the Court in connection with the approval of this Settlement shall so provide:

> In executing the Release and Covenant Not To Sue, each Class Member, on behalf of himself, herself or itself, and his, her or its parents, subsidiaries, affiliates, members, shareholders, predecessors, heirs, administrators, officers,

directors, successors, assigns, and any person the Class Member represents, intending to be legally bound hereby, for good and valuable consideration, the receipt of which is hereby acknowledged, hereby absolutely, fully and forever releases, relieves, remises and discharges the City, and each of its successors and assigns, present and former agents, elected and appointed officials, representatives, employees, insurers, affiliated entities, attorneys and administrators, of and from any and all manner of actions, causes of action, suits, debts, accounts, understandings, contracts, agreements, controversies, judgments, consequential damages, compensatory damages, punitive damages, claims, liabilities, and demands of any kind or nature whatsoever, known or unknown, which arise from the beginning of time through January 31, 2017 concerning (a) the City's calculation or assessment of Rates or Charges; (b) the components of costs included in the Rates; and/or (c) the City's Water and Sewer Fund balance. This release is intended to include all claims that were asserted or could have been asserted in the Lawsuit concerning the City's Rates and/or Charges. In executing the Release and Covenant Not to Sue, each Class Member also covenants that: (a) except for actions or suits based upon breaches of the terms of this Agreement or to enforce rights provided for in this Agreement, he, she or it will refrain from commencing any action or suit, or prosecuting any pending action or suit, in law or in equity, against the City on account of any action or cause of action released hereby; (b) none of the claims released under the Release and Covenant Not To Sue has been assigned to any other party; and (c) he, she or it accepts and assumes the risk that if any fact or circumstance is found, suspected, or claimed hereinafter to be other than or different from the facts or circumstances now believed to be true, the Release and Covenant Not To Sue shall be and remain effective notwithstanding any such difference in any such facts or circumstances. The foregoing shall not affect the claims of any Class Member whose individual water and sewer bills were calculated in error on the basis of facts or circumstances unique to such class member and not based on the claims that were or could have been asserted by the Class in the Lawsuit.

ATTORNEYS' FEES AND EXPENSES

30. Class Counsel shall be paid an award of attorneys' fees, costs, and expenses from the Settlement Fund. For purposes of an award of attorneys' fees and costs, the Settlement Fund shall be deemed to be a "common fund," as that term is used in the context of class action settlements. Class Counsel shall not make an application for any attorneys' fees and costs which are in addition to the "common fund" attorneys' fees and costs contemplated by this Agreement.

31. The amount of attorneys' fees, costs and expenses to be paid to Class Counsel shall be determined by the Court applying legal standards and principles applicable to awards of attorneys' fees and costs from common fund settlements in class action cases. Class Counsel agrees that it will not seek an award of attorneys' fees in excess of Thirty-Three Percent (33%) of the Settlement Fund, and the City agrees that it will not oppose Class Counsel's fee request, provided it complies with this Agreement. The Parties agree that Class Counsel may seek Court approval of an incentive award on behalf of class representative Andrew Schroeder in an amount not to exceed Ten Thousand Dollars ($10,000) to be paid solely from the Settlement Fund. Further, if the pursuit of the Stormwater Overcharge claim results in the recovery of proceeds, Class Counsel may seek an award of attorneys' fees not exceeding 33% of such proceeds subject to approval by the Court.

32. The award of attorneys' fees, costs and expenses to be paid from the Settlement Fund to Class Counsel pursuant to Paragraph 31 does not include any out-of-pocket expenses incurred by Kickham Hanley PLLC acting in its capacity as Claims-Escrow Administrator. The Claims-Escrow Administrator shall make a separate application for such expenses.

33. The Court shall determine and approve the award of attorneys' fees and costs to Class Counsel, reimbursement of the expenses incurred by the Claims-Escrow Administrator, and any incentive award to Andrew Schroeder in connection with the Final Approval hearing. The attorneys' fees, costs and expenses awarded to Class Counsel and the Claims-Escrow Administrator and any incentive award to Andrew Schroeder shall be paid from the Settlement Fund upon the Settlement Date.

TERMINATION

34. If this Agreement and Settlement is disapproved, in part or in whole, by the Court, or any appellate court; if dismissal of the Lawsuit with prejudice against the City cannot be accomplished; if the Court does not enter an Order of Preliminary Approval substantially in the form attached as Exhibit "B" within twenty-eight (28) days after its submission to the Court; if a final judgment on the terms set forth in Paragraph 28 is not entered within ninety (90) days after the entry of the Order substantially in the form attached as Exhibit "B"; if the Settlement Date defined in Paragraph 5 does not occur prior to July 31, 2017; if the Court (or any appellate court) alters the terms of this Settlement in any material way not acceptable to the City or to Class Counsel; or if this Agreement and Settlement otherwise is not fully consummated and effected:

a. This Agreement shall have no further force and effect and it and all negotiations and proceedings connected therewith shall be without prejudice to the rights of the City, the Named Plaintiff and the Class;

b. The Claims-Escrow Administrator shall immediately return to the City the Settlement Fund;

c. The Parties shall return to the status quo ante in the Lawsuit as if the Parties had not entered into this Agreement, and all of the Parties' respective pre-Settlement claims and defenses will be preserved; and

d. Counsel for the Parties shall inform the Court that the pending Motion for Reconsideration is ripe for disposition by the Court.

35. The City and Class Counsel may, in their sole and exclusive discretion, elect to waive any or all of the terms, conditions or requirements stated in Paragraph 34. Such waiver

must be memorialized in a writing signed by the City and/or its Counsel and Class Counsel and delivered via certified mail to Class Counsel, or it will have no force or effect.

36. The City may, in its sole and exclusive discretion, elect to extend any or all of the deadlines stated in Paragraph 34. Such extension must be memorialized in a writing signed by the City and/or its Counsel and delivered via certified mail to Class Counsel, or it will have no force or effect.

37. In the event the Settlement is terminated in accordance with Paragraph 34, any discussions, offers, negotiations, or information exchanged in association with this Settlement shall not be discoverable or offered into evidence or used in the Lawsuit or any other action or proceeding for any purpose. In such event, all Parties to the Lawsuit shall stand in the same position as if this Agreement had not been negotiated, made or filed with the Court.

USE OF THIS AGREEMENT

38. Except to the extent required to enforce Paragraphs 15 and 22, this Agreement, the Class Period, the Settlement provided for herein (whether or not consummated), and any proceedings taken pursuant to this Agreement shall not be:

a. construed by anyone for any purpose whatsoever as, or deemed to be, evidence of a presumption, concession or an admission by the City of the truth of any fact alleged or the validity of any claims, or of the deficiency or waiver of any defense that has or could have been asserted in the Lawsuit, or of any liability, fault or wrongdoing on the part of the City; or

b. offered or received as evidence of a presumption, concession or an admission of any liability, fault, or wrongdoing, or referred to for any other reason by the Named Plaintiff, Class Members, or Class Counsel in the Lawsuit, or any other person or entity not a party

to this Agreement in any other action or proceeding other than such proceedings as may be necessary to effectuate the provisions of this Agreement; or

c. construed by anyone for any purpose whatsoever as an admission or concession that the Settlement amount represents the amount which could be or would have been recovered after trial, or the applicable time frame for any purported amounts of recovery.

d. construed more strictly against one Party than the other, this Agreement having been prepared by Counsel for the Parties as a result of arms-length negotiations between the Parties.

WARRANTIES

39. Class Counsel further warrants that in its opinion the Settlement Fund represents fair consideration for and an adequate settlement of the claims of the Class released herein.

40. The undersigned have secured the consents of all persons necessary to authorize the execution of this Agreement and related documents and they are fully authorized to enter into and execute this Agreement on behalf of the Parties.

41. Class Counsel deems this Agreement to be fair and reasonable, and has arrived at this Agreement in arms-length negotiations taking into account all relevant factors, present or potential.

42. The Parties intend this Agreement to be a final and complete resolution of all disputes between them with respect to the claims arising in the Lawsuit.

43. The Parties have relied upon the advice and representation of counsel, selected by them, concerning their respective legal liability for the claims hereby released. The Parties have

read and understand fully this Agreement, and have been fully advised as to the legal effect thereof by their respective Counsel and intend to be legally bound by the same.

BINDING EFFECT AND ENFORCEMENT

44. All covenants, terms, conditions and provisions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by the respective predecessors and successors, and past and present assigns, heirs, executors, administrators, legal representatives, trustees, subsidiaries, divisions, affiliates, parents (and subsidiaries thereof), partnerships and partners, and all of their officers, directors, agents, employees and attorneys, both past and present, of each of the Parties hereto. It is understood that the terms of this paragraph are contractual and not a mere recital.

45. This Agreement, with the attached Exhibits A through E, constitutes a single, integrated written contract and sets forth the entire understanding of the Parties. Any previous discussions, agreements, or understandings between or among the Parties regarding the subject matter herein are hereby merged into and superseded by this Agreement. No covenants, agreements, representations, or warranties of any kind whatsoever have been made by any Party hereto, except as provided for herein.

46. All of the Exhibits attached hereto are hereby incorporated by reference as though fully set forth herein.

47. This Agreement shall be construed and governed in accordance with the laws of the State of Michigan.

48. Before filing any motion in the Court raising a dispute arising out of or related to this Agreement, the Parties shall consult with each other and discuss submitting any disputes to

non-binding mediation. The Parties shall also certify to the Court that they have consulted and either have been unable to resolve the dispute in mediation or are unwilling to submit the dispute to mediation and the reasons why.

49. The Court shall retain jurisdiction with respect to the implementation and enforcement of the terms of this Agreement, and the Parties shall submit to jurisdiction of the Court for purposes of implementing and enforcing the settlement reflected in this Agreement.

MODIFICATION AND EXECUTION

50. This Agreement may be executed in counterparts, all of which shall constitute a single, entire agreement.

51. Change or modification of this Agreement, or waiver of any of its provisions, shall be valid only if contained in a writing executed on behalf of all the Parties hereto by their duly authorized representatives.

52. This Agreement shall become effective and binding (subject to all terms and conditions herein) upon the Parties when it has been executed by the undersigned representatives of the Parties.

IN WITNESS WHEREOF, each of the Parties executes this Agreement through his, her or its duly authorized representatives.

KICKHAM HANLEY PLLC

In its capacity as Class Counsel and on behalf of the Named Plaintiff in the Lawsuit and the Class

By: _____
Gregory D. Hanley (P51204)
Attorneys for Plaintiffs
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Dated: 3/22/17

CITY OF ROYAL OAK,

By: _____
Its: Mayor
Dated: 3.10.17

By: Melanie Halas
Its: City Clerk
Dated: 3.10.17

Exhibit 2

2019 WL 1965891
Only the Westlaw citation is currently available.

UNPUBLISHED
Court of Appeals of Michigan.

KICKHAM HANLEY PLLC, Plaintiff-Appellant,
v.
OAKLAND COUNTY MICHIGAN, Defendant,
and
George W. Kuhn Drainage District, Defendant-Appellee.

No. 341076
|
May 2, 2019

Oakland Circuit Court, LC No. 2017-159351-CZ

Before: Murray, C.J., and Sawyer and Redford, JJ.

Opinion

Per Curiam.

***1** Plaintiff, Kickham Hanley PLLC, appeals as of right the trial court's order granting summary disposition of its claims under MCR 2.116(C)(7) and (8) and denying its motion for leave to amend its complaint. We affirm.

I. BACKGROUND

Plaintiff commenced this action against defendants [1] after the settlement of a class action lawsuit brought by a water and sewer ratepayer against Royal Oak, Michigan. The class representative alleged Headlee Amendment violations, Const 1963, art 9, § 31, and challenged Royal Oak's mandatory debt service charge and mandatory stormwater disposal charge to users of its water and sanitary disposal services. The circuit court in that action dismissed both counts of the complaint and the class representative moved for reconsideration. While that motion pended, the parties settled. The circuit court approved the settlement and entered a final judgment.

During the class action litigation, the class representative came to believe that defendant, the George W. Kuhn Drainage District (GWKDD), inflated Detroit Water and Sewerage Department (DWSD) charges for stormwater disposal and overcharged for several years Royal Oak which passed on the charges to users. As part of the settlement in the class action lawsuit, Royal Oak paid a settlement to the class and assigned any claims it may have had for refund of the overcharges to plaintiff, as the trustee for a litigation trust. In its assignment, Royal Oak made no warranty or representation that it, in fact, imposed any overcharges or that any refunds were owed. The class members in turn released Royal Oak from any and all claims they had against Royal Oak concerning the city's rates and charges. The circuit court entered a final judgment and order approving the settlement and appointing plaintiff as the trustee of a litigation trust established for the benefit of the class members. The order authorized plaintiff to pursue a claim for refund of the GWKDD's alleged overcharges and ordered that any monetary recovery be distributed to the class members.

In its complaint, plaintiff alleged that Royal Oak's combined sewer system flows through the George W. Kuhn Drain, which is owned and maintained by Oakland County. The GWKDD is a component unit of Oakland County, comprised of several municipalities in the area, including Royal Oak, whose stormwater and sewerage flow into the Kuhn Drain. The GWKDD's stormwater flow is conveyed for ultimate disposal by Oakland County to a treatment plant operated by DWSD or the Great Lakes Water Authority (GLWA) for ultimate disposal. The DWSD charges the GWKDD a flat annual rate for stormwater disposal based on a formula tied to the amount of rainfall and the volume of surface water that enters the county's system for disposal. The GWKDD, in turn, proportionately allocates DWSD's stormwater charges among the municipalities in the district and charges each municipality that has a combined sewer system, including Royal Oak, a flat rate per month for stormwater disposal based on an apportionment formula stated in a resolution approved and adopted by the Drainage Board for the George W. Kuhn Drain at a public meeting held on April 19, 2005, and specified in the Drainage Board's Final Order of Apportionment issued April 19, 2005, pursuant to the board's resolution. The Final Order of Apportionment provided for the apportionment of the costs of administration, operations, and maintenance of the George W. Kuhn Drain. The Drainage Board allocated 29.7915% of the costs to Royal Oak.

***2** Royal Oak, in turn, passed through the charges imposed by the GWKDD to its ratepayers by incorporating the charges into its water and sewer rates to recover the entire

amount of the GWKDD's charge. The Drainage Board's Final Order of Apportionment provided that the charges to the municipalities, including Royal Oak, were comprised of two components: (1) the DWSD's charges to the George W. Kuhn Drain to treat the total stormwater flow and (2) the administrative costs of operating and maintaining the balance of the George W. Kuhn Drain System.

Plaintiff, as Royal Oak's assignee, filed a two count complaint against Oakland County and the GWKDD alleging a breach of contract claim and an equitable claim in assumpsit for money had and received. Plaintiff alleged that the GWKDD charged Royal Oak in excess of the amount DWSD charged for disposal of the stormwater and that the Drainage Board's resolution contractually obligated the GWKDD to charge Royal Oak only its proportionate share of the DWSD's actual charges to the GWKDD. Plaintiff claimed that, by overcharging Royal Oak, the GWKDD breached the contract causing Royal Oak breach of contract damages. Alternatively, plaintiff alleged that, if no express contract existed, based on Royal Oak's assignment of its claims, plaintiff had entitlement to recover the GWKDD's overcharges through an action in assumpsit. The GWKDD, in lieu of filing an answer, moved for summary disposition under MCR 2.116(C)(7) and (8). The GWKDD asserted that the Drainage Board's resolution that formed the basis of plaintiff's breach of contract claim did not constitute a contract. The GWKDD also asserted that plaintiff's claims in actuality alleged tort liability from which the GWKDD had governmental immunity. Regarding the assumpsit count, the GWKDD asserted that plaintiff stood in the shoes of Royal Oak as its assignee and had no right to any damages from the alleged overcharges because the city passed through the overcharges to the ratepayers and suffered no compensable loss.

While the GWKDD's summary disposition motion pended, plaintiff filed an amended complaint that added an unjust enrichment claim. Defendant moved to strike plaintiff's amended complaint and the trial court granted the motion prompting plaintiff to file a motion for leave to amend. At the conclusion of a hearing on the parties' motions, the trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8), denied plaintiff's motion for leave to amend, and dismissed plaintiff's lawsuit with prejudice.

II. SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

A. STANDARD OF REVIEW

We review de novo the trial court's grant of summary disposition under MCR 2.116(C)(8) to determine whether the opposing party failed to state a claim upon which relief can be granted. *Dalley v. Dykema Gossett, PLLC*, 287 Mich. App. 296, 304; 788 N.W.2d 679 (2010). In *Dalley*, this Court explained:

> A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. When deciding a motion under (C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the moving party. A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions. Summary disposition on the basis of subrule (C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. [*Id.* at 304-305 (quotation marks and citations omitted).

***3** In a contract action the trial court may examine the contract attached to the complaint. *Liggett Restaurant Group, Inc. v. Pontiac*, 260 Mich. App. 127, 133; 676 N.W.2d 633 (2003). "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v. Domino's Pizza, LLC*, 273 Mich. App. 449, 452; 733 N.W.2d 766 (2006). Further, whether an equitable claim can be maintained presents a question of law subject to de novo review. *Morris Pumps v. Centerline Piping, Inc.*, 273 Mich. App. 187, 193; 729 N.W.2d 898 (2006).

B. BREACH OF CONTRACT

Plaintiff first claims that the trial court erred by granting summary disposition of its breach of contract claim. We disagree.

The party claiming a breach of contract must establish by a preponderance of the evidence (1) the existence of a contract, (2) the other party's breach, and (3) damages to the party claiming breach. *Miller-Davis Co. v. Ahrens Constr., Inc.*, 495 Mich. 161, 178; 848 N.W.2d 95 (2014). An express contract is "an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language either orally or in writing." *Benson v. Dep't of Mgt. and Budget*, 168 Mich. App. 302, 307; 424 N.W.2d 40 (1988) (quotation marks and citation omitted). In *AFT Mich. v. Michigan*, 497 Mich. 197, 235; 866 N.W.2d 782 (2015), our Supreme Court summarized the principles of contract formation as follows:

> A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. The party seeking to enforce a contract bears the burden of proving that the contract exists. Contracts necessarily contain promises: a contract may consist of a mutual exchange of promises, or the performance of a service in exchange for a promise. [Citations omitted.]

Further, to create a contract, there must be an offer and acceptance by the parties signifying their unambiguous mutual assent or meeting of the minds on the essential terms. *Kloian*, 273 Mich. App. at 452-253 (citations omitted).

In this case, plaintiff alleged one count of breach of contract based on the resolution adopted by the Drainage Board. It argued to the trial court that the resolution coupled with the Drainage Board's Final Order of Apportionment constituted an express contract that the GWKDD breached. The record reflects that plaintiff attached the resolution and the Final Order of Apportionment to its complaint as exhibits making them part of its pleadings and relied on those documents to allege the existence of a contract between the GWKDD and Royal Oak. Therefore, the trial court could properly consider those documents for determination of defendant's summary disposition motion under MCR 2.116(C)(8). *Liggett*, 260 Mich. App. at 133.

Plaintiff argues as it did to the trial court that the resolution and the Final Order of Apportionment constituted a binding express contract between the GWKDD and Royal Oak that the GWKDD breached. We disagree.

The language of the Drainage Board's resolution and its Final Order of Apportionment plainly establish that these two documents neither individually, nor combined, constituted a binding contract between the GWKDD and Royal Oak. The documents expressed no offer or promises made by either party to the other that required acceptance. Nor did the documents express the five elements necessary for the creation of a valid contract in Michigan.

***4** The Drainage Board's resolution and its Final Order of Apportionment expressed independent determinations made by the Drainage Board, as statutorily required under Chapter 20 of Michigan's drain code of 1956, MCL 280.461 *et seq.* which governs intracounty drains. The GWKDD is a drainage district, a governmental body with powers conferred upon it by law. See MCL 280.5. The drain code authorizes recovery of the costs of county drains necessary for the public health, MCL 280.462, and makes drainage boards responsible for the operation and maintenance of such drains, MCL 280.478. [2] Under the drain code, drainage boards must establish percentages to apportion the costs of operating and maintaining drains to the public corporations assessed for the costs of the drain, considering the benefits that accrue to each public corporation and the extent to which each public corporation contributes to the conditions which make the drain necessary. See MCL 280.468; MCL 280.469; MCL 280.478. Drainage boards are statutorily required to determine, after notice and a hearing, the apportionment of the costs and confirm their determinations by issuance of a final order of apportionment. See MCL 280.469; MCL 280.478. The drain code, however, nowhere provides that a final order of apportionment issued by a drainage board constitutes a contract with the municipal entities to which the order applies. Nor does the drain code grant a right of action to such entities for an alleged breach of a final order of apportionment.

The resolution and Final Order of Apportionment at issue in this case, therefore, constituted a statutorily required determination that apportioned the costs of stormwater

disposal and treatment by the DWSD, and allocated to the municipalities in the GWKDD their proportionate share. Neither the resolution nor the Final Order of Apportionment, nor those documents combined constituted contracts on which Royal Oak could base a breach of contract claim. Plaintiff, therefore, failed and could not meet its burden of establishing the existence of a contract. Accordingly, the trial court properly granted summary disposition of plaintiff's breach of contract claim under MCR 2.116(C)(8). [3]

C. ASSUMPSIT

Plaintiff next argues that the trial court erred by granting defendant summary disposition because, in the absence of an express contract, it could recover the overcharges on equitable grounds in assumpsit for money had and received. We disagree.

A claim in assumpsit is "an equitable action, and can be maintained in all cases for money which in equity and good conscience belongs to the plaintiff." *Hoyt v. Paw Paw Grape Juice Co.*, 158 Mich. 619, 626; 123 NW 529 (1909) (quotation marks and citation omitted). The right to bring an action in assumpsit "exists whenever a person, natural or artificial, has in his or its possession money which in equity and good conscience belongs to the plaintiff, and neither express promise nor privity between the parties is essential." *Id.* at 626 (citation and emphasis omitted); see also *Trevor v. Fuhrmann*, 338 Mich. 219, 223-224; 61 N.W.2d 49 (1953). As our Supreme Court explained in *Moore v. Mandlebaum*, 8 Mich. 433, 448 (1860):

> We understand the law to be well settled that an action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties; and if it appear, from the whole case, that the defendant has in his hands money, which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover; and that as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.

***5** "The basis of a common-law action for money had and received is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor*, 338 Mich. at 224-225.

In this case, plaintiff alleged a claim in assumpsit for money had and received on the ground that the GWKDD improperly overcharged Royal Oak contrary to the Drainage Board's resolution. Plaintiff based that alternative claim on its position as Royal Oak's assignee. Plaintiff did not dispute that Royal Oak passed through the alleged overcharges to its water and sewer ratepayers. The trial court ruled that plaintiff, as Royal Oak's assignee, could not maintain the assumpsit claim because Royal Oak suffered no recoverable loss. The trial court did not err in this regard.

Under Michigan law, an assignee stands in the shoes of the assignor and acquires only the same rights as the assignor and remains subject to the same defenses as the assignor. *Coventry Parkhomes Condo Ass'n. v. Fed. Nat'l. Mortg. Ass'n.*, 298 Mich. App. 252, 256-257; 827 N.W.2d 379 (2012). Therefore, as Royal Oak's assignee, plaintiff acquired no more rights than Royal Oak had at the time of the assignment and it remained subject to the same defenses as Royal Oak. In this case, plaintiff sought a refund of the alleged overcharges as Royal Oak's assignee. Royal Oak, however, passed through to its water and sewer ratepayers the GWKDD's charges by incorporating them into the water and sewer rates. Royal Oak suffered no loss because the funds it paid to the GWKDD were recovered from its ratepayers who paid their water and sewer bills. The record reflects that plaintiff conceded at the hearing that Royal Oak did nothing wrong and had authority to charge its ratepayers whatever amount the GWKDD charged Royal Oak, including the alleged overcharges, because Royal Oak was "purely a pass-through." Thus, if the GWKDD overcharged and collected fees from Royal Oak for stormwater disposal, plaintiff can claim no right to recover from the GWKDD because Royal Oak suffered no loss from its payment of the alleged overcharges. Royal Oak passed on the charges

and passed on the ratepayers' payments. Royal Oak recouped any excess payments from its water and sewer ratepayers. Royal Oak had no claim against the GWKDD that it had in its possession money which in equity and good conscience belonged to Royal Oak. Royal Oak, therefore, occasioned no compensable loss. *Trevor*, 338 Mich. at 224-225; *Hoyt*, 158 Mich. at 626. The trial court correctly discerned that Royal Oak had no claim in assumpsit. Consequently, plaintiff failed and could not state a claim in assumpsit.

Plaintiff argues that federal antitrust law principles articulated in the United States Court of Appeals for the Sixth Circuit's decision in *Oakland Co. v. Detroit*, 866 F2d 839 (CA 6, 1989) and the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720; 97 S Ct 2061; 52 L.Ed. 2d 707 (1977) should be considered and applied in this case. Both of those cases, however, are distinguishable because in *Oakland Co.*, the Sixth Circuit addressed whether counties had standing to bring a federal antitrust action and seek treble damages under the Racketeering Influence and Corrupt Organizations Act (RICO), and in *Illinois Brick*, the Supreme Court addressed who could seek recovery under the Clayton Act in an antitrust action. The courts considered who constituted an injured party within the meanings of RICO and the Clayton Act for federal antitrust violation claim purposes. The courts based their decisions on concerns that holding otherwise would lead to the filing of numerous antitrust actions and unmanageable antitrust class actions that presented enormous evidentiary complexities and uncertainties. We do not find the rationale for the courts' decisions applicable in this case. Further, neither case involved an equitable action in assumpsit. Accordingly, we decline to apply federal antitrust law principles in this case.

***6** Although the ratepayers may have had viable claims against a government entity for the overcharges they allegedly paid,[4] the class members settled and released Royal Oak from any and all liability for refunds of their alleged overpayments. Under *Hoyt*, the right to bring an action for assumpsit must be held by the plaintiff who can establish that the defendant has in its possession money which, in equity and good conscience, belonged to the plaintiff. In this case, plaintiff sued as Royal Oak's assignee for recovery of money paid to the GWKDD. The money plaintiff sought did not belong to Royal Oak, its assignor, but to the ratepayers. Therefore, the trial court did not err by granting the GWKDD summary disposition of plaintiff's claim in assumpsit.[5]

III. GOVERNMENTAL IMMUNITY

Defendant argues that, in the absence of a contract, plaintiff's claims constituted negligence claims subject to government immunity under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.* Plaintiff counters by asserting that the trial court correctly decided that government immunity did not apply in this case. We agree that the trial court correctly determined this issue.

Under MCR 2.116(C)(7), "[s]ummary disposition may be granted when, among other things, a claim is barred by governmental immunity." *Dybata v. Wayne Co.*, 287 Mich. App. 635, 637; 791 N.W.2d 499 (2010). "When considering a motion brought under subrule (C)(7), the trial court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact precluding summary disposition." *Id.* (citations omitted). "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred by governmental immunity is an issue of law." *Id.* at 637. Further, this Court reviews de novo the application of governmental immunity. *Id.* at 638.

"The [GTLA] provides 'broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function.' " *Milot v. DOT*, 318 Mich. App. 272, 276; 897 N.W.2d 248 (2016), quoting *Ross v. Consumers Power Co. (On Rehearing)*, 420 Mich. 567, 595; 363 N.W.2d 641 (1984). There is no dispute that the GWKDD, a unit of Oakland County, a political subdivision of the state of Michigan, is a governmental entity generally immune from tort liability under MCL 691.1407(1). *Milot*, 318 Mich. App. at 276. This Court explained in *Yellow Freight Sys, Inc. v. State of Michigan*, 231 Mich. App. 194, 203; 585 N.W.2d 762 (1998), rev'd on other grounds 464 Mich. 21 (2001), rev'd 537 U.S. 36; 123 S Ct 371; 154 L.Ed. 2d 377 (2002), that "[a]n action in assumpsit for money had and received is not an action in tort." "Therefore, governmental immunity from tort liability under MCL 691.1407 ... does not apply." *Id.* Accordingly, we find no merit to defendant's argument that, in the absence of a contract, plaintiff's assumpsit claim

should have been construed as a negligence claim barred by governmental immunity. We hold that the trial court did not err in concluding that governmental immunity did not apply in this case.

IV. AMENDED COMPLAINT

***7** Plaintiff also argues that the trial court erred by granting defendant's motion to strike its first amended complaint and by denying its motion for leave to amend under MCR 2.118(A)(2) based on futility. We disagree.

We review for an abuse of discretion a trial court's decision to strike a pleading. *Belle Isle Grill Corp. v. Detroit*, 256 Mich. App. 463, 469; 666 N.W.2d 271 (2003). We also review for an abuse of discretion a trial court's decision regarding a motion for leave to file an amended complaint. *Kostadinovski v. Harrington*, 321 Mich. App. 736, 742-743; 909 N.W.2d 907 (2017). An abuse of discretion occurs when the court's decision results in an outcome outside the range of principled outcomes. *Decker v. Trux R. U.S., Inc.*, 307 Mich. App. 472, 478; 861 N.W.2d 59 (2014). A trial court abuses its discretion when it makes an error of law. *Kostadinovski*, 321 Mich. App. at 743. We review de novo a trial court's interpretation of a court rule. *Acorn Investment Co. v. Mich. Basic Prop. Ins. Ass'n.*, 495 Mich. 338, 348; 852 N.W.2d 22 (2014). "[W]hether a claim for unjust enrichment can be maintained is a question of law" subject to de novo review. *Morris Pumps*, 273 Mich. App. at 193.

"The principles of statutory construction apply to the interpretation of the Michigan Court Rules." *Decker*, 307 Mich. App. at 479. We look to " 'the plain language of the court rule in order to ascertain its meaning' and the 'intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole.' " *Id.*, quoting *Henry v. Dow Chem. Co.*, 484 Mich. 483, 495; 772 N.W.2d 301 (2009). " 'If the rule's language is plain and unambiguous, then judicial construction is not permitted and the rule must be applied as written.' " *Decker*, 307 Mich. App. at 479, quoting *Jenson v. Puste*, 290 Mich. App. 338, 342; 801 N.W.2d 639 (2010).

In this case, plaintiff filed the complaint on June 20, 2017. In lieu of answering, on August 18, 2017, the GWKDD moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). Before responding to the GWKDD's summary disposition motion, plaintiff filed an amended complaint. That prompted the GWKDD to move to strike plaintiff's amended complaint under MCR 2.115(B) on the ground that its filing of a motion for summary disposition precluded plaintiff from filing an amended complaint without first obtaining leave from the trial court under MCR 2.118(B)(2). At the hearing on the GWKDD's motion to strike, the trial court held in abeyance its ruling. Nevertheless, the trial court later entered an order granting the GWKDD's motion and striking plaintiff's amended complaint.

MCR 2.118 governs amendment of a party's pleadings. *Ligons v. Crittenton Hosp.*, 490 Mich. 61, 80; 803 N.W.2d 271 (2011). MCR 2.118(A) provides, in pertinent part:

> (1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.
>
> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

***8** MCR 2.118(A)(1) permits a party to "amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party[.]" *Ligons*, 490 Mich. at 80 (quotation marks and citation omitted). MCR 2.110(A) specifies that the term "pleading" includes only a complaint, a cross-complaint, a counterclaim, a third-party complaint, an answer, and a reply to an answer, and states that "[no] other pleading is allowed." "[W]hen a court rule specifically defines a given term, that definition alone controls." *Ligons*, 490 Mich. at 81 (quotation marks and citation omitted). The GWKDD's motion for summary disposition, therefore, was not a responsive pleading. *Huntington Woods v. Ajax Paving Indus., Inc.*, 179 Mich. App. 600, 601; 446 N.W.2d 331 (1989). Accordingly, plaintiff's right as a matter of course to amend its complaint under MCR 2.118(A)(1) was not triggered by GWKDD filing of its motion for summary disposition of plaintiff's claims in its original complaint. Plaintiff's filing without leave to amend did not comport with the requirements of MCR 2.118(A)(1). The trial court,

therefore, did not abuse its discretion by striking plaintiff's improperly filed amended complaint.

The record reflects that plaintiff then moved for leave to amend its complaint to state two claims in assumpsit and to assert a new count for unjust enrichment. Under MCR 2.118(A)(2), "[a] court should freely grant leave to amend a complaint when justice so requires." *Lane v. Kindercare Learning Ctrs., Inc.*, 231 Mich. App. 689, 696; 588 N.W.2d 715 (1998). In *Lane*, this Court explained:

> Ordinarily, a motion to amend a complaint should be granted, and should be denied only for the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment.
>
> * * *
>
> An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim. [*Id.* at 697 (citations omitted).]

In this case, the record reflects that the trial court considered plaintiff's proposed amended complaint and determined that the amended allegations and proposed unjust enrichment claim failed to overcome plaintiff's original complaint's deficiencies and failed to state a claim upon which relief could be granted. The trial court concluded that plaintiff's new unjust enrichment claim was futile for the same reasons that plaintiff's assumpsit claim failed.

The equitable right of restitution exists when a person has been unjustly enriched at another person's expense. *Morris Pumps*, 273 Mich. App. at 193. The law will imply a contract "to prevent unjust enrichment when one party inequitably receives and retains a benefit from another." *Id.* at 194; see also *Belle Isle Grill*, 256 Mich. App. at 478. 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. "In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id.*

In this case, plaintiff stood in the shoes of Royal Oak as its assignee. It alleged in its proposed amended complaint that the GWKDD was unjustly enriched by overcharging Royal Oak for the costs of stormwater disposal. Although plaintiff alleged that the GWKDD received a benefit and asserted that it would be unjust for the GWKDD to retain the alleged overcharges, plaintiff cannot establish any inequity resulting to Royal Oak from the GWKDD's retention of the overcharges because Royal Oak passed through to ratepayers the alleged overcharges and recouped from them the amount it allegedly overpaid. While the retention of the alleged overcharges collected by the GWKDD may have resulted in an inequity to the ratepayers, Royal Oak suffered no loss. The record reflects that plaintiff did not specifically allege in its proposed amended complaint that any inequity resulted to Royal Oak. Royal Oak could not state a claim for unjust enrichment under the circumstances presented in this case. Therefore, plaintiff, as Royal Oak's assignee, could not state a claim for unjust enrichment. Because Royal Oak admittedly passed through the charges to its water and sewer ratepayers, the GWKDD was not unjustly enriched at the expense of Royal Oak. *Id.* at 195. Accordingly, plaintiff's proposed unjust enrichment claim suffered from the same defect as its assumpsit claim and the trial court could properly deny plaintiff's motion to amend on the ground of futility. Therefore, the trial court did not abuse its discretion by denying plaintiff's motion for leave to amend its complaint.

***9** Affirmed.

All Citations

Not Reported in N.W. Rptr., 2019 WL 1965891

Footnotes

1 The trial court dismissed Oakland County based upon a stipulation of the parties.

2 MCL 280.462 provides: “County drains which are necessary for the public health may be located, established and constructed under the provisions of this chapter where the cost thereof is to be assessed wholly against public corporations.” MCL 280.478 provides, in part: “Any necessary expenses incurred in the administration and in the operation and maintenance of the drain and not covered by contract shall be paid by the several public corporations assessed for the cost of the drain.”

3 Defendant also argues that, because plaintiff's claims were premised on the resolution and Final Order of Apportionment, the claims challenged the propriety of the Final Order of Apportionment and the legality of apportioning the costs to Royal Oak. Defendant contends that plaintiff's claims were barred by the limitations period prescribed under MCL 280.483 which governs challenges to orders of apportionment. We find no merit to defendant's argument because plaintiff's complaint plainly did not challenge the apportionment decision. Further, we decline to review this issue because it is not necessary for the disposition of this case. See *Fast Air, Inc v. Knight*, 235 Mich. App. 541, 549-550; 599 N.W.2d 489 (1999).

4 See *Bond v. Public Schools of Ann Arbor*, 383 Mich. 693; 178 N.W.2d 484 (1970).

5 Defendant also argues that this action improperly imposed against it a certified class from the earlier settled action despite the fact that defendant was not a party to that action. Although defendant raised this issue before the trial court, the trial court did not decide the issue. Therefore, the issue was not preserved for review by this Court and we decline to review it. Further, the issue is not necessary for the disposition of this case. *Fast Air, Inc.*, 235 Mich. App. at 549-550.

End of Document

Exhibit 3

2021 WL 137773
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

KICKHAM HANLEY PLLC, as Trustee for a Certified Class of Persons and All Others Similarly Situated, Plaintiff-Appellant,
v.
GEORGE W. KUHN DRAINAGE DISTRICT, Defendant-Appellee.

No. 351317
|
January 14, 2021

Oakland Circuit Court, LC No. 2019-172077-CZ

Before: Fort Hood, P.J., and Cavanagh and Tukel, JJ.

Opinion

Per Curiam.

***1** Plaintiff, assignee of the City of Oak Park and trustee for a certified class of persons defined in the final order approving a class settlement in Lower Court No. 15-149751-CZ, appeals as of right the trial court's opinion and order granting summary disposition in favor of defendant. We affirm.

I. BACKGROUND FACTS

Defendant is a drainage district, which is an independent corporate entity that has powers conferred upon it by law. [1] Drainage districts are governed by drainage boards. [2] Defendant maintains and operates the George W. Kuhn Drain (the drain), which operates in an area that includes Oak Park.

Oak Park has a combined sewer system that collects both sanitary sewage and stormwater. That sewer system flows to the system operated by defendant. Generally, defendant diverts all of the stormwater flow from Oak Park and the other communities within the operational area of the drain to two water treatment plants respectively operated by the Detroit Water and Sewerage Department and the Great Lakes Water Authority. All of the subject stormwater flow travels through Detroit's Dequindre Interceptor, and there the flow is measured by a meter. Accordingly, the water treatment plants charge defendant an annual flat rate to dispose of stormwater based on the measured flow, and defendant allocates that charge among the communities within the operational area of the drain.

In February 2005, defendant's drainage board tentatively established an apportionment of the costs of the drain for stormwater disposal for the communities within the operational area of the drain. As part of the apportionment, the drainage board made an allocation on the basis of an assumption that all water purchased from the Detroit Water and Sewerage Department would be returned as sanitary flow, and so only the difference between the purchased water and the "Master Meter Charges" would be considered stormwater flow. Thus, under the apportionment, two rates would be charged to the communities within the drain's operational area, one for the cost of sanitary sewage flow into the drain, and the other for stormwater flow, which would be apportioned among the communities on the basis of an engineering study that determined each community's contribution of stormwater.

In April 2005, the drainage board resolved to adopt the tentative apportionment of costs it established in February 2005. On the same day, the drainage board entered a Final Order of Apportionment that provided an apportionment of costs between the communities within the operational areas of the drain.

In February 2019, in Lower Court No. 2015-149951-CZ, the trial court entered a final judgment and order approving a class settlement between the plaintiffs, two persons acting as individuals and as representatives of a class of similarly situated persons (the class action plaintiffs), and the defendant, Oak Park. [3] The instant trial court took specific notice of the assignment provisions of that settlement agreement according to which any claims Oak Park possessed against Oakland County or its agencies—including defendant—for storm water management services relating to overcharges for stormwater management services would be assigned to the class action plaintiffs "or for their benefit." Additionally, plaintiff was appointed trustee of a litigation trust to pursue the claims against defendant on behalf of the

plaintiffs, and was also appointed counsel for the litigation trust.

***2** The trial court also noted that the class action plaintiffs and other members of the class who did not ask to be excluded from the class would be deemed to have executed a release of all claims against Oak Park relating to the assessment and costs of water and sewer rates "from the beginning of time through the date" of the final judgment and a period of time thereafter. Subsequently, Oak Park executed an assignment of claims to plaintiff.

Plaintiff filed its complaint against defendant on the basis of the assignment of Oak Park's claims to plaintiff as a trustee for the class action plaintiffs. In its complaint, plaintiff alleged that defendant charged Oak Park approximately $3 million dollars per year for the disposal of stormwater. It further alleged that Oak Park "passe[d] on that cost to its sewer Customers by imposing stormwater charges in its sewer rates to recover the entire $3 million plus per year imposed upon the City by [defendant] on an annual basis." According to the complaint, the amount defendant charged Oak Park for stormwater disposal should have been the same amount defendant was charged by the water treatment plants for stormwater disposal.

Plaintiff alleged that defendant charged Oak Park "substantially more than the amount" charged by the water treatment plants for the disposal of Oak Park's stormwater since at least 2011. According to the complaint, defendant improperly reallocated the sanitary sewage disposal costs imposed by the water treatment plants to stormwater disposal costs, and as a result defendant overcharged Oak Park. Thus, plaintiff raised claims of breach of contract, assumpsit, and unjust enrichment against defendant. The trial court ultimately granted defendant's motion for summary disposition and dismissed plaintiff's claims.

II. ANALYSIS

Plaintiff argues that the trial court erred when it granted defendant's motion for summary disposition. We disagree.

A. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Zaher v. Miotke*, 300 Mich. App. 132, 139; 832 N.W.2d 266 (2013). The trial court granted defendant's motion under MCR 2.116(C)(8). "A court may grant summary disposition under MCR 2.116(C)(8) if '[t]he opposing party has failed to state a claim on which relief can be granted.' A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Dalley v. Dykema Gossett*, 287 Mich. App. 296, 304; 788 N.W.2d 679 (2010) (alteration in original), quoting *Corley v. Detroit Bd. of Ed.*, 470 Mich. 274, 277; 681 N.W.2d 342 (2004). "When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone." *El-Khalil v. Oakwood Healthcare, Inc.*, 504 Mich. 152, 160; 934 N.W.2d 665 (2019). "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.*

"Generally, this Court reviews de novo '[t]he interpretation of statutes and court rules.' " *Simcor Constr., Inc. v. Trupp*, 322 Mich. App. 508, 513; 912 N.W.2d 216 (2018) (alteration in original), quoting *Estes v. Titus*, 481 Mich. 573, 578; 751 N.W.2d 493 (2008). "[T]he rules governing statutory interpretation apply with equal force to a municipal ordinance ...." *Bonner v. City of Brighton*, 495 Mich. 209, 222; 848 N.W.2d 380 (2014). The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v. Domino's Pizza L.L.C.*, 273 Mich. App. 449, 452; 733 N.W.2d 766 (2006). This Court reviews equity cases "de novo on the record on appeal." *Tkachik v. Mandeville*, 487 Mich. 38, 44-45; 790 N.W.2d 260 (2010). "Whether a claim for unjust enrichment can be maintained is a question of law that we review de novo." *Karaus v. Bank of New York Mellon*, 300 Mich. App. 9, 22; 831 N.W.2d 897 (2012).

B. BREACH OF CONTRACT

***3** Plaintiff first argues that the trial court erred when it ruled that plaintiff failed to state a breach-of-contract claim. We disagree.

"A party claiming a breach of contract must establish (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Dunn v. Bennett*, 303 Mich. App. 767, 774; 846 N.W.2d 75 (2013) (quotation

marks and citation omitted). "The party seeking to enforce a contract bears the burden of proving that the contract exists." *AFT Mich. v. Michigan*, 497 Mich. 197, 235; 866 N.W.2d 782 (2015). "Michigan courts will not lightly presume the existence of an enforceable contract because, regardless of the equities in a case, the courts cannot make a contract for the parties when none exists." *Huntington Nat'l Bank v. Daniel J. Aronoff Living Trust*, 305 Mich. App. 496, 508; 853 N.W.2d 481 (2014) (quotation marks and citation omitted). There is a "strong presumption that statutes do not create contractual rights." *Studier v. Mich. Pub. Sch. Employees' Retirement Bd.*, 472 Mich. 642, 661; 698 N.W.2d 350 (2005). Thus, "absent an adequate expression of an actual intent of the State to bind itself, courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party." *Id.* at 662 (quotation marks and citations omitted).

The elements required to create a valid contract are "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v. Leja*, 187 Mich. App. 418, 422; 468 N.W.2d 58 (1991). "In order for consideration to exist, there must be a bargained-for exchange—a benefit on one side, or a detriment suffered, or service done on the other." *Bank of America, NA v. First American Title Ins. Co.*, 499 Mich. 74, 101; 878 N.W.2d 816 (2016) (quotation marks and citation omitted). "Contracts necessarily contain promises: a contract may consist of a mutual exchange of promises, or the performance of a service in exchange for a promise." *AFT*, 497 Mich. at 235-236 (citations omitted). " 'Before a contract can be completed, there must be an offer and acceptance. Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed.' " *Kloian*, 273 Mich. App. at 452, quoting *Pakideh v. Franklin Commercial Mtg. Group, Inc.*, 213 Mich. App. 636, 640; 540 N.W.2d 777 (1995). "A basic requirement of contract formation is that the parties mutually assent to be bound." *Rood v. Gen. Dynamics Corp.*, 444 Mich. 107, 118; 507 N.W.2d 591 (1993). In other words, "the parties must have a 'meeting of the minds' on all the essential elements of the agreement." *Huntington*, 305 Mich. App. at 508. Courts determine if there was a meeting of the minds by reviewing objective evidence such as "the expressed words of the parties and their visible acts." *Id.* (quotation marks and citation omitted).

Plaintiff alleged in its complaint that the April 2005 resolution of the drainage board and the Final Order of Apportionment created a contract between defendant and Oak Park, and that defendant breached that contract when it overcharged Oak Park for stormwater disposal. The trial court ruled that those documents did not satisfy the elements of contract formation because they did not contain "any offer or promises or promises made by either party to the other that require[d] acceptance ...."

***4** In its brief on appeal, plaintiff does not explain how the April 2005 resolution and the Final Order of Apportionment satisfied the elements of contract formation, and instead argues that the April 2005 resolution was binding on defendant whether or not it was a contract. However, in its reply brief, plaintiff addressed for the first time whether the Final Order of Apportionment and the April 2005 resolution satisfied the elements of contract formation, arguing that the consideration between Oak Park and defendant consisted of defendant's promise to charge Oak Park "a particular allocated percentage of the total cost of stormwater disposal."

"Reply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief." *Kinder Morgan Mich., L.L.C. v. City of Jackson*, 277 Mich. App. 159, 174; 744 N.W.2d 184 (2007). Further, "[a] party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, or give issues cursory treatment with little or no citation of supporting authority." *Wolfe v. Wayne-Westland Community Sch.*, 267 Mich. App. 130, 139; 703 N.W.2d 480 (2005) (quotation marks and citation omitted). "If a party fails to adequately brief a position, or support a claim with authority, it is abandoned." *MOSES, Inc. v. SEMCOG*, 270 Mich. App. 401, 417; 716 N.W.2d 278 (2006).

Plaintiff did not raise any challenges regarding the elements of contract formation in its brief on appeal, and may not do so in its reply brief. Given that plaintiff failed to adequately brief this argument, we deem it abandoned. And even if plaintiff had properly presented its arguments regarding consideration, plaintiff failed to address the other elements of contract formation therefore plaintiff would have otherwise failed to expose error on the part of the trial court.

Regardless, even if plaintiff had properly argued that the April 2005 resolution and the Final Order of Apportionment satisfied the elements of contract formation, a brief review of

the relevant portions of the Drain Code reveals that such an argument would have been meritless. Plaintiff is the assignee of Oak Park, and Oak Park is a public corporation that benefits from the drain that is operated and maintained by defendant. Under MCL 280.468, the drainage board was required to apportion the costs for the drain on the basis of the benefits accrued to each benefiting public corporation, and under MCL 280.478(1) and MCL 280.478(2) the drainage board was required to make an apportionment of costs for any necessary expenses incurred in the operation and maintenance of the drain. As a benefiting public corporation, Oak Park had the opportunity to object to the drainage board's apportionment of costs. See MCL 280.469.

Plaintiff's complaint did not raise any claim that the drainage board failed to comply with the Drain Code when it entered the Final Order of Apportionment, MCL 280.460, and plaintiff explicitly abandoned any such challenge in its brief on appeal. Given the requirements set by the Drain Code, the drainage board was in no way engaged in bargaining with Oak Park or any of the other benefiting public corporations when it entered the Final Order of Apportionment pursuant to its statutory obligations. The drainage board made no offer to Oak Park, there was no bargained-for exchange, or meeting of the minds, between Oak Park and defendant before the Final Order of Apportionment was entered, and none was required. Therefore, plaintiff has failed to overcome the strong presumption that the Final Order of Apportionment did not create a contract. See *Studier*, 472 Mich. at 661. And while the Drain Code authorizes a drainage board to enter into contracts with public corporations, MCL 280.471, plaintiff did not allege that Oak Park had a separate contract with defendant.

***5** Plaintiff also briefly contends that municipal resolutions are enforceable by their beneficiaries, citing our Supreme Court's holding in *Hardaway v. Wayne Co.*, 494 Mich. 423; 835 N.W.2d 336 (2013). In that decision, the Court held that this Court improperly applied the last antecedent rule when it interpreted a municipal resolution pertaining to the entitlement of retirement benefits, and reinstated the trial court's grant of summary disposition of the plaintiff's declaratory judgment claim in favor of the defendant. *Id.* at 425, 427-429. Given that *Hardaway* concerned a declaratory judgment claim disposed of by way of summary disposition, rather than a breach-of-contract claim premised on a municipal resolution, it is unclear why plaintiff relies on *Hardaway*.

C. ASSUMPSIT & UNJUST ENRICHMENT

Plaintiff next asserts that the trial court erred when it ruled that plaintiff failed to allege any damages in support of its assumpsit and unjust enrichment claims. We disagree.

The Michigan Supreme Court explained actions of assumpsit as follows:

> "We understand the law to be well settled, that the action of *assumpsit* for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action." [*Trevor v. Fuhrmann*, 338 Mich. 219, 223-224; 61 N.W.2d 49 (1953), quoting *Moore v. Mandlebaum*, 8 Mich. 433, 448 (1860).]

"Assumpsit may be upon an express contract or promise, or for nonperformance of an oral or simple written contract, or it may be a general assumpsit upon a promise or contract implied by law." *Kristoffy v. Iwanski*, 255 Mich. 25, 28; 237 N.W. 33 (1931). "The right to bring this action exists whenever a person, natural or artificial, has in his or its possession money which in equity and good conscience belongs to the plaintiff, and neither express promise nor privity between the parties is essential." *Hoyt v. Paw Paw Grape Juice Co.*, 158 Mich. 619, 626; 123 N.W. 529 (1909). "The basis of a common-law action for money had and received is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor*, 338 Mich. at 224-225 (quotation marks and citation omitted).

Unjust enrichment is "the equitable counterpart of a legal claim for breach of contract." *AFT Mich. v. Michigan*, 303 Mich. App. 651, 677; 846 N.W.2d 583 (2014). A party may raise a claim of unjust enrichment "only if there is no express contract covering the same subject matter." *Local Emergency*

Fin. Assistance Loan Bd. v. Blackwell, 299 Mich. App. 727, 734; 832 N.W.2d 401 (2013) (quotation marks and citation omitted). The complaining party must establish "(1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party." *Karaus*, 300 Mich. App. at 22-23. Unjust enrichment "describes the result or effect of a failure to make restitution of or for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor." *Id.* at 23 (quotation marks and citation omitted).

***6** In its complaint, plaintiff alleged that, even if there was no contract between Oak Park and defendant, defendant overcharged Oak Park for stormwater disposal by way of the Final Order of Apportionment. Plaintiff thus raised claims in assumpsit and unjust enrichment against defendant. The trial court granted summary disposition of those claims because it ruled that plaintiff "failed to show that Oak Park suffered any damages." At the outset, plaintiff contends that the trial court erred when it dismissed plaintiff's claims in assumpsit and unjust enrichment, and it notes that those claims are essentially indistinguishable. We agree with the latter proposition and so will consider plaintiff's arguments regarding its unjust enrichment and assumpsit claims together.

Following its recitation of why it believes that claims of unjust enrichment and assumpsit against defendant were proper if there was no contract between defendant and Oak Park, plaintiff does not directly address the trial court's ruling that plaintiff failed to show that Oak Park was damaged by the stormwater disposal overcharges. Instead, plaintiff contends that Oak Park was the only entity that had standing to bring these claims against defendant, because the class action plaintiffs (i.e., Oak Park's ratepayers) did not directly pay the assessed stormwater disposal costs to defendant. However, the trial court did not reach the issue of plaintiff's standing by virtue of the assignment [4] it received from Oak Park, having disposed of the case on the ground that plaintiff failed to demonstrate that Oak Park was damaged by the stormwater disposal overcharges.

While the trial court did not explain the basis for its ruling, plaintiff alleged in its complaint that Oak Park "passe[d] on that cost to its sewer Customers by imposing stormwater charges in its sewer rates to recover the entire $3 million plus per year imposed upon the City by [defendant] on an annual basis." Plaintiff attached a copy of the final judgment of the class action lawsuit to its complaint, in which the trial court for that case noted that, per the settlement agreement between Oak Park and the class action plaintiffs, the class action plaintiffs were deemed to have executed a release of all claims against Oak Park relating to the assessment and costs of water and sewer rates "from the beginning of time through the date" of the final judgment, as well as a period of time for future claims. And plaintiff concedes in its reply brief that the class action plaintiffs released their claims against Oak Park.

Given the foregoing, we surmise that the trial court ruled that plaintiff failed to establish that Oak Park was harmed by the stormwater disposal overcharges because Oak Park directly passed on that cost to the class action plaintiffs, who in turn released any claims they had against Oak Park. Because the actual ratepayers of the alleged overcharge (i.e., the class action plaintiffs) released their claims against Oak Park, plaintiff cannot show that defendant either retained money that in "good conscience, belongs, or ought to be paid, to the plaintiff," *Trevor*, 338 Mich. at 223 (quotation marks and citation omitted), or that Oak Park suffered an inequity, *Karaus*, 300 Mich. App. at 22-23, because the money at issue belonged to Oak Park's ratepayers as opposed to Oak Park itself.

Plaintiff argues that any ruling that Oak Park was not harmed by the stormwater disposal overcharges because it passed through the overcharges to the class action plaintiffs runs afoul of a general rejection of "pass-through" defenses in all jurisdictions where such a defense has been raised. In support of its argument, plaintiff relies on a miscellany of decisions from a number of different contexts.

***7** The earliest decision upon which plaintiff relies, *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-535; 38 S. Ct. 186; 62 L. Ed. 451 (1918), arose from a judgment obtained against a number of railroad defendants (i.e., common carriers) after the Interstate Commerce Commission found that the rate they charged for transporting hardwood lumber was excessive, and where the United States Supreme Court held that the plaintiffs were permitted to collect a judgment against the defendants even if the plaintiffs may have passed on the excessive charge to their own customers. The Court explained that a common "carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the

sum," because "of the endlessness and futility of the effort to follow every transaction to its ultimate result." *Id.* Thus, that holding pertained to proceedings involving a decision by the Interstate Commerce Commission, and commercial transactions where it would be difficult to ascertain how the excessive rate affected the prices paid by customers of the affected businesses. Given that plaintiff readily alleged in its complaint that Oak Park passed the overcharges on to its ratepayers, and has not shown that there would be any particular complexity in determining how the overcharge directly affected the fees paid by Oak Park's ratepayers, plaintiff's reliance on *Southern Pacific Co.* is inapt.

Plaintiff also relies on decisions with similar holdings that pertain to claims based on federal antitrust violations: *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488-489, 493-494; 88 S. Ct. 2224; 20 L. Ed. 2d 1231 (1968) (rejecting a "passing-on" defense while recognizing that a buyer who was charged an illegally high price for materials used for the buyer's business had established a prima facie case under federal antitrust law); *Oakland Co. v. Detroit*, 866 F.2d 839, 844-846 (C.A. 6, 1989)[5] (holding that the county plaintiffs would have standing to bring claims under federal antitrust and racketeering law and could demonstrate an injury even if they recouped the illegal overcharges by passing it on to their own customers). However, those decisions pertain to claims based on violations of specific federal statutes rather than claims in assumpsit or unjust enrichment. Because the rationale for their disavowal of a "pass-through" or "passing-on" defense is based on considerations directly related to the aforementioned federal statutes, those cases do not militate in favor of adopting those holdings in the wholly distinct context of claims in assumpsit or unjust enrichment. Moreover, plaintiff, by virtue of its representation of the class action plaintiffs, fully demonstrated that a class action claim could be brought against Oak Park by its ratepayers, even if that litigation ended with the class action plaintiffs agreeing to release their claims against Oak Park.

Plaintiff also cites *Northern Arizona Gas Serv., Inc. v. Petrolane Transp., Inc.*, 145 Ariz. 467, 476; 702 P.2d 696 (Ariz. App., 1984), where the Arizona Court of Appeals held that the plaintiff's "waiver of its claim for lost profits did not constitute an admission that none resulted from [the defendant's] activities," because "it was based on the complexity of issues of proof—the very reason for the supreme court's rejection of the passing-on defense in *Hanover Shoe*." And the Arizona court also noted that the plaintiff was "the only party that can recover the overcharge from" the defendant. *Id.* Plaintiff has not shown that there is any complexity with issues of proof regarding the effect of the overcharges, and, as discussed above, Oak Park's rate-payers were entitled to recover the overcharges from Oak Park but they released those claims. Therefore, plaintiff's reliance on this decision is inapt.

For these reasons, plaintiff has failed to show that the trial court erred in concluding as a matter of law that Oak Park did not incur any damages in this matter.

Plaintiff also argues that the trial court erred when it granted defendant's motion for summary disposition because plaintiff's allegation that defendant charged Oak Park an unreasonable rate for stormwater disposal presented a question of fact. Again, we are not persuaded.

***8** In its complaint, plaintiff supported its second claim in assumpsit and its claim of unjust enrichment by alleging that defendant's charge for stormwater disposal was unreasonable because it exceeded the costs set by the Final Order of Apportionment. The trial court did not specifically address that allegation in its ruling, having disposed of the case on the ground of the lack of damages suffered by Oak Park. Because we affirm the result below on that ground, we need not consider the question of reasonableness of the stormwater disposal charge.

Nonetheless, plaintiff fails to show that defendant was under some general duty of reasonableness in connection with its stormwater disposal charges. Plaintiff relies on *Mapleview Estates, Inc. v. City of Brown City*, 258 Mich. App. 412; 671 N.W.2d 572 (2003). The discussion of reasonableness in that decision was limited to whether a "tap-in fee" for connecting to a municipal water system was reasonable under the Revenue Bond Act of 1933, MCL 141.101 *et seq.*, where a municipality is permitted to set the rates for services falling under that act provided that those rates are reasonable. *Id.* at 417-418.[6] But plaintiff provides no argument or explanation regarding how the RBA might be applicable in this situation.

And plaintiff did not raise an independent claim in its complaint that defendant charged unreasonable rates; rather, its allegation that the rates were unreasonable merely supported a claim in assumpsit and a claim of unjust

enrichment. Given that plaintiff has failed to cite legal authorities that establish defendant was required to charge a reasonable rate, or otherwise adequately brief how the trial court erred, plaintiff has abandoned this argument on appeal. See *MOSES, Inc.*, 270 Mich. App. at, 417; *Wolfe*, 267 Mich. App. at 139.

Plaintiff also briefly contends that defendant asserts that Oak Park released its claims against defendant during the class action suit. There is no indication that defendant actually raised this argument in the trial court. Because the trial court never considered any such contention, we decline to consider it.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2021 WL 137773

Footnotes

1 See MCL 280.5.

2 See MCL 280.464.

3 These class action plaintiffs were legally represented by plaintiff.

4 "Under general contract law, rights can be assigned unless the assignment is clearly restricted," and an "assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt v. Bailey*, 260 Mich. App. 636, 653; 680 N.W.2d 453 (2004).

5 "Opinions of the lower federal courts and foreign jurisdictions are not binding but may be considered persuasive." *People v. Patton*, 325 Mich. App. 425, 435 n. 1; 925 N.W.2d 901 (2018).

6 Plaintiff also cites two other decisions that do not show that defendant was required to charge a reasonable rate. See *Trahey v. Inkster*, 311 Mich. App. 582, 594; 876 N.W.2d 582 (2015) (where the city defendant challenged the trial court's finding that its water and sewer rates were unreasonable under the defendant's own city charter, which required the defendant's city council to set "just and reasonable rates" for public utility services provided by the defendant); *Plymouth v. Detroit*, 423 Mich. 106, 111; 377 N.W.2d 689 (1985) (a breach of contract action where the municipal water contract between the parties required the defendant to set rates for the water that was reasonable in relation to the costs incurred by the defendant).

Exhibit 4

2019 WL 360730
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Leonard S. BOHN, Individually and as Representative of a Class of Similarly Situated Persons and Entities, Plaintiff-Appellant,
v.
CITY OF TAYLOR, Defendant-Appellee.

No. 339306
|
January 29, 2019

Wayne Circuit Court, LC No. 15-013727-CZ

Before: Murray, C.J., and Servitto and Shapiro, JJ.

Opinion

Per Curiam.

***1** Plaintiffs brought suit alleging that defendant's water and sewer rates were unreasonable and that they constituted disguised taxes in violation of the Const. 1963, art. 9, §§ 25-34, popularly known as the Headlee Amendment. Plaintiffs appeal the trial court's order granting defendant summary disposition under MCR 2.116(C)(10). For the reasons set forth below, we affirm. [1]

1 A trial court's decision whether to grant summary disposition is reviewed de novo. *Pace v. Edel-Harrelson*, 499 Mich. 1, 5; 878 N.W.2d 784 (2016). In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Bank of America, NA v. Fidelity Nat'l Title Ins Co*, 316 Mich. App. 480, 488; 892 N.W.2d 467 (2016) (quotation marks and citations omitted).]

I. BACKGROUND

Defendant City of Taylor (the City) operates and maintains a water and sewer system. Plaintiffs brought suit alleging numerous improprieties in the City's water and sewer ratemaking. On appeal, plaintiffs challenge only the computation of the City's sewer rates as well as the fact that the City no longer directly pays for public fire protection costs.

Specifically, plaintiffs raise two issues relating to the determination of the City's sewer rates. The parties agree that the first step of ratemaking is to determine the utility's revenue requirements. The parties also agree that, as a general matter, a utility may recover depreciation expenses through its rates. However, plaintiffs maintain through their expert, Kerry Heid, that it is improper for the City to include depreciation as an expense when it uses the cash-basis approach to determining its revenue requirements. The City admits that it is improper to include depreciation when calculating cash-basis revenue requirements. But the City, relying on its expert, Eric Rothstein, contends that the term "depreciation" was improperly used in its calculations and that the term was merely used as a "proxy" to provide funding to calculate its capital expenditures.

Plaintiffs also take issue with the accumulation of a reserve fund which will be used to fund maintenance, repairs, and improvements to the City's sewer system. Plaintiffs contend that the sewer reserve fund, which now totals over $ 10,000,000, shows that the City's sewer rates are in excess of the City's actual costs. Plaintiffs also maintain that it is improper for the City to use funds received from sewer rates to pay for future capital improvements to the sewer system. However, plaintiffs concede that it is appropriate for the City to maintain a reserve fund for the purposes of maintaining and repairing its sewer system, and the City argues that plaintiffs failed to establish that the amount in the City's fund is unreasonable. The City also contends that the reserve fund is properly maintained to address near-term needs and therefore does not raise concerns of "intergenerational inequity."

***2** Lastly, plaintiffs claim that it is improper for the City to incorporate the cost of public fire protection into its service rates. Plaintiffs assert that the City should pay for those costs out of its general fund and that it is violating a City ordinance by failing to do so. Yet plaintiffs have not produced evidence that the City actually includes fire protection costs in its service rates. Further, the City contends that it is appropriate to pass the cost of public fire protection directly to consumers.

The parties filed competing motions for summary disposition. In a written opinion and order, the trial court determined that plaintiffs failed to establish a genuine issue of material fact as to whether the sewer rates constitute an unlawful tax and whether the rates were unreasonable. The trial court also determined that plaintiffs failed to establish that the City includes the cost of fire protection in its water rates.

II. ANALYSIS

A. REASONABLENESS OF SEWER RATES

The City's Charter provides that the city council "shall have the power to fix from time to time such just and reasonable rates and other charges as may be deemed advisable for supplying the inhabitants of the City and others with such public services as the City may provide...." Taylor Charter, § 17.3. The Charter does not provide any standards for determining "just and reasonable rates." But Taylor Ordinance, § 50-25(c), provides:

> The rates and charges hereby established shall be based upon a methodology which complies with applicable federal and state statutes and regulations. The amount of the rates and charges shall be sufficient to provide for debt service and for the expenses of operation, maintenance and replacement of the system as necessary to preserve the same in good repair and working order. The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses.

It is well established that municipal utility rates are presumptively reasonable. *Trahey v. Inkster*, 311 Mich. App. 582, 594; 876 N.W.2d 582 (2015). "The determination of 'reasonableness' is generally considered by courts to be a question of fact." *Novi v. Detroit*, 433 Mich. 414, 431; 446 N.W.2d 118 (1989). "[T]he presumption of reasonableness may be overcome by a proper showing of evidence." *Trahey*, 311 Mich. App. at 594. It is a plaintiff's burden "to show that any given rate or ratemaking practice is unreasonable." *Id.* "Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Id.* at 595.

Under the cash-basis method of utility ratemaking, a municipality first determines "the cash needs of the utility for a given period, *i.e.*, the dollars needed to pay the expense of operation, meet debt obligations, and make such capital improvements as would not require bond financing, *e.g.*, limited new plant construction, plus recurring replacements, renovation and extensions of existing plant." *Plymouth v. Detroit*, 423 Mich. 106, 115; 377 N.W.2d 689 (1985). Plaintiffs first argue that the City improperly includes depreciation when it calculates its expenses under the cash-basis method of ratemaking. Plaintiffs' expert, Heid, reached this conclusion by relying on ratemaking manuals which provide that depreciation is not to be included when determining cash-needs revenue requirements. The City's expert, Rothstein, agrees that depreciation, which is a non-cash expense, should not count as an expense under a cash-basis ratemaking approach. But Rothstein opined that the City had simply used the label of "depreciation expense" as a proxy for properly included costs, i.e., for investment in infrastructure renewal and rehabilitation.

***3** To begin, we note that the City is not required by law or ordinance to adhere to any ratemaking approach. Nor must the City abide by any particular ratemaking manual or guideline. Thus, we decline to hold that the City's failure to strictly follow the cash-basis approach renders its rates unreasonable or that the inclusion of depreciation in its rates is illegal or improper. To the contrary, it is common for utilities to set rates to cover the costs of depreciation. See 64 Am Jur 2d, Public Utilities, § 125, p. 516. Further, it is permissible to include a capital investment component in utility rates. See

Bolt v. Lansing, 459 Mich. 152, 160, 164-165; 587 N.W.2d 264 (1998).

That said, we agree with plaintiffs that the City should not be allowed to accomplish a "double recovery" by counting a single expense twice in determining its revenue requirements. However, plaintiffs have not provided evidence showing that the City has engaged in such a practice. While plaintiffs note that the City has included debt service payments as a budgeted expense in its sewer rates analysis, plaintiffs have not proffered any evidence that those payments are related to the depreciated items. Indeed, Heid admitted that he did not identify any specific items in defendant's budget that were funded through debt, that he did not identify any specific instances in which defendant collected for the same amount twice, and that he could not be aware of any such instances without going through each individual item of defendant's budget.

Thus, while plaintiffs argue that the City may have obtained a double recovery by including depreciated expenses in its sewer rates, they have failed to provide any supporting evidence on that matter. By contrast, Rothstein consulted with the City officials and determined that the City did not include depreciation expense and capital expenditure projections separately but rather used depreciation expense to inform its estimate of required capital expenditures. Heid also acknowledged that it is sometimes appropriate for utilities to use depreciation as a proxy for other expenses. Although the evidence must be viewed in a light most favorable to plaintiffs, they have failed to offer specific evidence that would give rise to a factual dispute regarding the depreciated expenses. Therefore, plaintiffs have failed to present clear evidence that the inclusion of depreciation costs in the City's sewer rates was improper or that this practice renders those rates unreasonable.

Next, plaintiffs challenge what they deem to be an excessive sewer reserve fund. Taylor Ordinances, § 50-24, provides that "[a]ll funds, including surplus funds, if any, shall be kept in separate accounts for the benefit of the bondholders, the operation and maintenance of the water and sewer divisions, and for no other purpose." Heid agreed that the City should be allowed to maintain a reserve fund for maintenance and repair of the sewer system. Indeed, rate-based public utilities commonly maintain a capital reserve to provide fiscal stability. *Jackson Co v. City of Jackson*, 302 Mich. App. 90, 111; 836 N.W.2d 903 (2013). Plaintiffs have not proffered any evidence as to how much money should actually be in the City's sewer fund. Heid testified that he does not know what work needs to be done to the City's sewer system and does not know how much the City needs in reserves for sewer replacements. Accordingly, plaintiffs have not shown that the amount of the City's sewer reserve fund is unreasonable per se.

Instead, plaintiffs contend that the City must have a specific plan for capital improvements equivalent to the amount in the reserve fund and that without such a plan, the fund's existence is evidence that the rates are excessive. Plaintiffs do not provide any authority (legal or otherwise) to support this contention. Setting that aside, we note that numerous witnesses testified that the City has undertaken or initiated actions and processes to assess its aging sewer system and to prepare and pursue a plan to repair and rehabilitate that system. There was also testimony that the City's reserves are insufficient to meet its infrastructure renewal needs.

***4** Plaintiffs counter that this a "post-hoc" justification and the City did not accumulate the reserve pursuant to any kind of capital improvement plan. For purposes of this appeal, we assume that to be true. However, we do not see how the lack of a capital improvement plan renders the accumulation of a reserve fund improper. First, there can be no plan to address the City's *unexpected* maintenance and repairs costs, which is one of the purposes of the fund. Second, Heid opined that the size of the reserve fund is largely due to the City's inclusion of depreciated expenses in its rates. Thus, the reserve fund is inherently aimed toward the replacement and renewal of the sewer system. In other words, by including depreciation expenses in its rates, the City is saving for the day when the depreciated items will need to be replaced. This does not mean, however, that the City must at all times have a plan in place for infrastructure replacements. Presumably, large improvement projects are not continuously planned and executed. Rather, such projects occur periodically as the pipes and other infrastructure decays. The evidence shows that the City is currently inspecting its system and planning infrastructure improvements, for which it will use the reserve fund. Plaintiffs fail to explain why the City must constantly have a capital improvement plan to justify the accumulation of funds that will eventually be used to fund the renewal and replacement of the sewer system.

In sum, plaintiffs fail to establish that any of the City's ratemaking practices are improper or unreasonable. Nor have plaintiffs proffered any evidence that the City's sewer rates are unreasonable. Heid admitted that he does not know what

a reasonable rate is without performing a full cost of service study and that he would not be testifying concerning the amount of a reasonable rate. In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." *Novi*, 433 Mich. at 427. "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *Id.* at 430. In the absence of a complete study of the rate structure and all of its components, it is speculative to suggest that the City's sewer rates are unreasonable. Accordingly, plaintiffs have failed to demonstrate a genuine issue of material fact on that matter, and the trial court correctly granted summary disposition under MCR 2.116(C)(10).

B. THE HEADLEE AMENDMENT

The pertinent provision of the Headlee Amendment, Const. 1963, art. 9, § 31, states:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

The levying of a new tax without voter approval violates this section of the Headlee Amendment. *Jackson Co*, 302 Mich. App. at 99. However, a charge that constitutes a user fee is not subject to the Headlee Amendment. *Id.* The plaintiff bears the burden of establishing the unconstitutionality of the charge at issue. *Id.* at 98. A court decides, as a question of law, whether a charge is a permissible fee or an illegal tax. *Westlake Transp, Inc v. Public Serv Comm*, 255 Mich. App. 589, 611; 662 N.W.2d 784 (2003).

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt*, 459 Mich. at 160. In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id.* at 161 (quotation marks and citations omitted). In *Bolt*, our Supreme Court identified three key criteria to use in distinguishing between a user fee and a tax: (1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service. *Id.* at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v. Shelby Charter Twp*, 265 Mich. App. 657, 665; 697 N.W.2d 180 (2005) (brackets, quotation marks, and citations omitted).

***5** Water and sewer rates are generally considered user fees rather than taxes because they represent a fee paid in exchange for a service. See *Bolt*, 459 Mich. at 162. Water and sewer rates are not always considered user fees, however, because they must be proportionate to the cost of the service. See *Bolt*, 338 Mich. at 162 n. 12. That said, as discussed above, plaintiffs have not presented evidence that the City's sewer rates themselves are unreasonable particularly in light of Heid's concession that he had not performed a rate study and that he held no opinion concerning the reasonableness of the rates. Considering that plaintiffs fail to overcome the presumption that the City's rates are reasonable, we find no basis from which to conclude that the those rates are not proportionate to the cost of service. Instead, the rates constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the sewer systems. See Taylor Ordinances, § 50-25(c).

Consideration of the other *Bolt* criteria does not alter the conclusion that the City's sewer rates constitute a user fee rather than a tax. The first *Bolt* factor indicates that the rates comprise a valid user fee because the rates serve a regulatory purpose of providing sewer services to the City's residents. Although the rates generate funds to pay for the operation and maintenance of the sewer system, this by itself does not establish that the rates serve a primary revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham v. Kochville Twp*, 236 Mich. App. 141, 151; 599 N.W.2d 793 (1999).

Plaintiffs, relying on *Bolt*, 459 Mich. 152, contend that it is impermissible for the City to incorporate costs in its sewer rates which will be used to fund future capital improvements. In *Bolt*, the City of Lansing imposed a "storm water service charge" on property owners to fund the separation of the remaining portion of its combined sanitary and storm systems. *Id.* at 155. The Supreme Court determined that the storm water service charge failed to satisfy the first and second criteria because the charge did not correspond to the benefits conferred. *Id.* at 165. 75% of the property owners in Lansing were already served by a separate storm and sanitary sewer system, but those property owners would be charged the same amount as the 25% who would benefit most from the construction. *Id.* Further, the cost of this project was $ 176 million over 30 years. *Id.* at 155. The Court noted that the charge was "an investment in infrastructure that will substantially outlast the current 'mortgage' that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter." *Id.* at 164 (citation omitted).

Bolt is primarily distinguishable because it involved a rate increase to fund a completely new alteration to the existing sewer system that benefitted only 25% of the property owners. In this case, as discussed, the reserve fund is being used for maintenance and repairs of the existing system, and will be used to fund a large-scale project to replace and update much of that system which will benefit all users of the City's sewer services. Further, if one accepts the premise—as plaintiffs do—that the City may incorporate replacement costs into its rates, then we see no reason why surplus funds cannot be used to replace aging infrastructure. As for concerns that the City's ratepayers are funding improvements for future generations, we find Rothstein's reasoning on this point persuasive:

> The practical reality is that Taylor's current customers, like all utility customers, benefit from prior customers' investments that put in place a (depreciating) system to which they can connect and receive service. Equitably, current users are asked to pay to renew and replace these assets, as well as pay their share of system upgrades. Future users are asked to pay for their shares of system capacity and will likewise be responsible to pay for asserts renewals and replacements.

***6** The users of the City's sewer system contribute to that system's wear and tear, an expense that the City recoups by including depreciation as a revenue requirement in its rate analysis. Accordingly, the users pay a fee proportionate to the necessary costs of the service. And in order for the sewer system to serve its regulatory purpose, it must be maintained and periodically replaced and updated. For those reasons, we conclude that the first two *Bolt* criteria establish that the City's sewer rates constitute a user fee rather than a tax.

As for the third *Bolt* factor, plaintiffs contend that the City's sewer services are not voluntary under statute and the City's ordinances. Even assuming that the sewer charges were deemed effectively compulsory in this case, "the lack of volition does not render a charge a tax; particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler*, 265 Mich. App. at 666. We are unconvinced, in the absence of showing that the sewer rates are unreasonable, that those rates should be considered a tax as opposed to a user fee. Considering the *Bolt* criteria in totality, we conclude that plaintiffs have not established that the City has imposed an unconstitutional tax.

Accordingly, plaintiffs have not demonstrated a genuine issue of material fact in support of their claims alleging violations of the Headlee Amendment and MCL 141.91.[2] Therefore, the trial court properly granted summary disposition to the City pursuant to MCR 2.116(C)(10).

[2] MCL 141.91 provides:

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

C. FIRE PROTECTION

Plaintiffs claim that the City violated an ordinance by incorporating the costs of public fire protection into its service rates. Specifically, the water department, in addition to its primary task of providing potable water, maintains equipment

and operations sufficient to assure necessary pressure for the functioning of fire hydrants. The cost paid to the water department for this service is known as "fire hydrant rental." As a general matter, the experts agreed that it is appropriate for a municipality to recover this cost through water rates. Plaintiffs argue that this practice is nevertheless improper here because it violates Taylor Ordinance, § 50-25(g), which provides in relevant part:

> The reasonable cost and value of all water and sewer service rendered to the city and its various departments by the water and sewer system, including rentals for fire hydrant service for each fire hydrant connected to the system, during all or any part of the fiscal year, shall be charged against the city and will be paid for as the service accrues for the city's current funds, including the proceeds of taxes which will be levied in an amount sufficient for that purpose.

It is undisputed that the City no longer pays $ 44,000 a year in rental fees for all of the fire hydrants on public property as it did until 2010. However, plaintiffs have not provided any evidence that public fire protection costs are improperly passed on to plaintiffs through the City's water rates. Tellingly, Heid testified that "there is nothing to suggest that the customers are actually paying any amount for those public fire protection services." Nor could Heid determine the amount of such a charge in the absence of a rate study. Further, Heid agreed that, at the end of the day, residents will pay for public fire protection either on their water bills or on their tax bills. Given this testimony, plaintiffs have failed to produce evidence demonstrating a genuine issue of material fact concerning whether the costs for public fire protection are improperly included in defendant's water rates or the amount of any such charge. For the same reasons, plaintiffs fail to establish that the City is receiving "free service" from the water and sewer department in contravention of MCL 141.118(1)[3] by not paying for public fire protection costs.

[3] MCL 141.118(1) provides:

> Except as provided in subsection (2) [which is inapplicable here], free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both, and those charges, when so paid, shall be accounted for in the same manner as other revenues of the public improvement.

***7** Affirmed.

All Citations

Not Reported in N.W. Rptr., 2019 WL 360730

End of Document

2021 WL 5750616
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Daniel BRUNET, Individually and as Representative of a Class of Similarly Situated Persons and Entities, Plaintiff-Appellant,
v.
CITY OF ROCHESTER HILLS, Defendant-Appellee.

No. 354110
|
December 2, 2021

Oakland Circuit Court, LC No. 18-164764-CZ

Before: Murray, C.J., and Jansen and Riordan, JJ.

Opinion

Per Curiam.

***1** Plaintiff Daniel Brunet, individually and as class representative, appeals as of right the trial court's opinion and order granting defendant City of Rochester Hills's motion for summary disposition and denying his motion for partial summary disposition. This case concerns charges imposed by defendant for municipal water and sewer services. Defendant asserts that these charges are unlawfully excessive, unreasonable, and in violation of MCL 141.91 and a now-amended municipal ordinance. We affirm.

I. FACTS AND PROCEEDINGS

Defendant operates a municipal water supply system, of which plaintiff is a customer.[1] The water system has two central purposes: (a) supply treated or "potable" water to municipal water customers, and (b) provide excess capacity for public fire protection. In March 2018, plaintiff filed a 10-count complaint against defendant, generally alleging that the water charges imposed by defendant on its customers since 2012 have been unlawful for the following two principal reasons. First, defendant accumulated surplus funds to allegedly pay for future capital improvements to its water system, and these surplus funds are unnecessary to provide service to the *present* water customers. According to plaintiff, defendant may only charge its water customers for the present costs of supplying water. Second, defendant charges its water customers for the fire protection component of its water system. However, because fire protection operates for the benefit of the general public, not only the water customers themselves, the general public should be charged for the fire protection.[2] Plaintiff also noted that defendant had an ordinance providing that the fire protection component would be paid by defendant itself from its general fund. Plaintiff requested that the trial court certify the instant action as a class action with plaintiff himself as the class representative of all persons or entities who paid the water charges at any time in the preceding six years. He further requested that defendant disgorge the excess funds that it had received to the putative class in equity and that the trial court declare that the water charges are unlawfully excessive to the extent outlined in the complaint.

1 To be precise, this case involves the water and sewer system, water and sewer customers, and water and sewer charges. For ease of discussion, we simply refer to the "water system," "water customers," and "water charges," respectively.

2 Plaintiff refers to the future capital improvement component of the water charges as the "Reserve Charge" and the fire protection component as the "Fire Service Charge." To be clear, however, defendant does not separately itemize or charge its water customers for these components. These terms are created by plaintiff for the purposes of this litigation.

In March 2019, the trial court certified the class, which it defined as "all persons and entities who/which have paid the City for water and/or sewage disposal service at any time since March 30, 2012 or who/which pay the City for water and/or sewage disposal service during the pendency of this action."

***2** In December 2019, plaintiff moved for partial summary disposition, arguing that the water charges were unreasonable as a matter of law until November 2018 because defendant had the following ordinance in effect concerning the cost of fire protection services:

> (b) Fire Service Fee. As a fire service fee for providing a water system with extra capacity available for fighting fires and protecting property in the city, the city shall be charged based on a base-extra capacity approach attributing to fire protection the difference between total system capacity and capacity required by other customer classes. The fire service fee shall be required and adjusted annually to reflect actual versus budgeted revenue requirement for the water fund for the previous year.
>
> (c) Quarterly billing. Charges against the City shall be payable in quarterly installments from the current city's fire fund or from the proceeds of taxes which the city, within constitutional limitations, is authorized and required to levy in an amount sufficient for this purpose. [Rochester Hills Ordinance, § 102-124.]

Plaintiff argued that although Rochester Hills Ordinance, § 102-124 essentially required that the fire protection component be paid for by defendant itself, defendant violated the ordinance during the class period until November 2018 by charging its water customers for this service. [3] Thus, plaintiff argued, he and the class were entitled to a refund for monies paid for the fire protection component.

3 Rochester Hills Ordinance, § 102-124 was amended in November 2018 to remove such language.

Defendant moved for summary disposition of the entire complaint. [4] Defendant acknowledged that the fund for its water system had accumulated a substantial surplus of about $46 million in recent years. However, defendant asserted, the majority of the water system will need to be replaced in the upcoming five to 10 years, and it will likely use substantially all of its surplus funds to do so. Defendant explained that it always has intended to use the surplus funds for these upcoming capital improvement projects and that paying for the projects with cash is more fiscally responsible than doing so with bonds. Defendant argued that it was authorized by MCL 141.121 to charge its customers for these future capital improvement projects and that its water charges were reasonable in all respects. Defendant also argued that a municipal regulation passed in 1999 authorized charging its water customers for the fire protection component, so its water charges were not unlawful to that extent.

4 The trial court dismissed two counts of the complaint months earlier, so defendant's motion concerned the remaining eight counts.

The parties presented competing evidence concerning the reasonableness of the water charges, with plaintiff's experts opining that the water charges were unreasonably excessive, and defendant's experts opining that the charges were reasonable. The trial court discussed this evidence in a 37-page opinion and ultimately granted summary disposition in favor of defendant. In relevant part, the trial court reasoned that the water charges did not violate MCL 141.91 because they were "user fees," not "taxes," under *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998); that the water charges were reasonable because plaintiff "has submitted no evidence of anything illegal or improper" and otherwise failed to overcome the presumption of reasonableness; and that plaintiff was not entitled to equitable relief with respect to the fire protection component of the water charges because his "sole evidence" in that regard was "an ordinance that was mistakenly left on the books and was arguably already overridden by lawful resolution." [5] Plaintiff now appeals.

5 The trial court also ruled in favor of defendant on other issues that plaintiff does not challenge on appeal.

II. MCL 141.91

***3** Plaintiff first argues that the water charges are an unlawful tax in violation of MCL 141.91. We disagree.

We review de novo whether a municipal charge is a "tax." See *Mapleview Estates, Inc. v. City of Brown City*, 258 Mich.App. 412, 413-414, 671 N.W.2d 572 (2003). We also review de novo questions of statutory interpretation. *PNC Nat'l Bank Ass'n v. Dep't of Treas.*, 285 Mich.App. 504, 505, 778 N.W.2d 282 (2009). Finally, "[t]his Court reviews de novo a trial court's ruling on a motion for summary disposition." *Hartfiel v. City of Eastpointe*, 333 Mich.App. 438, 444, 960 N.W.2d 174 (2020).

It is initially noted that plaintiff brought alternative claims for assumpsit and unjust enrichment. [6] "At common law, assumpsit was a proper vehicle for recovering unlawful fees, charges, or exactions—including unlawful utility charges—that the plaintiff had paid to a municipality under

compulsion of local law." *Youmans v. Charter Twp. of Bloomfield*, — Mich.App. —, —, — N.W.2d —, 2021 WL 67885 (2021) (Docket No. 348614); slip op. at 27 (cleaned up). "With the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved." *Id.* (cleaned up). "Hence, an assumpsit claim is modernly treated as a claim arising under quasi-contractual principles, which represent a subset of the law of unjust enrichment." *Id.* (quotation marks and citations omitted). "Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another." *Wright v. Genesee Co.*, 504 Mich. 410, 417, 934 N.W.2d 805 (2019). Consequently, if plaintiff is correct that the water charges violated MCL 141.91 (or any other law), he and the class would arguably be entitled to equitable relief to recover the charges unlawfully paid.

6 Plaintiff also sought declaratory relief in his "Prayer for Relief."

MCL 141.91 provides as follows:

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

MCL 141.121 provides, in relevant part, as follows:

> (1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates shall be sufficient to provide for all the following:
>
> (a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement as may be necessary to preserve the public improvement in good repair and working order.
>
> * * *
>
> (d) Other expenditures and funds for the public improvement as the ordinance may require.
>
> (2) The rates shall be fixed and revised by the governing body of the borrower so as to produce the amount described in subsection (1).... [7]

7 MCL 141.121 is part of the Revenue Bond Act of 1933, MCL 141.101 *et seq.* Although MCL 141.121 seems to contemplate only those situations in which bonds are issued, MCL 141.104 provides that "[t]he powers in this act granted may be exercised notwithstanding that no bonds are issued hereunder." Thus, the parties do not dispute that MCL 141.121 may apply in this case, notwithstanding that defendant apparently does not intend to exclusively issue bonds to fund the future capital improvements. See *Seltzer v. Sterling Twp*, 371 Mich. 214, 219, 123 N.W.2d 722 (1963) ("It was clearly the intention of the legislature to give townships the power and authority under the Revenue Bond Act of 1933 to purchase, acquire, construct, improve, enlarge, extend or repair a water supply system and a sewage disposal system, and to own, operate and maintain the same, notwithstanding no bonds are issued in connection therewith.").

***4** MCL 141.121 places "the amount of the charge within the sound discretion of the city officials, especially when considered in relation to the objectives of the program in maintaining the system and paying off the bonds in the manner required by statute." *Yurek v. City of Sterling Heights*, 37 Mich.App. 386, 390, 194 N.W.2d 474 (1971) (cleaned up).

In *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998), our Supreme Court considered whether a "storm water service charge" was either a valid user fee or a tax that violated the Headlee Amendment, Const. 1963, art. 9, § 31, which generally prohibits the imposition of new municipal "taxes" that are not ratified by the voters. The charge was imposed on "each parcel of real property located in the city using a formula that attempts to roughly estimate each parcel's storm water runoff," and it was intended to fund the separation of combined sanitary and storm sewers within the city that had not already been separated. *Id.* at 155, 587 N.W.2d 264. In its analysis, the Court first observed that "a 'fee' is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A 'tax,' on the other hand, is designed to raise revenue." *Id.* at 161, 587 N.W.2d 264 (cleaned up). The Court then identified the following three

factors to distinguish between a user fee and a tax: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose," (2) "user fees must be proportionate to the necessary costs of the service," and (3) user fees contain an element of "voluntariness." *Id.* at 161-162, 587 N.W.2d 264. The Court ultimately ruled that application of the three-factor test compelled the conclusion that the charge at issue was a tax for the purposes of the Headlee Amendment. *Id.* at 169, 587 N.W.2d 264.

In this case, plaintiff acknowledges in his brief on appeal that he is not maintaining a Headlee claim, but he argues that *Bolt* is persuasive authority for the proposition that the water charges at issue are unlawful "taxes" under MCL 141.91. In other words, because MCL 141.91 generally prohibits municipal taxes that are not otherwise authorized by law, and because application of the *Bolt* test indicates that the water charges here are "taxes," it necessarily follows that the water charges violate MCL 141.91. However, plaintiff simply fails to address defendant's argument that the water charges are authorized because they are fully consistent with MCL 141.121(1)(a) and (d). "An appellant's failure to properly address the merits of an argument constitutes the abandonment of an issue." *In re Application of Detroit Edison Co for 2012 Cost Recovery Plan*, 311 Mich.App. 204, 214, 874 N.W.2d 398 (2015). Thus, this issue is abandoned. [8]

8 Recently, our Supreme Court noted in different circumstances that merely because a particular "charge" is a "tax" for the purposes of the Headlee Amendment does not necessarily render it unlawful. See *Gottesman v. City of Harper Woods*, 964 N.W.2d 365 (2021).

Regardless, plaintiff's argument is meritless. In essence, plaintiff argues that because a municipality generally may not charge current ratepayers for future capital improvements—as recognized by older cases such as *Wolgamood v. Village of Constantine*, 302 Mich. 384, 4 N.W.2d 697 (1942), and newer cases such as *Bolt*—it follows that the water charges here are not permissible "rates" or "fees" but are instead "taxes" because defendant acknowledges that the cash reserve will be used for future capital improvements. In our view, plaintiff overstates the principle derived from such cases.

***5** In *Wolgamood*, our Supreme Court explained as follows:

> A municipally owned utility is built and operated, not for a corporate profit, but for the purpose of providing utility services at a reasonable cost to the citizens of the municipality, who are generally identical with the customers. For a municipally owned light plant to charge rates which will, in addition to the necessary expenses of construction and operation, build up a reserve for depreciation equaling the replacement cost of the plant, is to require the citizens and customers not only to pay for construction of their own utility but also to provide the capital for the construction of a new plant to serve future users. [*Wolgamood*, 302 Mich. at 404-405, 4 N.W.2d 697.]

In other words, a municipality may not charge current ratepayers for the costs of constructing the original municipal utility (typically though bonds that must be paid over time) *and* the future costs of replacing that same utility. Doing so "is to ask the consumers to pay off the capital investment twice, once as a debt service and again in the establishment of a depreciation reserve." *Id.* at 405, 4 N.W.2d 697 (quotation marks and citation omitted). Of course, there is nothing in *Wolgamood*, or any other case of which we are aware, to suggest that a municipality may not charge current ratepayers *once* for the cost of the municipal utility. Thus, there is no question that current ratepayers may be charged for the cost of servicing bonds that were issued years ago to pay for the costs of constructing the original municipal utility. It follows that if the municipality originally constructed its utility through cash and intends to replace the utility in a similar manner, then current ratepayers may properly be charged for accumulating that cash reserve. That is, there is no conceptual difference between requiring ratepayers to service bonds and requiring ratepayers to contribute to a cash reserve that will be used for future capital improvements to the utility.

Accumulating such a cash reserve by charging ratepayers based on depreciation is an appropriate way to do so. In *City of Detroit v. City of Highland Park*, 326 Mich. 78, 39 N.W.2d 325 (1949), Highland Park argued that the water and sewage rates charged by Detroit were unreasonable because, among

other reasons, Detroit included depreciation in its rates, and "to charge depreciation sufficient to amortize the cost over the service life of the system is to charge this generation for improvements to be used by the next generation." *Id.* at 95, 39 N.W.2d 325. Our Supreme Court rejected that argument, explaining that Detroit advanced "huge sums ... as an investment in a utility on which Detroit may earn a reasonable return." *Id.* Although Detroit issued bonds as well, "the bonds so issued were only for a small part of the total cost." *Id.* "[O]n a utility basis where the city is not recovering its capital as part of the expense, depreciation charges sufficient to rebuild and restore the system over its service are proper items of expense in determining the rate to be charged." *Id.* at 98, 39 N.W.2d 325. "It is incumbent on the city of Detroit, the owner, to keep up, repair or rebuild the system to the extent that it becomes necessary through depreciation in order to protect its large investment, the advance of almost $12,000,000 in cash besides the issuance of the bonds." *Id.* Simply put, our Supreme Court approved of depreciation charges "sufficient to rebuild and restore the system" because Detroit was entitled to "protect its large investment."

***6** *Bolt* presented the same concern as *Wolgamood*. In *Bolt*, the Court reasoned that the charge at issue was a "tax" because, in relevant part, "[a]t the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter.... The revenue to be derived from the charge is clearly in excess of the direct and indirect costs of actually using the storm water system over the next thirty years and, being thus disproportionate to the costs of the services provided and the benefits rendered, constitutes a tax." *Bolt*, 459 Mich. at 163, 587 N.W.2d 264. Thus, in *Bolt*, the ratepayers were expected to pay for the benefits of the improved system that they would enjoy *and* pay for the benefits of the improved system that future ratepayers, who would not pay the charge at issue, would enjoy. This constituted a similar "double charge" as in *Wolgamood*.

Accordingly, it is not enough for plaintiff to simply show that the water charges at issue are funding a reserve to pay for future capital improvements. Our Supreme Court approved of such a practice in *Highland Park*. Rather, at a minimum, plaintiff must also show that current ratepayers are being "double charged" for the water system, contrary to cases such as *Wolgamood* and *Bolt*. We consider that issue below.

III. REASONABLENESS

Plaintiff argues that the water charges are unreasonable. We disagree. We review de novo whether a municipal charge is reasonable. See *Mapleview Estates, Inc.*, 258 Mich.App. at 413-414, 671 N.W.2d 572.

It is a longstanding principle that municipal utility rates are presumed to be reasonable. See *Highland Park*, 326 Mich. at 100-101, 39 N.W.2d 325 ("The rate lawfully established by the plaintiff is assumed to be reasonable in absence of a showing to the contrary or a showing of fraud or bad faith or that it is capricious, arbitrary or unreasonable, and the burden of proof is on the defendant to show that the rate is unreasonable."). In *Meridian Twp. v. City of East Lansing*, 342 Mich. 734, 71 N.W.2d 234 (1955), Meridian Township challenged the water rates set by East Lansing, arguing that East Lansing violated a provision of the contract between the parties stating that "such rates shall always be reasonable in relation to the costs incurred by the City for the supply of water." *Id.* at 748, 71 N.W.2d 234. Our Supreme Court explained that the question before it was whether the water rates were "reasonable" as defined by the contract:

> We are asked by the appellant to find that the rate charged is not reasonable as above prescribed. It will be noted that the clause under examination does not equate rates to costs. Identity is not required. Obviously there is elbow-room for adjustment. The requirement merely is that they shall be 'reasonable' in relation to costs. *The word 'reasonable' with respect to rates charged by utilities is a word of the most universal employment. It may be provided by ordinance, statute, or constitution, that rates shall be 'reasonable,' or 'fair and reasonable.'* Moreover, should the question of rate arise on a contract implied in law, the judicial requirement is that the rate to be paid shall be 'reasonable.' It may also be employed (as in the case at bar) in a contract. The determination of its meaning, in any case, is not subject to mathematical computation

> with scientific exactitude but depends upon a comprehensive examination of all factors involved, having in mind the objective sought to be attained in its use. Here it is related to the costs incurred by the city in the supply of water. [*Id.* at 749, 71 N.W.2d 234 (internal citations omitted; emphasis added).]

Ultimately, our Supreme Court ruled in favor of East Lansing, stating that Meridian Township failed "to show that the rates charged were, in fact, unreasonable with relation to costs." *Id.* at 753, 71 N.W.2d 234.

In *City of Plymouth v. City of Detroit*, 423 Mich. 106, 377 N.W.2d 689 (1985), Detroit increased water rates it imposed on suburban Detroit municipalities by 39 percent. *Id.* at 109, 377 N.W.2d 689. Plymouth sued Detroit, alleging that the increase was unreasonable. *Id.* Detroit argued that the increase was necessarily reasonable under the version of MCL 123.141 in effect at the time, which essentially provided that "the city may charge its outlying customers not more than twice what it charges its own users." *Id.* at 123, 377 N.W.2d 689. According to Detroit, because it did not charge the suburban municipalities more than twice what it charged its own customers, and because MCL 123.141 "represents the only applicable standard of reasonableness," it logically followed that the 39-percent increase was reasonable. *Id.* Plymouth responded that a contractual provision between the parties stated that "rates shall always be reasonable in relation to the costs incurred by the Board for the supply of water." *Id.* at 111, 377 N.W.2d 689. Thus, Plymouth argued, "the statute only provides for a statutory floor and ceiling of reasonableness and that the specific provisions of the contracts between the parties govern their relationship." *Id.* at 124, 377 N.W.2d 689. In resolving the dispute, our Supreme Court agreed with our conclusion that "the statute does not render reasonable as a matter of law rates within its maximum and minimum provisions in the face of a contractual provision which states that rates shall be reasonable in relation to costs. Regardless of how the statute reads, [Detroit] has limited its discretion in setting rates by agreeing to the contractual provision." *Id.* at 124-125, 377 N.W.2d 689 (quotation marks and citation omitted). Ultimately, however, the Supreme Court ruled in favor of Detroit, concluding that Plymouth failed to sustain its burden of showing that the water rates were unreasonable in violation of the contract:

> ***7** The plaintiff had ample opportunity to substantiate its claim on the theory with which it had chosen to prove that the rates in question were violative of the contract between the parties. The trial court concluded that the rates charged had not been shown to be unreasonable. We find no error in the trial court's conclusion.... [*Id.* at 137, 377 N.W.2d 689.]

In *City of Novi v. City of Detroit*, 433 Mich. 414, 446 N.W.2d 118 (1989), Novi challenged the water rates set by Detroit, arguing that they violated the newly enacted MCL 123.141(2), see 1981 PA 89, which provided, in relevant part, as follows:

> The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of ratemaking....

The trial court ruled in favor of Detroit, but we reversed, explaining that MCL 123.141(2) established the standard that water rates must "reflect the actual cost of providing the service," and as a result, the concept of reasonableness was no longer relevant. *Id.* at 427-428, 446 N.W.2d 118 (quotation marks and citation omitted). Our Supreme Court reversed this Court, stating as follows:

> We acknowledge that the Legislature intended that municipal water rates more accurately reflect the actual cost of service when it eliminated the artificial limits imposed by the previous version of MCL 123.141. However, the Legislature's use of the phrase "based on the actual cost of service as determined under the utility basis of rate-making" cannot be construed to mean "exactly equal to the actual cost of service," in light of the difficulties inherent in the rate-making process and the statutory and practical limitations on the scope of judicial review. The concept of reasonableness, as recognized by the courts of this state and other states in utility rate-

> making contexts, must remain operable, in order to provide a meaningful and manageable standard of review.
>
> * * *
>
> For these reasons, we hold that 1981 PA 89 did not render inoperable the concept of reasonableness in the process of judicial review of municipal utility water rates. The burden of proof remains on the plaintiff to show that a given rate or rate-making method does not reasonably reflect the actual cost of service as determined under the utility basis of rate-making pursuant to MCL 123.141(2). [*Id.* at 430-433, 446 N.W.2d 118 (cleaned up).]

Our Supreme Court ultimately concluded that "the plaintiff City of Novi did not meet its burden of proving that the City of Detroit Water and Sewerage Department's rate-making method, or the resulting rates charged, did not comply with the utility basis of rate-making." *Id.* at 438, 446 N.W.2d 118.

More recently, in *Trahey v. City of Inkster*, 311 Mich.App. 582, 876 N.W.2d 582 (2015), this Court summarized the following pertinent principles concerning the presumption of reasonableness:

> The determination of reasonableness is generally considered by courts to be a question of fact. Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable. This presumption exists because courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making. However, the presumption of reasonableness may be overcome by a proper showing of evidence. The burden of proof is on the plaintiff to show that any given rate or ratemaking practice is unreasonable. [*Id.* at 594, 876 N.W.2d 582 (cleaned up).]

***8** Here, plaintiff argues that the water charges imposed by defendant are unreasonable for the following reasons: (1) "the City has charged far more than necessary to operate its water and sewer systems," i.e., that "the City has been operating its Water and Sewer Fund for a profit because its revenues have consistently exceeded its expenses"; (2) his experts opined that the water charges were unreasonable because, among other things, "[b]y including depreciation in setting its rates, the City's rates double count certain capital expenses"; and (3) defendant did not accumulate the surplus *with the intent* of funding future capital improvements.

Plaintiff, however, does not identify the standard or authority for "reasonableness." In other words, plaintiff does not identify a statute, contractual provision, or ordinance establishing the underlying basis for "reasonableness." In *Meridian Twp*, for example, the basis for "reasonableness" was a contractual provision stating that water rates must be "reasonable in relation to the costs incurred by the City for the supply of water." *Meridian Twp.*, 342 Mich. at 748, 71 N.W.2d 234. In *City of Plymouth*, the basis for "reasonableness" was a contractual provision stating that water rates "shall always be reasonable in relation to the costs incurred by the Board for the supply of water." *City of Plymouth*, 423 Mich. at 111, 377 N.W.2d 689. In *City of Novi*, the basis for "reasonableness" was a statute stating that "[t]he price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making." *City of Novi*, 433 Mich. at 419, 446 N.W.2d 118.[9] And in *Trahey*, the basis for "reasonableness" was a municipal ordinance stating that water rates must be "just and reasonable." *Trahey*, 311 Mich.App. at 594, 876 N.W.2d 582.

[9] Although the statute did not expressly include the word "reasonable," our Supreme Court explained that the concept must nonetheless be imposed within the statute. See *id.* at 433, 446 N.W.2d 118.

Plaintiff apparently is attempting to maintain a freestanding claim of "reasonableness" that is not grounded in any specific law nor in any type of cogent reasoning. A bald assertion of some type of unknown reasonableness standard is not consistent with the caselaw discussed above, in which "reasonableness" was linked to a statute, contractual provision, ordinance, or other source of authority. Of course, plaintiff is nominally correct that municipal utility rates must be "reasonable," but he overlooks the fact that the standard for "reasonableness" is often uniquely determined by reference to the specific law, cost basis, or contract at issue. In one case, a "reasonable" water rate had to simply reflect the costs of supplying water, whereas in another case, a "reasonable"

water rate had to reflect the costs of supplying water as determined under the utility basis of rate-making. Yet, in other cases, as in *Trahey*, the concept of "reasonableness" was that referred to by ordinance. Thus, in light of plaintiff's failure to identify a basis for "reasonableness" here, we could consider this issue abandoned. See *In re Application of Detroit Edison Co. for 2012 Cost Recovery Plan*, 311 Mich.App. at 214, 874 N.W.2d 398.

Regardless, most of plaintiff's arguments in regard to his understanding of reasonableness are meritless and we dispose of them quite briefly. First, plaintiff argues that the mere fact that defendant accumulated a reserve of about $50 million shows that the water charges were unreasonable. [10] However, as explained previously, our Supreme Court in *Highland Park* approved of such accumulated reserves to pay cash for future capital improvements. Second, plaintiff argues that his experts' opinion created a genuine issue of material fact as to whether the water charges were unreasonable, given that they opined that defendant "collected more than $24 million in excess of the amounts it was entitled to collect." However, one of those experts acknowledged during his deposition that he was unaware of the particular depreciating nature of defendant's water system, the critical justification offered by defendant in support of its reserve. [11] Such a lack of knowledge fundamentally undermines the opinion of plaintiff's experts. A plaintiff cannot proceed to trial simply because his or her expert was unaware of the pertinent facts. Compare *Pete v. Iron Co.*, 192 Mich.App. 687, 689, 481 N.W.2d 731 (1991) (concluding that summary disposition was properly granted to the defendant in a slip-and-fall case because, in relevant part, "[p]laintiff's expert testified during deposition that he did not know what caused plaintiff's fall, but opined that she may have 'misstepped' "). In other words, where defendant argues that it accumulated its reserve to pay for substantial capital improvements in the upcoming five to 10 years and that its water charges are therefore reasonable, plaintiff's experts cannot ignore that fact but nonetheless conclude that the water charges are unreasonable. Third, plaintiff argues that there is a question of fact as to whether defendant had a specific plan to use its reserve to fund future capital improvements before the instant action was filed. However, notwithstanding the testimony of defendant's officers that defendant did have a specific plan for its reserve, and notwithstanding that plaintiff does not dispute that the reserve will actually be used to fund future capital improvements, plaintiff provides no authority for the proposition that defendant was obligated to have a specific plan for its reserve before the instant action was filed. See *Bohn v City of Taylor*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2019 (Docket No. 339306, 2019 WL 360730) ("Instead, plaintiffs contend that the City must have a specific plan for capital improvements equivalent to the amount in the reserve fund and that without such a plan, the fund's existence is evidence that the rates are excessive. Plaintiffs do not provide any authority (legal or otherwise) to support this contention."). [12]

10 Plaintiff relies on *Mich. Ass'n of Home Builders v. City of Troy*, 504 Mich. 204, 934 N.W.2d 713 (2019), for the proposition that a municipal utility charge that consistently returns a profit is evidence (perhaps conclusive) that the charge is unreasonable. In that case, our Supreme Court favorably cited the dissenting opinion of Judge Jansen, who explained that consistent annual profits generated by the city's building fees was evidence that the fees were unauthorized by statute. See *id.* at 220, 934 N.W.2d 713. According to plaintiff, the same reasoning should apply here. Plaintiff's argument misses the mark because the statute at issue in that case provided that the building fees "shall be intended to bear a reasonable relation to the cost, including overhead." MCL 125.1522(1)-(2). Thus, as Judge Jansen observed, consistent annual profits indicated that the building fees were not, in fact, intended to bear a reasonable relation to the cost of operating the regulatory scheme. Here, in contrast, plaintiff does not ground his argument of "unreasonableness" in a similarly worded statute.

We also note that municipal utilities are not necessarily precluded from generating a reasonable profit. See *Chocolay Charter Twp. v. City of Marquette*, 138 Mich.App. 79, 84, 358 N.W.2d 636 (1984) ("A municipality is not required to furnish utility services at cost, but may charge a rate which will yield a profit."); McQuillin: The Law of Municipal Corporations, § 35:60 ("While in theory, water from a municipally owned plant should come to the consumer without profit to the municipality, this does not exclude the idea of profit in operation. A city is entitled to a reasonable profit and it may even use that profit for other valid municipal purposes.").

11 Although the expert only testified in the first person, the most reasonable inference is that neither

expert was aware of the particular depreciating nature of defendant's water system. Tellingly, there is nothing in the experts' 27-page written opinion to suggest otherwise.

12 "Although unpublished opinions of this Court are not binding precedent, MCR 7.215(C)(1), they may, however, be considered instructive or persuasive." *Adam v. Bell*, 311 Mich.App. 528, 533 n.1, 879 N.W.2d 879 (2015) (quotation marks and citation omitted).

In any event, the law is contrary to plaintiff's argument that charges by a municipal utility are unreasonable if the municipality does not have a specific plan for use of its reserve before a lawsuit is filed. "A city has no duty to justify or explain its actions in setting rates until the party contesting their validity shows their invalidity by competent evidence." McQuillin: The Law of Municipal Corporations, § 35:57. In other words, a party contesting the validity of municipal charges (i.e., rates) must *first* produce evidence that the charges are unreasonable, and *then* the municipality must justify its actions in setting those charges. As applied here, defendant does not have to justify its actions in setting the water charges at issue—its alleged lack of a preexisting specific plan for use of the reserve—unless plaintiff first shows that the charges are unreasonable. Plaintiff cannot simply demand a justification for the water charges and subsequently argue that the purported insufficiency of the justification establishes that the water charges are unreasonable.

Moreover, plaintiff's argument is illogical for the simple reason that "[m]unicipal utility rates may include a profit margin," and "[t]he profit may be transferred to the general fund and used for purposes other than supplying the utility service." *Id.* Thus, so long as the charges are reasonable, the municipality may use accumulating reserves from those charges (i.e., profit) for any municipal purpose whatsoever. See *id.* It therefore cannot be the case that defendant is obligated to have a specific plan providing that accumulated reserves from its water charges must be used for one particular municipal purpose, or future capital improvements, rather than for some other lawfully allowed purpose.

***9** Plaintiff's best argument for reversal is that defendant "double counted" both debt service and depreciation for six particular assets, such that water customers were charged for both the original construction of those assets (funded through bonds) and anticipated future construction (funded through depreciation as a proxy for anticipated costs). However, the trial court did not address this argument. In his lower court brief discussing this position, plaintiff summarily directed the trial court to the three particular exhibits:

> [FN 14]: *See* Exhibit 23 hereto (City's Objections and Responses to Plaintiff's Fourth Interrogatories and Fourth Requests for Production of Documents).
>
> [FN 15]: See Exhibit 24 hereto (excerpts from City's annual financial statements showing principal debt expense for the assets listed below). See also Budget documents (Exhibit 20 hereto).

With this glaring lack of analysis and citation to the record, the trial court cannot be reasonably faulted for its failure to consider plaintiff's "double counting" argument. Plaintiff submitted dozens of pages of detailed accounting statements and responses to interrogatories, but he did not inform the trial court how it should consider these documents or where the pertinent facts relating to plaintiff's argument could be found. While true that MCR 2.116(G)(5) provides that "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)," this subrule does not mean that a party may submit hundreds of pages of documents to the trial court and expect that court to parse through the documents to find the relevant facts establishing a genuine issue of material fact. Rather, this Court has explained that a trial court is "not obligated under MCR 2.116(G)(5) to scour the record to determine whether there exists a genuine issue of fact to preclude summary disposition." *Barnard Mfg. Co., Inc. v. Gates Performance Engineering, Inc*, 285 Mich.App. 362, 381, 775 N.W.2d 618 (2009) (quotation marks and citation omitted). "It is absurdly difficult for a judge to perform a search, unassisted by counsel, through the entire record, to look for such evidence." *Id.* at 379, 775 N.W.2d 618 (citation omitted).

Similarly, MCR 7.212(C)(7), which concerns briefs filed in this Court, provides, in relevant part, that "[f]acts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." Thus, the mere citation to a multipage exhibit is

insufficient. See *Derderian v. Genesys Health Care Sys.*, 263 Mich.App. 364, 388, 689 N.W.2d 145 (2004) ("In support of this claim, plaintiffs provide general citations from Dr. Derderian's deposition, testimony from the profusionist in one patient's case, and one patient's medical records. Such general citations are insufficient."). Accordingly, because plaintiff failed to cite supporting documentary evidence for his assertion that defendant engaged in improper "double counting," both in the trial court and in this Court, he is not entitled to relief on this basis.

IV. VIOLATION OF ORDINANCE

Finally, plaintiff argues that the water charges were unreasonable as a matter of law before November 2018 to the extent that defendant included a component for fire protection, contrary to former Rochester Hills Ordinance, § 102-124.

Initially, we note that plaintiff appears to be arguing only that the violation of former Rochester Hills Ordinance, § 102-124 resulted in the water charges being unreasonable. See *Trahey*, 311 Mich.App. at 595, 876 N.W.2d 582 ("Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable."). While plaintiff cites multiple cases for the basic proposition that a municipality is bound by its own ordinances, see, e.g., *Taber v. City of Benton Harbor*, 280 Mich. 522, 526, 274 N.W. 324 (1937), he does not challenge the basis for the trial court's dismissal of the counts of the complaint seeking relief for a violation of former Rochester Hills Ordinance, § 102-124 alone.[13] To the extent that plaintiff intended to challenge that dismissal, his argument is waived. See *Houghton ex rel Johnson v. Keller*, 256 Mich.App. 336, 339-340, 662 N.W.2d 854 (2003) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue."). Thus, we need only address the argument that the alleged violation of the November 2009 version of Ordinance § 102-124 resulted in the water charges being unreasonable.

13 The trial court ruled that Rochester Hills's ordinances are only enforceable by certain government officials and entities. Plaintiff does not argue otherwise on appeal.

***10** "This Court must presume the amount of the [municipal utility] fee to be reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence." *Jackson Co. v. City of Jackson*, 302 Mich.App. 90, 109, 836 N.W.2d 903 (2013) (cleaned up). Here, the fire protection component of the water charges was substantively a component for "excess capacity" of the water system, i.e., water capacity that was beyond that necessary to service the ordinary needs of the water customers. In *Novi*, our Supreme Court explained that "excess capacity is includable in the rate base where it is reasonably necessary to fulfill contractual obligations." *Novi*, 433 Mich. at 435, 446 N.W.2d 118. Moreover, the Court suggested that when "facilities that are arguably excess capacity are constantly in use," the excess capacity is properly includable for that additional reason as well. See *id.* ("In the instant case, because the DWSD system is integrated, the facilities that are arguably excess capacity are constantly in use.").

Assuming that plaintiff is correct that the language of former Rochester Hills Ordinance, § 102-124 resulted in the water charges including an illegal component for excess capacity and thereby rebutting the presumption of reasonableness, the trial court correctly held that plaintiff is not entitled to equitable relief. In *Youmans*, another case involving a claim for equitable relief for allegedly inflated water charges, this Court explained that "[w]hether the Township would receive an unjust 'benefit' from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were 'excessive,' not on whether some aspect of the Township's ratemaking methodology was improper." *Youmans*, —— Mich App at ——, —— N.W.2d ——, slip op. at 30. Thus, this Court rejected the plaintiff's argument that "in the face of illegal or improper expenses included in the disputed rates, she is not required to demonstrate that the rates actually *overcharged* for the related water and sewer services." *Id.* (emphasis in original).

The same is true here. It would not be inequitable to allow defendant to retain the money for excess capacity because that excess capacity, i.e., the "fire service fee," provided exclusive benefits to water customers. The fire service fee under former Rochester Hills Ordinance, § 102-124 was determined by "a base-extra capacity approach attributing to fire protection the difference between total system capacity and capacity required by other customer classes." Simply, this means that the fire service fee was the difference between the capacity *required* by water customers and the overall water system capacity. This excess-capacity difference supported the fire protection services, which admittedly benefitted the general

public, but also the water customers themselves. Defendant's public utilities engineering manager explained the benefits of the excess capacity in an affidavit as follows:

> 4. One benefit of the water system's capacity is that it ensures that the City will have sufficient water flow to fight fires. The system's capacity also provides numerous benefits to ratepayers who purchase and use City water, including meeting customers' minimum needs for average daily water flow.
>
> 5. The system's capacity also allows the City to provide service under emergency conditions, maintain service during an event that causes failure, and quickly recover from these events.
>
> 6. In addition, extra water system capacity allows system users to access sufficient water flow to irrigate their lawns. Many of the City's water ratepayers take advantage of this benefit and use sprinkler systems to irrigate their lawns in summer months.

Thus, the excess-capacity costs that plaintiff attributes entirely to the costs of fire protection services actually provide unique benefits to water customers alone. Similarly, for example, our Supreme Court in *Novi* explained that the "base-extra capacity method" in that case required separating "base costs," which were "[t]hose costs associated with furnishing water at average annual rates of use," with other costs, such as "[t]hose additional costs associated with meeting water demands on the day or days of maximum use" and "[t]hose additional costs associated with meeting demands during the peak hour of use." *Novi*, 433 Mich. at 421-422, 446 N.W.2d 118. In *Novi*, as in this case, charging water customers for excess capacity provided exclusive benefits to those customers.

***11** It is impossible to disentwine the "fire protection" aspect of excess capacity with the "potable water" aspect of excess capacity. As noted, excess capacity is necessary to provide potable water during times of heightened demand or emergencies.[14] Moreover, even when excess capacity is used to provide fire protection, i.e., the water supply is used to fight a fire, that excess capacity still benefits water customers because those customers are (typically) able to maintain ordinary water use. If the water system had no excess capacity, then fighting a fire would result in water customers not having access to the ordinary water supply. Essentially, "fire protection" is but one example of heightened demand or emergency. If water customers may properly be charged for excess capacity to protect against heightened demand during a hot summer day—as plaintiff does not seem to dispute—it follows that they may also be charged for excess capacity to protect against fighting a large fire.

[14] Compare *In re Reliability of Electric Utilities for 2017-2021*, 505 Mich. 97, 103 n 1, 949 N.W.2d 73 (2020) ("Regulators overseeing capacity calculate peak demand using the hottest days of the year and add a 'reserve margin'—that is, some *extra* capacity—to ensure that suppliers meet even unexpectedly high spikes of demand.") (emphasis in original).

At a minimum, even if plaintiff is correct that the "fire protection" aspect of excess capacity exclusively benefits the general public and does not provide any unique benefits to water customers themselves, which would perhaps raise *Bolt*-type concerns, it is apparent that "fire protection" is so intertwined with the concept of excess capacity itself that the two cannot be disentangled by this Court, at least where plaintiff has simplistically equated "fire protection" with excess capacity. Under these circumstances, equity does not entitle plaintiff and the class to relief.

V. CONCLUSION

The trial court correctly granted summary disposition in favor of defendant because plaintiff did not show that the water charges violated MCL 141.91 or were "unreasonable," or that he was entitled to equitable relief for the alleged violation of former Rochester Hills Ordinance, § 102-124. Therefore, we affirm.

Jansen, J. (concurring).
I concur in the result only.

All Citations

Not Reported in N.W. Rptr., 2021 WL 5750616

2019 WL 360725
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC., and Woodview Condominium Association, Individually and as Representatives of a Class of Similarly Situated Persons and Entities, Plaintiffs-Appellants,
v.
CITY OF WESTLAND, Defendant-Appellee.

No. 339143
|
January 29, 2019

Wayne Circuit Court, LC No. 15-006473-CZ

Before: Murray, C.J., and Servitto and Shapiro, JJ.

Opinion

Per Curiam.

***1** Plaintiffs brought suit alleging that defendant's water and sewer rates violated several provisions of law including MCL 123.141(1) and Const. 1963, art. 9, §§ 25-34, popularly known as the Headlee Amendment. Plaintiffs appeal the trial court's order granting defendant summary disposition. For the reasons set forth below, we affirm. [1]

[1] Because the trial court considered materials outside the pleadings, we will review the trial court's grant of summary disposition to defendant under MCR 2.116(C)(10). A trial court's decision whether to grant summary disposition is reviewed de novo. *Pace v. Edel-Harrelson*, 499 Mich. 1, 5; 878 N.W.2d 784 (2016).

> In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Bank of America, NA v. Fidelity Nat'l Title Ins. Co.*, 316 Mich. App. 480, 488; 892 N.W.2d 467 (2016) (quotation marks and citations omitted).]

II. BACKGROUND

Defendant City of Westland (the City) operates and maintains a water and sewer system. By law, the rates charged to users of the system must be based on the water and sewer department's (the department) actual costs of providing those services to its inhabitants. Among the department's expenses is the amount it transfers to the City's general fund to cover its proportional share of the City's administrative costs. [2] Plaintiffs agree that the City may make such transfers to the general fund in order to compensate the City's other departments for the goods and services they render to the water and sewer department. However, plaintiffs maintain that the City has "grossly inflated" the costs of those goods and services by allocating a disproportionate amount of the City's administrative costs to the department. Plaintiffs allege that doing so violates the Headlee Amendment as well as MCL 123.141(3), common law ratemaking rules, and the City's Charter. Accordingly, plaintiffs seek a refund of what they deem to be overcharges paid in the previous six years, in addition to declaratory and injunctive relief.

[2] For instance, the City transfers water and sewer funds to the City's general fund to pay for a percentage of the operation of the City's IT Department, which provides services to the department.

Plaintiffs' claim rests largely on the testimony of their expert witness, James R. Olson, an analyst for MGT of America Consulting Group. MGT specializes in "indirect cost allocation" and primarily works with municipalities to identify "overhead" costs that can be allocated to specific departments. Olson reviewed the City's cost allocation sheet, the deposition testimony of City officials, and the City's balance sheet and budget. He took issue with the City's allocation methodology, asserting that it is not based on

"actual cost data." For example, he pointed out that the City allocates 30% of its annual attorney fees to the department, but could not provide documentary support for that allocation. Similarly, Olson opined that the City improperly allocates 50% of the rent for the City's DPS garage to the water and sewer department and that the allocation should instead be based on the building's depreciation expense.

***2** The City responds that Olson's testimony, while criticizing some individual allocations, failed to address, let alone establish, that the final rate charged was inconsistent with the department's *total* expenses. The City points out that Olson conceded that he did not perform a "full cost allocation study," meaning that, while Olson looked at certain individual categories of the City's cost allocation, he did not perform a complete analysis of the goods, services, and facilities provided by the City's general departments to the water and sewer department. Thus, Olson did not have an opinion as to whether the total amount of administrative costs allocated to the water and sewer department was reasonable. Nor did Olson perform a "rate study," which would have required him to identify all the department's expenses and identify the revenue necessary to operate the utility in a sound financial manner. Thus, Olson did not express an opinion on whether the actual rates were unreasonable in relation to the necessary revenue. In addition, he conceded that a 10 to 15% variation between budgeted costs and actual costs is reasonable.

Plaintiffs also claim that the City's calculation of water and sewer rates is improper because it includes an expense of $500,000 per year for future capital improvements and repairs. Plaintiffs do not dispute that the department's budgeting must include amounts to finance *current* capital improvements, but they assert that it is improper for the City to include sums for future, as yet unspecified capital improvements in its revenue requirements.

In the trial court, the parties filed competing motions for summary disposition. The City filed a response to plaintiffs' motion for summary disposition in which the City first disclosed Mark Beauchamp, president of Utility Financial Solutions, as an expert witness. In an affidavit, Beauchamp echoed Olson's conclusion that a full cost allocation study was necessary to verify the reasonableness of the administrative costs the City allocated to water and sewer department. He further averred that he reviewed and approved a revised cost allocation study performed by Deborah Peck, the City's budget director, which concluded that the department's actual administrative costs were always within 10% of the budgeted administrative costs. Plaintiffs then filed a motion in limine to exclude Beauchamp's and Peck's proposed testimony arguing that the City failed to timely disclose Beauchamp as an expert witness and that Peck's testimony was inadmissible because her revised allocation study was not in the record.

In June 2017, the trial court issued an opinion and order granting the City's motion for summary disposition, denying plaintiffs' motions for summary disposition, and denying plaintiffs' motion in limine. The trial court determined that plaintiffs failed to overcome the presumption that the City's rates were reasonable. The trial court also rejected plaintiffs' argument that the City's rates constituted a tax that was imposed in violation of the Headlee Amendment and MCL 141.91. Further, the trial court ruled that plaintiffs' Headlee Amendment claim was barred by the one-year statute of limitations set forth in MCL 600.308a(3). In denying plaintiffs' motion for in limine, the court stated that plaintiffs could move for an order compelling production of Peck's analysis, which would be a more appropriate remedy than striking the evidence. The court also determined that Beauchamp's analysis was reliable and that his explanation of methods used by the City would assist the trier of fact. The court concluded that both Peck and Beauchamp could serve as rebuttal witnesses to Olson.

III. ANALYSIS

A. REASONABLENESS OF RATES

MCL 123.141, *et seq.*, governs the sale of water outside territorial limits. Because the City purchases its water from the Great Lakes Water Authority,[3] it is a "contractual customer" under MCL 123.141(2). Accordingly, the City's water ratemaking[4] must comply with MCL 123.141(3), which provides that "[t]he retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service." However,

> ***3** MCL 123.141 does not alter the general standard of reasonableness applied by courts when reviewing utility rates. Because of the difficulties inherent in ratemaking and the limitations on judicial review, the phrase "actual cost of providing the service" as used in the statute does not mean exactly equal to the actual costs of providing the service. Accordingly, while a utility fee must be reasonably

proportionate to the direct and indirect costs of providing the service for which the fee is charged, mathematic precision is not required. [*Trahey v. Inkster*, 311 Mich. App. 582, 597; 876 N.W.2d 582 (2015) (citations omitted).]

3 MCL 123.141(1) provides that "[a] municipal corporation, referred to in this act as a corporation, authorized by law to sell water outside of its territorial limits, may contract for the sale of water with a city, village, township, or authority authorized to provide a water supply for its inhabitants." The City has historically purchased its water from the city of Detroit; the GLWA was formed during the city of Detroit's bankruptcy proceedings.

4 MCL 123.141 only applies to sale of water and therefore it does not govern the City's sewer ratemaking. However, the City's Charter requires reasonable sewer rates. Specifically, "[t]he City may fix and collect charges for such disposal services, tap-in fees and connection fees, the proceeds of which shall be exclusively used for the purpose of the sewage disposal system." Westland Charter, § 16.10. Further, "The Council shall have the power to fix from time to time such just and reasonable rates and other charges as may be deemed advisable for supplying the inhabitants of the City and others with such public utility services as the City may provide." Westland Charter, § 17.3.

"Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable." *Id.* at 594. In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." *Novi v. Detroit*, 433 Mich. 414, 427; 446 N.W.2d 118 (1989). "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *Id.* at 430. "The determination of 'reasonableness' is generally considered by courts to be a question of fact." *Id.* at 431. "[T]he presumption of reasonableness may be overcome by a proper showing of evidence." *Trahey*, 311 Mich. App. at 594. It is a plaintiff's burden "to show that any given rate or ratemaking practice is unreasonable." *Id.* "Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Id.* at 595.

As noted, plaintiffs argue that the City allocated too great a portion of certain administrative costs to the water and sewer department. Viewing the evidence in a light most favorable to plaintiffs, we agree that there is a question of fact regarding those particular allocations. Indeed, the City effectively conceded that there were errors in its cost allocation when it presented proposed testimony regarding a revised cost allocation study.

We disagree with plaintiffs' contention, however, that questions regarding particular administrative costs, by themselves, precludes summary disposition. It is plaintiffs' burden to establish the unreasonableness of the City's rates, and they have failed to present evidence that the City's overall allocation of administrative costs to the water and sewer department is unreasonable. Specifically, Olson testified that he did not prepare a full cost allocation plan in analyzing the administrative expenses allocated to the water and sewer department. He also admitted that other municipal departments could have provided more services to the water and sewer department than reflected in the budget and that a full cost allocation plan could indicate that the cost allocation should be higher than the amount that the City allocated in its budget. Olson further acknowledged that rates are set prospectively, that such prospective budgeting cannot be conducted with mathematical certainty, and that it would be reasonable if the budgeted amount of a cost allocation was off by about 15%. [5]

5 This testimony is consistent with established legal principles, including that "ratemaking is a prospective operation," *Trahey*, 311 Mich. App. at 597, and that "mathematic precision is not required" when a court assesses whether a utility fee is "reasonably proportionate to the direct and indirect costs of providing the services for which the fee is charged," *id.*

***4** Most significantly, plaintiffs failed to analyze the reasonableness of the City's overall rates by conducting a rate study. Olson agreed that if the rates cover the actual revenue requirements of the water and sewer department, then the rates are valid and customers will have suffered no damages. Yet Olson was not asked to review the overall expenditures of the water and sewer department, and he held no opinion overall concerning whether the total expenditures of the water and sewer department were reasonable. Thus, plaintiffs made no attempt to analyze the City's rates in lights of the department's revenue requirements. Nor have

plaintiffs explained how incorrect or improper administrative cost allocations in and of themselves renders the City's water and sewer rates unreasonable.

In sum, plaintiffs argue that their claims may proceed solely on the basis of certain selected individual expense components that they have chosen to address without a broader evaluation of whether such allegedly improperly estimated expenses in the City's original budget (1) resulted in an unreasonable variance from the actual overall costs and (2) affected the reasonableness of the rates. Given the lack of a more universal analysis, plaintiffs have failed to provide an evidentiary basis from which to conclude that the amount of the department's administrative costs renders the City's water and sewer rates unreasonable.

Plaintiffs also fail to cite any authority to support what would be a form of active court oversight that would amount to an exacting level of judicial auditing of only those individual expenses of a municipal utility that a plaintiff chooses to challenge without respect to whether the overall cost allocation is reasonably accurate and without respect to whether the actual water and sewer rates are reasonable. Plaintiffs' argument is at odds with the limited role of the judiciary in reviewing municipal utility rates. See *Novi*, 433 Mich. at 425-426, 428, 430. Nor have plaintiffs cited any authority for their implicit contention that they are entitled to the correction of every expense allocated to the water and sewer department that was allegedly overestimated.

Plaintiffs also argue that the City's rates are unreasonable because the City uses a portion of its revenue to create a reserve fund for future unspecified infrastructure improvements to its water and sewer systems. Plaintiffs fail to provide any legal authority to establish that this is an improper ratemaking procedure. To the contrary, rate-based public utilities commonly maintain a capital reserve to provide fiscal stability. *Jackson Co. v. City of Jackson*, 302 Mich. App. 90, 111; 836 N.W.2d 903 (2013). According to the affidavit of Steven Smith, the City's finance director, the City's water and sewer systems are comprised of nearly 674 miles of infrastructure and have a replacement cost of approximately $674 million (i.e., it costs approximately $1 million to rebuild each mile of infrastructure). The City has existed for 50 years, its infrastructure has an expected life of 50 to 70 years, and it experiences an average of 160 water main breaks a year. Given this unrebutted evidence, plaintiffs do not overcome the presumption that a $500,000 annual addition to the City's cash reserves to fund future improvements to the water and sewer system is a reasonable ratemaking practice.

In affirming the trial court, we are not relying on the proposed testimony of Beauchamp or Peck regarding the City's revised allocation study. Even if the trial court properly considered those affidavits, the evidence must be viewed in a light most favorable to plaintiff, and there is clearly a question of fact regarding certain aspects of the City's administrative cost allocation. But Olson's own testimony establishes the necessity of an overarching analysis of the water and sewer department's revenue requirements. In the absence of a complete study of the rate structure and all of its components, it is speculative to suggest that some improper expenses have caused the rates to become excessive or unreasonable. Accordingly, plaintiffs have failed to demonstrate a genuine issue of material fact regarding whether the City's rates were unreasonable. And because we do not rely on Beauchamp's or Peck's proposed testimony, we need not address whether the trial court erred in denying plaintiffs' motion in limine. See *B P 7 v. Bureau of State Lottery*, 231 Mich. App. 356, 359; 586 N.W.2d 117 (1998) ("As a general rule, an appellate court will not decide moot issues.").

B. THE HEADLEE AMENDMENT

***5** The pertinent provision of the Headlee Amendment, Const. 1963, art. 9, § 31, states:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

The levying of a new tax without voter approval violates this section of the Headlee Amendment. *Jackson Co.*, 302 Mich. App. at 99. However, a charge that constitutes a user fee is not subject to the Headlee Amendment. *Id.* The plaintiff bears the burden of establishing the unconstitutionality of the charge at issue. *Id.* at 98. A court decides, as a question of law, whether a

charge is a permissible fee or an illegal tax. *Westlake Transp., Inc. v. Public Serv. Comm.*, 255 Mich. App. 589, 611; 662 N.W.2d 784 (2003).

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt v. Lansing*, 459 Mich. 152, 160; 587 N.W.2d 264 (1998). In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id.* at 161 (quotation marks and citations omitted). In *Bolt*, our Supreme Court identified three key criteria to use in distinguishing between a user fee and a tax: (1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service. *Id.* at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v. Shelby Charter Twp.*, 265 Mich. App. 657, 665; 697 N.W.2d 180 (2005) (brackets, quotation marks, and citations omitted).

Water and sewer rates are generally considered user fees rather than taxes because they represent a fee paid in exchange for a service. See *Bolt*, 459 Mich. at 162.

> The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. [*Bolt*, 459 Mich. at 162, quoting *Ripperger v. Grand Rapids*, 338 Mich. 682, 686; 62 N.W.2d 585 (1954).]

Water and sewer rates are not always considered user fees, however, because they must be proportionate to the cost of the service. See *Bolt*, 338 Mich. at 162 n. 12. That said, plaintiffs have presented no evidence that the rates themselves are unreasonable given the deficiencies in their proofs discussed above, particularly Olson's concession that he had not performed a rate study and that he held no opinion concerning the reasonableness of the rates. Considering that plaintiffs fail to overcome the presumption that the City's rates are reasonable, we find no basis from which to conclude that the rates are not proportionate to the cost of service. Instead, the rates constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. See Westland Ordinances, § 102-61. [6] The trial court aptly noted: "Those who use water and sewer services derive a benefit from paying the rates imposed. Moreover, the rates correlate directly with the amount and frequency of use by each particular user."

6 Westland Ordinances, § 102-61 provides, in relevant part:

> The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses.

***6** Consideration of the other *Bolt* criteria does not alter the conclusion that the City's water and sewer rates constitute a user fee rather than a tax. The first *Bolt* factor indicates that the rates comprise a valid user fee because the rates serve a regulatory purpose of providing water and sewer services to the City's residents. Although the rates generate funds to pay for the operation and maintenance of the water and sewer system, this by itself does not establish that the rates serve a primary revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham v. Kochville Twp.*, 236 Mich. App. 141, 151; 599 N.W.2d 793 (1999).

Plaintiffs, relying on *Bolt*, 459 Mich. 152, contend that it is impermissible for the City to incorporate costs in its water and sewer rates which will be used to fund future capital improvements. In *Bolt*, the City of Lansing imposed a "storm water service charge" on property owners to fund the separation of the remaining portion of its combined sanitary and storm systems. *Id.* at 155. The Supreme Court determined that the storm water service charge failed to satisfy the first and second criteria because the charge did not correspond to the benefits conferred. *Id.* at 165. 75% of the property owners in Lansing were already served by a separate storm and sanitary sewer system, but those property owners would be charged the same amount as the 25% who would most benefit from the construction. *Id.* Further, the cost of this

project was $176 million over 30 years. *Id.* at 155. The Court noted that the charge was "an investment in infrastructure that will substantially outlast the current 'mortgage' that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter." *Id.* at 164 (citation omitted).

Bolt is primarily distinguishable because it involved a rate increase to fund a completely new alteration to the existing sewer system that benefitted only 25% of the property owners. Here, the City's reserve fund will be used for future capital projects that will benefits all users of the water and sewer services. Those users contribute to wear and tear of the water and sewer system and, by including the cost of future capital projects into its rates, the City ensures that the users will pay a fee proportionate to the necessary costs of service. And in order for the sewer system to serve its regulatory purpose, it must be maintained and periodically replaced and updated. For those reasons, we conclude that the first two *Bolt* criteria establish that the City's water and sewer rates constitute a user fee rather than a tax.

As for the third *Bolt* factor, plaintiffs contend that the City's water and sewer services are not voluntary under statute and the City's ordinances. Even assuming that the water or sewer charges were deemed effectively compulsory in this case, "the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler*, 265 Mich. App. at 666. We are unconvinced, in the absence of showing that the water and sewer rates are unreasonable, that those rates should be considered a tax as opposed to a user fee. Considering the *Bolt* criteria in totality, we conclude that plaintiffs have not established that the City has imposed an unconstitutional tax.

Accordingly, plaintiffs have not demonstrated a genuine issue of material fact in support of their claims alleging violations of the Headlee Amendment and MCL 141.91.[7] Therefore, the trial court properly granted summary disposition to the City pursuant to MCR 2.116(C)(10). Given our ruling, we decline to address whether plaintiffs' claims are barred by the applicable statute of limitations.

[7] MCL 141.91 provides:

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

***7** Affirmed.

All Citations

Not Reported in N.W. Rptr., 2019 WL 360725

End of Document

2021 WL 219225
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Wesley GANSON, Plaintiff-Appellant,
v.
DETROIT PUBLIC SCHOOLS, Defendant-Appellee.

No. 351276
|
January 21, 2021

Wayne Circuit Court, LC No. 18-001363-CK

Before: K. F. Kelly, P.J., and Stephens and Cameron, JJ.

Opinion

Per Curiam.

***1** Plaintiff, Wesley Ganson, appeals as of right the trial court order granting defendant's, Detroit Public Schools, motion to dismiss under MCR 2.116(C)(8). We affirm.

I. BACKGROUND

Plaintiff began working for defendant in 1985. In June 2009, defendant decided not to renew plaintiff's contract. In December 2010, the Office of Retirement Services (ORS) informed plaintiff by letter that he did not meet the eligibility requirements for an incentivized retirement because plaintiff had not worked between November 1, 2009 and May 1, 2010. In February 2011, plaintiff unsuccessfully appealed the decision of the ORS in the State of Michigan Administrative Hearing System. An administrative law judge (ALJ) found that plaintiff did not qualify for incentivized retirement benefits because plaintiff failed to prove by a preponderance of the evidence that he was employed by the defendant during the six-month period ending on May 1, 2010. The ALJ's findings of fact and conclusions of law were adopted by the Public School Employees' Retirement Board in September 2012.

In August 2016, plaintiff filed a two-count complaint for breach of fiduciary duty against defendant related to the nonpayment and retention of his retirement benefits in the United States District Court for the Eastern District of Michigan. A federal district court magistrate recommended dismissal of the case in defendant's favor. When neither plaintiff nor defendant challenged the magistrate's recommendation, it was adopted by a federal district court judge.

In February 2018, plaintiff filed the instant case against defendant for breach of contract in the Wayne County Circuit Court. Plaintiff alleged that after his contract was not renewed in 2009, he was appointed by defendant's school board to the position of Executive Director of Student Affairs at Wayne State University. He alleged that this employment sufficed to qualify him as an employee performing out of system public education services pursuant to MCL 38.1306. Plaintiff alleged that upon retirement, he "was supposed to receive an early buyout package for the remainder of the Plaintiff's life and a multiplier for a period of six (6) years following the termination of his employment[.] ... Along with the early buyout incentive, the Plaintiff was supposed to receive a multiplier that would provide the Plaintiff $100 per month for a period of six years.... [Plaintiff alleged that he] was informed that he would be provided with his early buyout retirement benefits if he worked for Detroit Public Schools for one day between the period of time between November 1, 2009 and May 1, 2010." Plaintiff pled that he had fulfilled that requirement when he "worked for Spain Elementary for three (3) days". According to the complaint, "[t]he Plaintiff was not provided with the aforementioned multiplier and thus has not received $7,200 that he was supposed to receive." Further, "[b]etween the time that the Plaintiff attempted to collect on his early retirement benefits and the time that he was entitled to receive them, he has been damaged in the amount of approximately $300,000." Relevant to this appeal, attached to the complaint was a one-page-document titled "CONTRACT FOR EXECUTIVE DIRECTOR OF THE CENTER FOR STUDENT ADVOCACY SERVICES" and that listed "PARTIES, PURPOSES, DUTIES, REPORTS, TERMS OF EMPLOYMENT, COMPENSATION AND REPRESENTATIONS" as subpoints 1.1 through 1.10. There was no signature page.

***2** Defendant filed a motion to dismiss under MCR 2.116(C)(8) that argued plaintiff failed to state a claim upon which relief could be granted because plaintiff failed to attach the complete contract to the complaint as required by MCR

2.113(F)(1), and that the claim was barred by the statute of limitations and res judicata. The court granted the motion to dismiss for plaintiff's failure to attach the whole contract as required under MCR 2.113(F) and under res judicata. On appeal, plaintiff challenges the application of the statute of limitations to his claim and whether the trial court erred in dismissing his complaint under MCR 2.113(F).

II. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v. Rozwood*, 461 Mich. 109, 118, 597 N.W.2d 817 (1999).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. [*El-Khalil v. Oakwood Healthcare, Inc.*, 504 Mich. 152, 159-160, 934 N.W.2d 665 (2019).]

"[W]hether a claim for unjust enrichment can be maintained is a question of law, which we [also] review de novo." *Morris Pumps v. Centerline Piping, Inc.*, 273 Mich. App. 187, 193, 729 N.W.2d 898 (2006). We also review de novo as a question of law whether an action is barred by the statute of limitations. *Parks v. Niemiec*, 325 Mich. App. 717, 719, 926 N.W.2d 297 (2018).

III. ANALYSIS

Plaintiff first argues that defendant: 1) misled the court into believing that the accrual date for plaintiff's breach of contract claim was when the contract was signed, and 2) that the trial court erred in agreeing with defendant. The record does not support either assertion. To the contrary, in its brief in support of its motion to dismiss, defendant argued that the period of limitations for breach of contract claims "accrue at the time of the wrong upon which the claim is based was done regardless of the time when damage results" and that the statute of limitations began to run in this case in 2010 when plaintiff received a decision from the ORS. Defendant maintains that same theory on appeal.

The record also does not support plaintiff's assertion that the trial court agreed with defendant's statute of limitations argument. Rather, at the hearing for the motion to dismiss, the court declined to address the statute of limitations despite it having been pled and argued, as evidenced by the following colloquy:

> *Defendant*: The second basis, Your Honor, is even assuming that the entire contract had been filed, one, the defendant Detroit Public Schools is not a party to it.
>
> And even if it was filed again in it's entirety. The statute of limitations would bar the complaint.
>
> *The court*: So do we even need to address it when we know it wasn't filed completely?
>
> *Defendant*: I was just giving all of the arguments.
>
> *The Court*: I appreciate that. Yeah. And then you also have the issue of res judicata.

The record does not reflect a holding from the court regarding the statute of limitations issue. Neither was this issue a basis for the court's decision to dismiss.

Plaintiff next argues that his breach of contract claim is not barred by the statute of limitations and continues to accrue because the defendant's failure to pay plaintiff any retirement benefits constitutes a continuing breach where each failure to pay is a new breach. This argument was not raised before the trial court and is considered waived on appeal. See *Walters v. Nadell*, 481 Mich. 377, 751 N.W.2d 431 (2008) (citation omitted) ("Michigan generally follows the 'raise or waive' rule of appellate review."). While this Court "may overlook preservation requirements when the failure to consider an issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented," *Gen. Motors Corp. v. Dep't of Treasury*, 290 Mich. App. 355, 387, 803 N.W.2d 698 (2010), we decline review of this issue because its

consideration is not necessary for a proper determination of the case. The court granted defendant summary disposition on the bases of the contract not being attached to the complaint in full and res judicata — not the statute of limitations. Consideration of this issue, even if determined to be in plaintiff's favor, would not disturb the trial court's ruling or change the end result.

***3** Plaintiff also argues that defendant's retention of all of plaintiff's retirement benefits constitutes unjust enrichment. We disagree. "Our Supreme Court has long recognized the equitable right of restitution when a person has been unjustly enriched at the expense of another." *Morris Pumps*, 273 Mich. App. at 193, 729 N.W.2d 898 (quotation marks and citation omitted). "When unjust enrichment exists, the law operates to imply a contract in order to prevent it." *Keywell & Rosenfeld v. Bithell*, 254 Mich. App. 300, 327–28, 657 N.W.2d 759 (2002) (quotation marks and citation omitted). "However, a contract will be implied only if there is no express contract covering the same subject matter." *Barber v. SMH (US), Inc.*, 202 Mich. App. 366, 375, 509 N.W.2d 791 (1993). Like a claim of breach of contract, the statute of limitations period for a claim of unjust enrichment is six years. MCL 600.5813 ("All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."); MCL 600.5815 ("The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought...."). To prove a claim of unjust enrichment, the plaintiff must show "(1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to plaintiff from defendant's retention of the benefit." *Bellevue Ventures, Inc. v. Morang–Kelly Investment, Inc.*, 302 Mich. App. 59, 64, 836 N.W.2d 898 (2013).

Plaintiff's claim of unjust enrichment fails for multiple reasons. The claim would first be barred by the statute of limitations. Absent a date from plaintiff as to when the breach occurred, the ALJ's findings established that plaintiff knew as early as 2010 and as late as 2011 that he was being denied incentivized retirement benefits, however, he did not file the complaint in the instant matter until over six years later in 2018. MCL 600.5813; MCL 600.5815. Second, plaintiff's reliance on the continuing wrongs doctrine to extend the statute of limitations for his unjust enrichment claim is of no avail where the doctrine is no longer recognized in Michigan. *Marilyn Froling Revocable Living T. v. Bloomfield Hills Country Club*, 283 Mich. App. 264, 288, 769 N.W.2d 234 (2009). Third, plaintiff cannot prove the second element of an unjust enrichment claim — that defendant retained a benefit — when defendant was not the holder of plaintiff's retirement funds. While it is true that defendant received the benefit of plaintiff's labor and length of employment, defendant is not the entity responsible to pay plaintiff's retirement benefits. According to the ALJ's proposal for decision, the ORS, acting on behalf of the Public School Employees' Retirement System denied plaintiff an incentivized retirement. Thus, plaintiff's retirement benefits were retained by the Public School Employees' Retirement System, which is in turn, maintained by the state of Michigan, not the defendant. See *AFT Michigan v. State of Michigan*, 497 Mich. 197, 202, 866 N.W.2d 782 (2015) ("the Public School Employees Retirement Act (Retirement Act), MCL 38.1301 *et seq.*, ... governs the Michigan Public School Employees' Retirement System (MPSERS).").

Plaintiff additionally argues that the trial court erred in dismissing his complaint 1) under MCR 2.113(F) because the contract was attached to the complaint, and 2) because defendant failed to assert the defense of lack of an existence of an agreement in its first responsive pleading. Importantly, plaintiff does not challenge the trial court's additional basis for dismissal based on res judicata.

To prevail on his claim for breach of contract, plaintiff must establish by a preponderance of the evidence that "(1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach." *Bank of Am., NA v. First Am. Title Ins. Co.*, 499 Mich. 74, 100, 878 N.W.2d 816 (2016). "If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading ...." MCR 2.113(C)(1). "[T]he written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apartments v. Roumayah*, 274 Mich. App. 631, 635, 734 N.W.2d 217 (2007). [1]

1 MCR 2.113(F) has been redesignated MCR 2.113(C), and has been modified without substantive changes to accommodate "a statewide uniform e-Filing process," effective September 1, 2018, 501 Mich. ——, and again modified without substantive changes, effective August 14, 2019 and January 1, 2020. See 503 Mich. ——, ——.

***4** In his complaint, plaintiff referred to the contract as Exhibit E. According to the lower court record received by this Court and the certified copy of the lower court record

submitted by defendant, exhibit E consisted of a letter from the Detroit Public Schools' superintendent recommending plaintiff for the position of director of student advocacy, a resolution from the Detroit Public Schools Board of Education to implement the student advocacy pilot program, and a document titled "Contract for Executive Director of the Center for Student Advocacy." This last document was one page, listed one section titled "Parties, Purposes, Duties, Reports, Terms of Employment, Compensation and Representations", and had subsections 1.1 through 1.10. It did not contain any other sections or pages. Upon receipt of the complaint, defendant's counsel twice alerted plaintiff by e-mail that the document was only one page. At the hearing on the motion to dismiss, plaintiff's counsel could not attest before the court as to whether he attached the contract in its entirety to the complaint. The court, in receipt of extensive communications between counsel in which the defendant repeatedly asked for the entire contract and plaintiff counsel's equivocation, found that the entire contract was not attached to the complaint.

Even if the trial court erred and the plaintiff either included the entire contract or supplemented his complaint with the additional page alleged to have been omitted, his breach of contract complaint would not have survived legal scrutiny and defeat. The second page contained subsections 1.11 through 1.17 and was signed by a school board representative, interim superintendent, plaintiff, two witnesses, and a notary. While the additional page stated that "The relationship of the Executive Director to the School District is that of an employee", it said nothing about the incentivized benefits plaintiff claims he was promised which would form the basis of the alleged breach. Plaintiff has failed to provide proof of the promises upon which his contractual claim was based: entitlement to an early buyout and a multiplier for six(6) years post retirement. if he worked for Detroit Public Schools for one day between the period of time between November 1, 2009 and May 1, 2010. While plaintiff claims this information was conveyed to him, he offers no basis upon which to legally augment, supplement, or modify a written contract. Thus, even if the trial court erred in finding that the entire contract was not filed with the complaint and erred in affording him the opportunity to amend, the court reached the correct conclusion that the contract claim was fatally flawed.

Plaintiff next argues that defendant waived its right to assert the lack of an existence of an agreement because it did not plead the affirmative defense in its first responsive pleading. We disagree.

"A party generally must raise the affirmative defense of release in his first responsive pleading or be deemed to have waived the defense." *Meridian Mut. Ins. Co. v. Mason-Dixon Lines, Inc.*, 242 Mich. App. 645, 647, 620 N.W.2d 310 (2000); See MCL 2.113(F)(3) ("Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended ..."). "[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v. State Farm Mut. Auto. Ins. Co.*, 200 Mich. App. 307, 317, 503 N.W.2d 758 (1993). According to the lower court record, defendant attached to its answer to plaintiff's complaint affirmative defenses that included: "Plaintiff has failed to plead the existence of a valid contract." and "Plaintiff has failed to attach a contract as required by Michigan law."

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2021 WL 219225

End of Document

2023 WL 174810
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Joan GREENFIELD, Plaintiff-Appellant,
v.
CITY OF FARMINGTON HILLS, Defendant-Appellee.

No. 357579
|
January 12, 2023

Oakland Circuit Court, LC No. 2018-169707-CZ

Before: M. J. Kelly, P.J., and Boonstra and Swartzle, JJ.

Opinion

Per Curiam.

***1** Plaintiff appeals by right the trial court's order granting defendant's motion for summary disposition. Plaintiff also challenges the trial court's order denying plaintiff's motion for class certification. We affirm the former and do not reach the latter.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In November 2018, plaintiff filed a class action complaint against defendant, challenging the reasonableness of the rates defendant charged for water and sewer services. Defendant charges property owners in the city of Farmington Hills for water and sewer services based on their metered use of water. Plaintiff alleged that, from 2012 to 2018, defendant's water/sewer rates were set far in excess of the amount needed to pay for the actual cost of those services. Plaintiff noted that defendant's water and sewer rates included a component charge labeled "Reserves," and that defendant had accumulated a cash reserve from such billings of approximately $79 million as of July 1, 2018. Plaintiff alleged that the reserve rate charges had resulted in defendant accumulating funds far in excess of the amount necessary to be held in reserve for repair and maintenance of the water and sewer system. Plaintiff's complaint challenged the reserve rate charges in six counts: three counts alleging unjust enrichment and three counts alleging assumpsit. Of those six counts, one count of unjust enrichment and one count of assumpsit asserted that defendant's rates were arbitrary, capricious, and unreasonable under the common law; two corresponding counts asserted that defendant had violated MCL 141.91; and two other corresponding counts asserted that defendant had violated its own ordinances.

Plaintiff filed a motion for class certification on March 6, 2019, asking the trial court to certify a plaintiff class comprised of every property owner who had paid or incurred defendant's water and sewer rates beginning in 2012. Plaintiff argued that the class was sufficiently numerous, that common questions of fact or law predominated, that plaintiff's claims were representative of the claims of the class members, and that plaintiff would fairly and adequately assert and protect the interests of the class. Plaintiff also argued that maintenance of the action as a class action would be superior to other methods of adjudication because of the large number of class members, the fact that the class sought equitable relief, and the fact that while the aggregated claims would justify litigation of a class action, the damages suffered by individual class members would not warrant the cost of separate litigation.

Defendant responded, arguing that plaintiff could not satisfy the requirements of MCR 3.501(A)(1) for a class action. Defendant argued that its cash reserves were required to keep the system in good repair and working order, as well as anticipated capital replacements during the next five years; defendant also asserted that the reserve funds were restricted funds that could only be used to pay for water or sewer services. Therefore, defendant argued, plaintiff could not demonstrate that any members of the putative class had suffered any damages. Moreover, defendant argued that plaintiff's claims were not typical of the class, that plaintiff could not adequately protect the interests of the class, and that her claims were contrary to the best of interests of the other ratepayers.

***2** After a hearing on plaintiff's class certification motion, the trial court took the matter under advisement. The trial court then issued an order denying plaintiff's motion for class certification in December 2019, stating in relevant part:

> Class certification must be denied because plaintiff has failed to satisfy

> the five factors required pursuant to MCR 3.501(A)(1). Plaintiff has not shown that the proposed class members have suffered any actual injury. In addition, the court finds that under the facts presented, it is not probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administrating the action to justify a class action.

Plaintiff moved for reconsideration, which the trial court denied. Plaintiff applied for leave to appeal in this Court, which this Court denied. [1]

[1] See *Greenfield v City of Farmington Hills*, unpublished order of the Court of Appeals, entered July 1, 2020 (Docket No. 353010).

Plaintiff's case continued as an individual action, and the parties conducted extensive discovery. [2] In March 2021, defendant moved for summary disposition under MCR 2.116(C)(8) and (10). Defendant argued that its rates were set as part of its Capital Improvements Plan (CIP) and that "substantial parts of the water and sanitary sewer system have reached or are nearing the end of their useful life" and would soon require extensive replacement and repairs. Defendant argued that, according to the city and county officials and professional engineers, its capital reserves were not only necessary, but were in fact insufficient to meet the next five years of capital investment required to maintain the water and sewer system. Further, defendant argued that its water and sewer rates were a fee and not a disguised tax. Defendant supported its motion with several affidavits. These included an affidavit from Carrie Ricker Cox, the Chief Engineer for the Oakland County Water Resources Commissioner's Office (OCWRC). In her affidavit, Cox averred that, as of April 2019, the replacement cost of defendant's water and sewer system's "horizontal" assets (e.g., water mains and sanitary gravity mains) exceeded $1.225 billion, and the replacement cost of "vertical" assets (e.g., storage tanks) exceeded $61 million. Cox also averred that

> [a]s of April 22, 2019, the estimated capital expenditure for horizontal assets, alone, required to maintain the desired level of service for the City's water and sewer systems over the five year time period of 2019-2023 is more than $38 Million, over the ten year time period of 2019-2028 is more than $65 Million, and over the twenty year time period of 2018-2037 is more than $134 Million.

[2] In early 2021, counsel for nonparties Oakland County Water Resources Commissioner and County of Oakland filed an appearance in the case and sought a protective order related to some of plaintiff's nonparty discovery requests, which the trial court granted. Plaintiff does not challenge the trial court's discovery rulings regarding these nonparties, and they are not parties to this appeal.

Defendant's motion was also accompanied by an affidavit from Karen Mondora, the Director of defendant's Public Services Department. Mondora's affidavit provided an explanation of how defendant's water and sewer system operated and how its assets were managed, including federal grant funds. Mondora averred in her affidavit that the defendant had recognized that substantial repair and replacement of the water and sewer system would be needed in the next five-to-ten years and had adjusted its rates accordingly; she further noted that the reserve funds were earmarked and restricted for this purpose only. Mondora opined that, based on her experience "the practice of gathering reserves a little bit at a time to pay for a substantial amount of looming required capital improvements to the system that the City knows are on the not-too-distant horizon smooths the rates into more predictable bills and is therefore more desirable" to the users of the system, as compared to "foisting much larger fees on water bills whenever an emergency repair or major system capital improvement needs arise." Mondora further noted that defendant and the OCWRC were in the process of implementing necessary capital improvements to the system and opined that "[a]lthough we prefer and it is our plan to pay cash using the reserve fund for most of those projects, it is likely the City will also need to incur some bonded indebtedness." Steven Barr, defendant's Finance Director and Treasurer, similarly stated in an affidavit that "the City of Farmington Hills reserves as of June 30, 2018 were insufficient to cover the cost of known capital

improvement requirements, along with required maintenance needs and necessary reserves to fund daily operational needs."

***3** Defendant also accompanied its motion with a summary of its Wastewater Asset Management Plan, which includes the CIP, as well as numerous communications with the Michigan Department of Environmental Quality (MDEQ) concerning corrective action plans for defendant and Oakland County in order to comply with several administrative consent orders, and copies of those orders. Defendant also attached extensive documentation related to its water and sewer funds, city real property taxes, city ordinances related to the water and sewer system and associated charges, and Oakland County water and sewer regulations. Defendant also provided the report of its retained water and sewer financing expert, Eric P Rothstein, which contains Rothstein's opinions, as well as the data upon which he based those opinions, that (1) defendant's water and sewer rates were and are reasonable, (2) defendant's rates are in line with similar rates charged for similar water and wastewater systems in other communities in Michigan and nationwide, (3) defendant's use of a reserve system to finance the renewal and replacement of its water and sewer system lines was preferable to the use of debt financing, (4) defendant's "reserve practices are reasonable and appropriate" and the reserve levels were not excessive, and (5) plaintiff's allegations merely represented a personal opinion regarding the appropriate amount of reserve funds defendant should possess.

Plaintiff responded, arguing that the rates charged by defendant were unreasonable as a matter of law, or in the alternative that the determination of reasonableness was generally a question of fact to be left to the jury. Plaintiff also argued that her expert contradicted the opinions of defendant's experts, resulting in, at best, a question of fact. Plaintiff's motion was accompanied by a report prepared by John Farnkopf and Rick Simonson[3] of HF & H Consultants, LLC (a water, wastewater, and stormwater consulting service). Plaintiff's experts opined that defendant had charged unreasonably high overall rates, and that the reserve fund balance had exceeded a reasonable target balance every year since 2012; further, plaintiff's experts opined that defendant had accumulated an unreasonably high reserve fund balance as of June 30, 2018. Plaintiff also argued that the alleged overcharge constituted a tax in violation of MCL 141.91.

[3] Farnkopf and Simonson were also deposed during discovery.

The trial court held a hearing on defendant's motion in June 2021. Plaintiff argued that, as a matter of law, defendant's reserve rate charges were an impermissible tax, because defendant was not permitted to impose charges to finance capital improvements that would result in defendant fully recouping its investment in a period significantly shorter than the useful live of the improvements. Plaintiff also argued that she had shown that defendant's rates as a whole were excessive and therefore had established at least a genuine issue of material fact as to their reasonableness, noting that the parties had presented differing expert opinions on the issue. Defendant argued that it had demonstrated that the funds collected and the rates charged were reasonable and for a proper purpose. Defendant also noted that plaintiff's expert, in his deposition, had conceded that defendant's fees would be reasonable as long as they were necessary for capital improvements that were to be done over the next ten years.

The trial court took the matter under advisement. It subsequently issued a written opinion and order granting defendant's motion for summary disposition. The trial court held that plaintiff had failed to provide proof that defendant had collected the funds at issue for any improper purpose. The court also noted that plaintiff's experts had failed to "review and consider the actual capital improvement needs of the City's water and sewer system and all of Defendant's asset management plans and materials, administrative consent orders and intended use of the reserve funds" and concluded that "[p]laintiff cannot create an issue of fact by having her expert review only a subset of facts to come up with an opposing opinion." Further, the court noted that plaintiff's expert had concluded that defendant's reserve funds would be reasonable if used within ten years. The trial court therefore concluded that plaintiff had failed to support any of her claims.

This appeal followed. At the outset, we note that plaintiff's statement of questions presented on appeal consists of sixteen separately-numbered questions, but the argument section of plaintiff's brief does not contain separate sections or subsections for each question. Plaintiff's arguments fall into three broad categories: (1) the trial court erred by dismissing plaintiff's unjust enrichment and assumpsit claims, because defendant's water and sewer rates were unreasonable, (2) the reserve portion of defendant's water and sewer rates constituted an illegal tax, and (3) the trial court erred by denying class certification.

II. PLAINTIFF'S COMMON-LAW UNJUST ENRICHMENT AND ASSUMPSIT CLAIMS [4]

[4] As noted, all six counts of plaintiff's complaint are presented as unjust enrichment or assumpsit claims. Moreover, in opposing summary disposition in the trial court, plaintiff specifically acknowledged that all of her claims were "grounded in principles of assumpsit and unjust enrichment." This includes her claims that are premised on alleged violations of MCL 141.91 and defendant's ordinances. This section of our opinion is limited, however, to Counts I and IV of plaintiff's complaint, which allege unjust enrichment and assumpsit independent of any alleged violation of statute or ordinance. Further, on appeal, plaintiff does not present a separate argument concerning defendant's alleged violation of its own ordinances (Counts III and VI of her complaint); rather, plaintiff argues in a footnote that defendant's alleged violation of its ordinance requiring that sewer service rates be "sufficient to provide for debt service and for the expenses of operation, maintenance, and replacement as necessary to preserve the same in good repair and working order" demonstrates that its rates are unreasonable. Because plaintiff has not provided a detailed argument concerning defendant's alleged violation of its ordinance, we do not address this issue in depth, and leave the trial court's ruling concerning Counts III and VI undisturbed. See *Central Cartage v Fewless*, 232 Mich App 517, 529; 591 NW2d 422 (1998) (noting that this Court is not obligated to search for authority to support a party's argument on appeal).

***4** Plaintiff argues that the trial court erred by holding that plaintiff had failed to establish at least a genuine issue of material fact regarding the unreasonableness of defendant's water and sewer rates. Specifically, plaintiff argues that she presented evidence that defendant's water and sewer rates during the relevant time period were in excess of the amounts necessary to finance the actual costs of providing those services, and that the cash reserves accumulated by defendant were far in excess of the amount necessary to support the city's water and sewer system, even accounting for necessary capital improvements. Plaintiff also argues that the reasonableness of utility rates is generally a question of fact and that she met her burden of providing "clear evidence of illegal or improper expenses" included in defendant's rates. We disagree.

Plaintiff, in her complaint, presented claims of unjust enrichment and assumpsit related to defendant's water and sewer rates. These common-law claims are equitable claims that this Court reviews de novo. *Youmans v Charter Twp of Bloomfield*, 336 Mich App 161, 211; 969 NW2d 570 (2021). We also review de novo the trial court's decision on a motion for summary disposition. *Zarzyski v Nigrelli*, 337 Mich App 735, 740; 976 NW2d 916 (2021). A party is entitled to summary disposition under MCR 2.116(C)(10) when the evidence does not present a genuine issue of material fact. *Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 470; 957 NW2d 377 (2020). "A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue upon which reasonable minds might differ." *MacDonald v Ottawa Co*, 335 Mich App 618, 622; 967 NW2d 919 (2021) (quotation marks and citation omitted). "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Jewett*, 332 Mich App at 470 (quotation marks and citation omitted). This includes pleadings, affidavits, admissions, and depositions, along with other evidence submitted by the parties. *Walega v Walega*, 312 Mich App 259, 265-266; 877 NW2d 910 (2015). We review de novo the interpretation of statutes and ordinances. *Youmans*, 336 Mich App at 211.

Historically, at common law, an action for assumpsit was "a proper vehicle for recovering unlawful fees, charges, or exactions—including unlawful utility charges—that the plaintiff had paid to a municipality under compulsion of local law." *Id.* at 213 (citation omitted). However, after assumpsit was abolished as a form of action in Michigan in 1963, an assumpsit claim became "modernly treated as a claim arising under 'quasi-contractual' principles which represent 'a subset of the law of unjust enrichment.' " *Youmans*, 336 Mich App at 213-214, quoting *Wright v Genesee Co*, 504 Mich 410, 421; 934 NW2d 805 (2019). We therefore treat plaintiff's assumpsit claims as unjust-enrichment claims.

"Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another." *Wright*, 504 Mich at 417. In order to sustain a claim for 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 v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006). The remedy for unjust enrichment is restitution, i.e. the return of the excessive or unjust benefits retained by defendant. *Wright*, 504 Mich at 419.

In cases involving municipal ratemaking, there is a rebuttable presumption that a municipality's utility rates are reasonable. *Youmans*, 336 Mich App at 214. In order to succeed on a claim for unjust enrichment, a plaintiff must rebut this presumption by both (1) presenting clear evidence of illegal or improper expenses included in a municipal utility's rates and (2) after presenting such evidence, demonstrating that the rates, viewed as a whole, are unreasonable, i.e., excessive. *Youmans*, 336 Mich App at 217-218, citing *Trahey v Inkster*, 311 Mich App 582, 594, 597-598; 876 NW2d 582 (2015). Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption of reasonableness. *Trahey*, 311 Mich App at 595. Even if such an illegal or improper expense is included in a municipal utility's rates, a plaintiff is still required to demonstrate that "the disputed rates actually overcharged plaintiff ... for the related water and sewer services." *Youmans*, 336 Mich App at 219.

***5** The heart of plaintiff's common-law claims is the allegation that defendant's water and sewer rates were unreasonable during the relevant time period (July 1, 2012 through July 1, 2018). We agree with the trial court that plaintiff failed to rebut the presumption of reasonableness. Defendant's experts opined that defendant's water and sewer rates, as a whole, were proportionate to the rates charged by similarly-sized retail water and wastewater systems both in Michigan and nationwide. Plaintiff's experts did not address the issue of whether defendant's rates, as a whole, were excessive; in fact, plaintiff's experts admitted that they had not conducted a comprehensive rate study. Rather, plaintiff's experts based their conclusion that defendant's rates were unreasonable solely on their opinion that the rates had resulted in an excessively large reserve fund.

In *Youmans*, this Court noted that "without a comprehensive rate study—or some similar evidence demonstrating that the disputed rates excessively compensated the Township for the related utility services—one can at best speculate about whether the disputed rates were proportional to the underlying costs." *Youmans*, 336 Mich App at 220. This Court also noted that several experts had reviewed the defendant's financial statements and determined that its "cash inflows and outflows over the disputed period were proportional." *Id.* Although plaintiff argues that her experts provided evidence that the disputed rates excessively compensated defendant by analyzing the growth of the reserve fund, her experts specifically noted that they did not perform "a comprehensive review of the City's rate-making process." The HF & H report only notes the actual costs incurred by defendant in operating its water and sewer system for one year, the fiscal year 2017-2018, and does not analyze cash inflows for any of the years in question. Further, the report does not analyze defendant's overall cash flow related to the water and sewer system; rather, plaintiff's expert's analysis is limited to the growth of defendant's reserve funds.

In plain language, plaintiff argues that defendant must be overcharging for water and sewer services because an account associated with that system has too much money it. We are unconvinced that the former must necessarily be inferred from the latter. In the absence of a more comprehensive review of cash inflows and outflows associated with the water and sewer system, it appears that plaintiff is, at best, speculating about the proportionality of the rate as a whole. See *Youmans*, 336 Mich App at 220. This Court in *Youmans* agreed with the defendant's position that "even if a *specific* expense that is included in formulating a challenged municipal utility rate is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a *whole*." *Id.* at 218. Plaintiff's claims for unjust enrichment depend on "whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were "excessive," not on whether some aspect of the Township's ratemaking methodology was improper." *Id.* at 219. In the absence of a more holistic analysis of defendant's rates, we conclude that plaintiff, even if she could carry her burden of showing that the reserve portions of the challenged rates were illegal or improper, did not carry her burden of proving that the overall rates were unreasonable. The trial court therefore did not err by granting defendant's motion for summary disposition with respect to those claims.

Further, we agree with the trial court that plaintiff has not carried her burden of showing that the reserve portion of defendant's sewer rates was illegal or improper. We note at the outset that plaintiff's allegation that defendant lacks a written reserve fund policy, even if true, does not resolve

the issue. Defendant is not required by law or ordinance to have such a written policy, or to adhere to a particular ratemaking approach or guidelines. Moreover, defendant is not required by law or ordinance to have a specific plan for capital improvements equivalent to the amount in the reserve fund, so long as the funds are earmarked and restricted for use in maintaining the water and sewer system.

***6** Plaintiff's experts agree, in general, that defendant is permitted to maintain a reserve fund for maintenance and repair of its sewer system. Public utilities commonly maintain capital reserves to provide fiscal stability. See *Jackson Co v City of Jackson*, 302 Mich App 90, 111; 836 NW2d 903 (2013). Instead, plaintiff and her experts argue that defendant's reserve fund is excessively high. Plaintiff's experts base their opinion on expenses incurred by defendant for capital improvements in the years 2012 through 2018, and defendant's projections for capital improvement expenses through 2023. But, as noted by the trial court, plaintiff's experts did not review and consider the actual capital improvement needs of defendant's water and sewer system, and did not opine on necessary capital improvements over the next ten years. Further, Farnkopf agreed at his deposition that "reserves are all about managing risk and that is a subjective question" upon which opinions might differ. Defendant offered substantial evidence that its cash reserves were necessary to fund large-scale necessary maintenance, repair, and replacement of both the horizontal and vertical assets in its water and sewer system; this evidence was not refuted by plaintiff's experts, who focused much more narrowly on the balance of the reserve fund compared to *past* capital improvement expenditures and the limited amount of capital-improvement projects that were already in the process of being implemented in the near future and funded by the reserve fund.

On the whole, the evidence showed that defendant had inspected its water and sewer system and had determined that substantial repairs, maintenance, and replacement would be necessary in the near future. There was also testimony that defendant's reserves would possibly be insufficient to meet those needs. This testimony was not refuted by plaintiff; as the trial court noted, plaintiff's experts' narrow focus on the reserve fund balance failed to take into account numerous other factors that would impact the determination of whether defendant's reserve rates were illegal or improper.

In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." *Novi v Detroit*, 433 Mich 414, 427; 446 NW2d 118 (1989). "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in ratemaking." *Id.* at 430, In the absence of a complete review of defendant's rate-making process, or the need for large-scale repairs or replacement of assets in the near future, plaintiff's allegation that defendant's water and sewer rates are unreasonable is speculative. Mere speculation is insufficient to survive summary disposition. See *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). Plaintiff failed to rebut the presumption of reasonableness, and the trial court properly granted defendant's motion for summary disposition on plaintiff's common-law assumpsit and unjust-enrichment claims. *Zarzyski*, 337 Mich App at 740.

III. VIOLATION OF MCL 141.91

Plaintiff also argues that the trial court erred by not holding that the portions of defendant's water and sewer rates that represent what plaintiff alleged to be an overcharge were a disguised tax in violation of MCL 141.91. We disagree. We review de novo the interpretation of statutes and ordinances. *Youmans*, 336 Mich App at 211.

MCL 141.91 provides: "Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964." At the outset, we note that challenges to a utility fee on the ground that it is a disguised tax, rather than a fee, are generally brought under the Headlee Amendment, Const. 1963, art. 9, § 31, which provides in pertinent part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the

> qualified electors of that unit of Local Government voting thereon ....

Plaintiff has not, however, brought a claim under the Headlee Amendment. Nor has she argued that MCL 141.91 provides a separate cause of action or provides her with a private right of action. Instead, she brings unjust enrichment and assumpsit claims premised on a claimed violation of MCL 141.91, yet relies upon Headlee challenge cases for her analytical framework. See *Bolt v Lansing*, 459 Mich 152; 587 NW2d 264 (1998). And, as defendant points out, plaintiff's complaint did not reference the Headlee Amendment or articulate the elements of a claim, even if cognizable, under MCL 141.91. But plaintiff did allege in her complaint that defendant had violated MCL 141.91 by imposing "disguised taxes that are not ad valorem property taxes" after 1964, and therefore was liable under unjust enrichment and assumpsit theories. Because, as we will discuss, plaintiff's claim fails in any event, we need not decide whether plaintiff sufficiently pleaded a valid cause of action in Counts II and V, but we note that plaintiff did not analyze or argue that MCL 141.91 provides a private right of action, and nothing in this opinion should be taken as this Court's holding that such a cause of action exists.

***7** Plaintiff argues that the analytical framework articulated in *Bolt* applies as easily to her claim as it does to a claim under the Headlee Amendment, while defendant argues that we should apply a pre-*Bolt* common-law analysis to plaintiff's claim. We find it unnecessary to resolve this issue, because even granting plaintiff the analytical framework of her choice, it is clear that the trial court did not err by rejecting her claims under MCL 141.91.

"Although the levying of a new tax without voter approval violates the Headlee Amendment, a charge that constitutes a user fee does not." *Youmans*, 336 Mich App at 226 (citations and quotation marks omitted). In *Bolt*, our Supreme Court set forth a three-prong test for determining whether a municipal charge represents a user fee or a tax: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose"; (2) "user fees must be proportionate to the necessary costs of the service"; and (3) a user fee is voluntary in that users are "able to refuse or limit their use of the commodity or service." *Bolt*, 459 Mich at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Youmans*, 336 Mich App at 226 (citation omitted). The party challenging a utility rate bears the burden of establishing that it is a tax and not a user fee. *Id.* at 225. The presumption of reasonableness is a "pertinent" consideration when considering whether a user fee is proportionate to the necessary costs of the service. *Id.* at 227-228 (citation omitted).

As discussed in *Youmans*, this Court has held that a water and sewer rate that includes an assessment for future capital improvements, repairs, and maintenance "serves a regulatory purpose" notwithstanding the fact that it may generate revenue in support of that purpose, or even result in a surplus for the fiscal year. See *Youmans*, 336 Mich App at 228, quoting *Shaw v Dearborn*, 329 Mich App 640, 666; 944 NW2d 153 (2019). Here, as in *Youmans*, there was undisputed evidence presented that the contested rates were assessed to fund the operation and capital improvements of defendant's water and sewer system, including defendant's obligations under various administrative orders and corrective action plans with the MDEQ. *Id.* at 606. We therefore similarly conclude that the challenged rates primarily serve valid regulatory purposes under the first *Bolt* factor.

Regarding the second *Bolt* factor, as discussed, plaintiff has not established even a question of fact regarding whether defendant's rates were disproportionate. As noted in *Bolt*, "[m]athematic precision is not required when reviewing the reasonable proportionality of a utility fee." *Bolt*, 459 Mich at 164-165. Further, a valid user fee can include "some capital investment component" as well as the actual costs of use. *Id.* The second *Bolt* factor also favors defendant's position.

Regarding the third *Bolt* factor, the challenged rates here are comprised of numerous component charges that are aggregated into an overall charge per 1,000 cubic feet of water used. However, there is also a minimum amount charged regardless of water usage; further, defendant's ordinances require all dwellings to be connected to the water and sewer system. Therefore, defendant's rates are not entirely "voluntary" because a property owner cannot entirely avoid them by refusing to use any water or disconnecting from the system. See *Youmans*, 336 Mich App at 232. The rationale of *Youmans* is equally applicable to the challenged rate in this case; we conclude that "at least the fixed portion of the disputed rates ... is effectively compulsory." *Id.* at 232.[5] The third *Bolt* factor therefore at least somewhat favors plaintiff's position. However, the mere "lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler*

v Shelby Charter Twp, 265 Mich App 657, 666; 697 NW2d 180 (2005).

5 It is, however, not clear from the record whether any portion of the fixed minimum charge goes to the reserve fund.

***8** Considered in their totality, *Youmans*, 336 Mich App at 226 (citation omitted), plaintiff has failed to carry her burden of showing that the challenged rates are impermissible taxes rather than valid user fees, even assuming that her chosen analytical framework applies to her claims asserting a violation of MCL 141.91. The trial court therefore did not err by granting defendant's motion for summary disposition on these claims.

In conclusion, the trial court did not err by granting defendant's motion for summary disposition and dismissing plaintiff's claims. *Zarzyski*, 337 Mich App at 740. Plaintiff did not carry her burden of showing that defendant's rates were unreasonable or constituted an illegal tax. Because we affirm the trial court's grant of summary disposition, we need not address plaintiff's arguments concerning the denial of class certification.

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219(A)(1).

All Citations

Not Reported in N.W. Rptr., 2023 WL 174810

End of Document

2023 WL 2436483
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

MIDWEST VALVE & FITTING COMPANY, and all others similarly situated, Plaintiff-Appellant,
v.
CITY OF DETROIT, Defendant-Appellee.

No. 358868
|
March 9, 2023

Wayne Circuit Court, LC No. 18-014337-CZ

Before: Rick, P.J., and M. J. Kelly and Riordan, JJ.

Opinion

Per Curiam.

***1** Plaintiff-appellant, Midwest Valve & Fitting Company, appeals as of right the trial court's order that, after a bench trial, dismissed its remaining claims related to the legality of certain fees charged by defendant, City of Detroit. The appeal also involves the trial court's earlier opinion and order granting summary disposition in favor of defendant on appellant's other claims.

This case involves appellant's challenge to the legality of certain annual charges that are imposed by defendant. The trial court determined that the charges are legal and dismissed appellant's claims, some in a pretrial motion for summary disposition and the remainder after a bench trial. Because its arguments have no merit, we affirm.

I. FACTS

Defendant imposes an annual charge on owners of commercial real property and multiunit residential real property located in Detroit. Although appellant initially claimed that the charges were "fire inspection charges," appellant on appeal has acquiesced to the trial court's and defendant's position that they are "permit fees."

Appellant received bills from defendant for these charges since at least 2013 and paid them. However, appellant maintained that it never received any fire safety inspection during this time.

Appellant filed a complaint, alleging numerous claims against defendant: Count I—violation of the Headlee Amendment, Count II—assumpsit/unreasonable charges, Count III—unjust enrichment/unreasonable charges, Count IV—assumpsit/violation of MCL 141.91, Count V—unjust enrichment/violation of MCL 141.91, Count VI—assumpsit/violation of city ordinance, Count VII—unjust enrichment/violation of city ordinance, and Count VIII—violation of equal protection.

Appellant moved for summary disposition under MCR 2.116(C)(10) on Counts I, IV, and V. It argued that the charges constituted taxes, which were imposed in violation of § 31 of the Headlee Amendment [1] and MCL 141.91. [2] After analyzing the characteristics of the charges, the trial court ruled that the charges were fees, not taxes, and granted summary disposition in favor of defendant on Counts I, IV, and V.

1 Const. 1963, art. 9, § 31.

2 As will be discussed in greater detail below, § 31 of the Headlee Amendment "prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate," *Durant v Mich*, 456 Mich 175, 183; 566 NW2d 272 (1997), and MCL 141.91 prohibits cities from imposing taxes other than ad valorem property taxes.

The trial court conducted a one-day bench trial on the remaining counts. In support of its position that the charges at issue were inspection fees, appellant primarily relied on (1) a fire marshal web page indicating that inspections get scheduled after payment of the fee, and (2) some internal city documents [3] that used terminology, such as "safety inspection charges" or "fire permit safety inspection," while referencing these charges. But, Fire Marshal Shawn Battle testified that those representations were factually incorrect because the fees were exclusively for permits, which allow businesses to operate, and have no relation to inspections. [4] Although it was the department's goal to inspect every commercial property every year, Battle stated this was not feasible because of a lack

of manpower. Battle also testified that his department did not utilize any of the documents appellant relied on and instead it used a system called MobileEyes, which identifies the charges as being for "permits." Further, the actual invoices and permits relating to these charges were admitted into evidence via stipulation. Those documents specifically reference "industrial/business/mercantile occupancy permit[s]," with no mention of inspections.

[3] The parties stipulated that these documents were created by an unknown city employee at some unknown time.

[4] Battle also testified that 10 months before trial started, someone had put in a request to Detroit's Information Technology Department to have that information removed from the website, but apparently, the information was still present as of a few days before trial.

***2** Although defendant was unable to verify that the city council had approved the charges any time before May 2021, the council later approved them retroactively back to 2013.

In its closing argument, appellant argued that even if the charges were "permit fees," they would be illegal because the city council never approved them, which was required by the city charter and ordinances. Appellant claimed that the city council's attempt to retroactively approve the charges was a legal nullity. Regarding its equal-protection claim, appellant argued that, with it not receiving any inspections, as opposed to other commercial property owners, it had not been treated objectively and reasonably.

The trial court found that the charges at issue are annual permit fees and not inspection fees. The trial court also noted that the burden was on appellant to prove that any fee or charge was unreasonable or otherwise unlawful. Further, the trial court ruled that Counts II and VI were not viable because Michigan does not recognize an independent cause of action for assumpsit.

The trial court dismissed appellant's unjust enrichment claims in Counts III and VII. The court noted that Count III was premised on the allegation that the charges were for fire inspections when no inspections had taken place. The trial court rejected this claim because the charges are not for inspections, but are for permits. The trial court also ruled two additional arguments appellant raised relating to the claims of unjust enrichment were unpersuasive. First, the trial court rejected appellant's contention that the charges were in violation of the city ordinance because they were in excess of the cost of the "issuance" of permits. The trial court noted that cities are allowed to recover all of their direct and indirect costs related to the regulation of those who are charged the fee and that courts are to give deference to a city's interpretation of its own ordinances. Second, the court rejected appellant's contention that defendant was unjustly enriched because the charges were never approved by the city council. The trial court then ruled that the city council's retroactive approval of the charges was permissible as a matter of law.

Finally, the trial court ruled that appellant failed to prove any of the essential elements of its equal-protection claim, including that defendant made a classification identifying a particular group, that defendant intentionally or purposefully treated that group differently from similarly situated individuals, and that there is no rational basis for defendant's disparate treatment.

II. HEADLEE AMENDMENT AND MCL 141.91

Appellant argues that the trial court erred when it granted summary disposition in favor of defendant on Counts I, IV, and V of its complaint. We disagree.

Whether a municipal charge is a "tax" is a question of law, which this Court reviews de novo. *Mapleview Estates, Inc v Brown City*, 258 Mich App 412, 413-414; 671 NW2d 572 (2003). This Court also reviews a trial court's decision on a motion for summary disposition de novo. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A motion under (C)(10) is properly granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

***3** In Counts I, IV, and V, appellant alleges violations of § 31 of the Headlee Amendment and MCL 141.91. Section 31 of the Headlee Amendment states, in pertinent part:

> Units of Local Government are hereby prohibited from levying any *tax* not authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. [Const. 1963, art. 9, § 31 (emphasis added).]

This section "prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." *Durant v Mich*, 456 Mich 175, 183; 566 NW2d 272 (1997).

MCL 141.91 states:

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a *tax*, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964. [Emphasis added.]

In concert, these provisions restrain a local government's ability to assess taxes. If the charges levied are not taxes, the Headlee Amendment is not implicated and appellant's claims here, based on violations of the Headlee Amendment and MCL 141.91, would necessarily fail. See *Bolt v City of Lansing*, 459 Mich 152, 158-159; 587 NW2d 264 (1998) (stating that user fees are not taxes and are not affected by the Headlee Amendment). [5]

5 Although *Bolt* only concerned whether a particular charge was a "tax" for the purposes of the Headlee Amendment, we find it equally relevant for determining whether a particular charge is a "tax" for the purposes of MCL 141.91 as well.

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id.* at 160. Three primary factors are considered in determining whether a charge is a fee or a tax. "The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose." *Id.* at 161. "A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service." *Id.* at 161-162. A third criterion is voluntariness: fees generally are voluntary, while taxes are not. *Id.* at 162. "[T]hese criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

There is no question of fact that the charges at issue here were for the acquisition of permits, not inspections. Although appellant took the position below that the charges were "fire inspection charges" or "fire inspection fees," it submitted no evidence to show that the charges were paid in consideration for receiving an inspection. Instead, the evidence showed that the charges were for obtaining occupancy permits. Thus, appellant's arguments that rely on the charges being fees for receiving inspection services are misplaced and are without merit.

Considering the first *Bolt* factor, whether the charge serves a regulatory purpose rather than a revenue-raising purpose, it is understood that a fee can raise money as long as it is in support of the underlying purpose. *Merrilli v St Clair Shores*, 355 Mich 575, 583; 96 NW2d 144 (1959). Indeed, in *Merrilli*, our Supreme Court held that permit fees, as opposed to taxes, are regulatory in nature. *Id.* at 582. Fire Marshal Battle testified in his deposition that the charge at issue provides the property owner with a permit, which allows the owner to operate in Detroit. Further, in a response to appellant's third set of interrogatories, defendant averred that those who pay the charge, and who do not receive an inspection, still receive the benefit of defendant's Fire Protection Program, which includes the "training of [the fire marshal] staff, maintenance of Fire Marshal's physical facility, public education, provision of information related to properties subject to the Fire Marshal's programs, maintenance of information, capacity to continue provision of services, including but not limited to inspections, etc."

***4** Appellant argues that the Fire Protection Program serves a public purpose, but ignores the primary benefit to a property owner who pays the charge—a permit, allowing the owner to operate on its premises. Undoubtedly, the public also benefits from the Fire Protection Program, but as this Court recognized in *Westlake Trans, Inc v Pub Serv Comm*, 255 Mich App

589, 613; 662 NW2d 784 (2003), fees that benefit the general public still can maintain their regulatory nature.

In *Westlake*, the plaintiffs argued, in part, that fees assessed to trucking companies were an impermissible tax. *Id.* at 611. This Court stated:

> [I]n exchange for the fees, a motor carrier receives the right to operate its trucks in Michigan, and the fees are used to enforce the provisions of the act that carry out the above-listed purposes. Thus, there is a direct benefit to the one who pays the fees. We recognize that promoting and regulating safe use of the highways benefits the general public as well. However, a regulatory fee can have dual purposes and still maintain its regulatory characterization. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose, and use benefit the general public. [*Id.* at 613 (citation omitted).]

The situation in *Westlake* is analogous to the circumstances before us. Like the plaintiffs in *Westlake*, who received the right to operate trucks in Michigan, appellant in the instant case receives a benefit by being allowed to operate its business in Detroit. Thus, appellant received "a direct benefit" from paying the charge. The fact that the general public also benefits from the Fire Protection Program does not negate the charge's regulatory nature. See also *Jackson Co v City of Jackson*, 302 Mich App 90, 108; 836 NW2d 903 (2013) ("[A] regulatory fee may confer a benefit on both the general public and the particular individuals who pay the fee and still maintain its regulatory character ...."). Therefore, the first of the factors we must consider weighs in favor of the charge being a fee and not a tax.

Secondly, the city's charge appears to be proportionate to the necessary costs of the service it is providing. Courts are to presume that the amount of the fee is reasonable. *Id.* at 109. Appellant's position is that the costs are not proportionate because, by not receiving any inspections, appellant received nothing different from anyone else in the city who was not required to pay the charges. We disagree with this argument because the main benefit of the city's charge was the receipt of a permit, not an inspection. Thus, those who paid the charge did receive a benefit distinct from someone who did not pay the fee—the right to occupy the premises as a business. Furthermore, these charges funded the year-to-year operations of the Fire Marshal Department. This is an important distinction from *Bolt*, in which our Supreme Court noted that the purpose of the charge, which it found to be a tax, was to finance a multiyear construction of a large infrastructure project. There, the benefit gained—new infrastructure—would substantially outlast the time period for which the charge was to be in place. *Bolt*, 459 Mich at 163-164. Further, the amounts collected from the charges in the case before us historically were significantly less than the program's costs. Consequently, the charge is reasonably proportional.

***5** As to the third factor, we must consider whether the city's charge was voluntary. The trial court did not explicitly rule on this factor and instead simply assumed that the charge was not voluntary. We agree that the charge was not voluntary. Although, while technically, the charge is voluntary because a business could decline to pay and simply opt to not operate in Detroit, that option is highly impractical for a business. Indeed, our Supreme Court in *Bolt* rejected the argument that a charge was voluntary because property owners could relinquish their rights of ownership. *Id.* at 168.

After weighing these same factors, the trial court ruled the charge was a fee, not a tax. We agree with the trial court's analysis and find it did not err. Significantly, this Court has recognized that "the lack of volition does not render the charge a tax, particular where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler v Shelby Twp*, 265 Mich App 657, 666; 697 NW2d 180 (2005). Thus, even with the charge at issue being involuntary, that fact alone is not sufficient to overcome the other two factors that appellant received a benefit and that the fee is proportional.

Because the charge at issue is a fee, not a tax, appellant is precluded from succeeding on its claims alleging violations of the Headlee Amendment and MCL 141.91. As a result, the trial court properly granted summary disposition in favor of defendant on Counts I, IV, and V.

III. VIOLATION OF CITY CHARTER AND ORDINANCES

Appellant argues that the trial court erred by finding no cause of action for its claims related to the violation of the city charter and ordinances. We disagree.

A trial court's findings of fact in a bench trial are reviewed for clear error, while its conclusions of law are reviewed de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Id.* A trial court's interpretation of a municipal charter is a question of law that this Court reviews de novo. *Save Our Downtown v Traverse City*, —— Mich App ——, ——; —— NW2d —— (2022) (Docket No. 359536); slip op. at 5.

Initially, it should be recognized that after the trial court's grant of summary disposition in favor of defendant on some of appellant's counts, trial proceeded with respect to only Counts II, III, VI, VII, and VIII. The trial court dismissed Counts II and VI, which alleges independent causes of action of assumpsit. This was not erroneous because Michigan no longer recognizes an independent cause of action for assumpsit. [6] *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). Notably, appellant does not challenge the dismissal of those counts. Instead, appellant focuses on its allegations that the charges were unlawful because they were imposed in violation of the city charter and ordinances. Thus, only appellant's claims pertaining to the alleged violations of the city charter and ordinances are before this Court. [7]

6 Although no independent cause of action for assumpsit exists, "the substantive remedies traditionally available under assumpsit were preserved." *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). In this instance, appellant's counts of assumpsit essentially were covered by its claims of unjust enrichment.

7 In Count III, appellant alleges that defendant unjustly enriched itself by collecting charges pertaining to fire inspections, while not providing such fire inspections. However, the trial court found that the charges at issue were fees for permits, not inspections. That finding, precluding unjust enrichment, is not clearly erroneous. Fire Marshal Battle testified at trial that the fees were for the issuance of permits, not inspections. Indeed, even the invoices that appellant received stated that the charges were for "permits," with no mention of "inspections." While there were some internal city documents that used terms such as "fire inspection fee," those documents could not be authenticated, and the trial court gave them little to no weight. The author of those documents is not known, and there is no evidence that defendant relied on them. Accordingly, the trial court did not err by finding no cause of action for that aspect of Count III.

***6** In Count VII, appellant asserted a claim of unjust enrichment premised on a violation of Detroit Ordinances, § 19-1-22, Subsection 1.4.11, which stated at the time, in pertinent part: [8]

> In accordance with Section 9-507 of the 1997 Detroit City Charter, the Fire Commissioner is authorized to establish necessary fees, with the approval of the City Council, for the cost of:
>
> (1) Inspection and consultation;
>
> (2) Issuance of permits and certificates;
>
> (3) Administrative appeals;
>
> (4) Issuance of reports; and
>
> (5) Copying of records.

8 The Detroit City Code was later recodified in December 2019. The content in this quoted portion was moved to Detroit Ordinances, § 18-1-22, Subsection 1.6.2. Although there are some minor modifications to the 2019 recodification, the content is substantially the same.

Appellant alleges in its complaint that this ordinance was violated because the charges could not be considered "necessary" when a property owner does not receive a fire inspection. This position again is premised on the assertion that the charges were paid in consideration for receiving fire inspections, but as already explained, that is not the case. The charges are a fee paid to obtain occupancy permits.

Although appellant's complaint only alleges that the ordinances were violated in this one respect in its proposed conclusions of law, appellant asserted that the charges were unlawful for two other reasons: (1) the city council never approved the charges, and (2) the charter provision cited in the ordinance does not allow for permit fees. The trial court rejected the former argument, but did not address the latter.

Regarding the former, the parties stipulated that there was no evidence of the city council approving the charges any time before May 2021. But the city council later retroactively approved the charges. Appellant argues that the retroactive approval is a nullity.

There is no per se prohibition on retroactive application of legislation. See *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Bd of Trustees v City of Pontiac (On Remand)*, 317 Mich App 570, 578-579; 895 NW2d 206 (2016). However,

> retrospective application of a law is improper where the law takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. [*In re Certified Questions from the United States Court of Appeals for the Sixth Circuit*, 416 Mich 558, 572; 331 NW2d 456 (1982) (quotation marks and citation omitted); see also *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 39; 852 NW2d 78 (2014).]

Appellant essentially argues that it had a vested right to not pay any of the charges until the city council approved them in May 2021. According to appellant, the retroactive imposition of those charges affected its vested right. Appellant's position is not persuasive. "Retroactive statutes curing defects in acts done, or authorizing or confirming the exercise of powers, are valid where the legislature originally had authority to confer the power or authorize the acts, except where it is attempted to impair vested rights." *Stott v Stott Realty Co*, 288 Mich 35, 45; 284 NW 635 (1939). As discussed below, the city council at all relevant times had the power or authority to approve the charges, making its retroactive authorization permissible. Notably, appellant during the preceding years thought that the charges were legally due and paid them to defendant. This is significant because the reason vested rights are not to be affected by retroactive legislation is that "it can deprive citizens of legitimate expectations and upset settled transactions." *LaFontaine*, 496 Mich at 38 (quotation marks and citations omitted). Because appellant had no expectation to be free from paying the permit fee, the retroactive authorization of that very same permit fee did not affect appellant. In other words, the retroactive imposition of the charge did not affect appellant as it incurred no new obligations to defendant after the passing of the resolution.

***7** Additionally, a retroactive application must be a rational means of achieving a city's legitimate objective. *Downriver Plaza Group v Southgate*, 444 Mich 656, 667; 513 NW2d 807 (1994). In this case, the retroactive ratification of the charges was a rational means to further a legitimate legislative purpose. The purpose was to maintain the Fire Protection Program, which certainly is a legitimate purpose, and the means to accomplish that was to simply authorize charges that property owners had already paid, which was reasonable. [9]

9 The only reason the charges had not been authorized earlier is that the Fire Marshal Department had thought that an authorization already was in place.

Appellant's latter argument not contained in its complaint was that the city council lacked the authority to approve the charges because they violate § 9-507 of the city charter. Section 9-507 provides:

> Any agency of the City may, with the approval of the City Council, charge an admission or service fee to any facility operated, or for any service provided, by an agency. The approval of the City Council shall also be required for any change in any such admission or service fee.

This section allows for the imposition of a charge for (1) admission to an agency-operated facility or (2) a service provided by a city agency. Only the second clause is pertinent in this case. While appellant concedes that if the charge was

for a fire inspection, then the charge would be for a service, it argues that if the charge is truly a "permit fee," then it is not a charge for a service. We disagree.

The city charter is to be interpreted according to the rules of statutory construction. *Save Our Downtown*, —— Mich App at ——; slip op. at 5. "The provisions are to be read in context, with the plain and ordinary meaning given to every word. Judicial construction is not permitted when the language is clear and unambiguous. Court apply unambiguous statutes as written." *Id.* (quotation marks and citation omitted). When a term is not defined in a statute, courts may consult dictionary definitions to determine the plain and ordinary meaning of the term. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 578; 609 NW2d 593 (2000). As evidenced by the 27 different definitions of the noun "service" in the dictionary, the term is defined broadly. See *Random House Webster's College Dictionary* (1995). However, one of those definitions is most pertinent: "the duty or work of public servants." *Id.* Although the work provided in this instance is not the provision of a fire inspection, it nonetheless still is a service because it is providing a permit. Consequently, the city's imposition of a charge to a property owner to obtain a permit does not run afoul of the city charter.

Appellant also contends that it is improper for the charges to fund "all of the direct and indirect costs" of the Fire Prevention Program. Appellant avers that the ordinance only allows for defendant to recover the administrative costs associated with issuing the permits. Appellant provides no authority for this argument and merely quotes the applicable provision in the city code: "the Fire Commissioner is authorized to establish necessary fees, with the approval of the City Council, for the cost of ... [i]ssuance of permits and certificates." Detroit Ordinances, § 19-1-22, Subsection 1.4.11. Appellant focuses on the word "issuance" for its position. "Issuance" is defined as "the act of publishing or officially giving out or making available." *Merriam-Webster's Collegiate Dictionary* (11th ed.).

***8** The strictly literal interpretation of this provision lends support to the suggestion that a charge is allowable only for the "act" of "giving out" the permit. However, the concept of a "permit" encompasses much more than a physical piece of paper. The more reasonable interpretation is that the cost of the issuance of a permit includes all the work involved with a particular program which that permit represents.

When interpreting an ordinance, courts are to give some deference to a municipality's interpretation. See *Macenas v Village of Michiana*, 433 Mich 380, 398; 446 NW2d 102 (1989). Battle testified that the Fire Marshal Department has been issuing the permit in the same manner since at least 1996, and that it would not be possible to issue these permits if all of the Fire Marshal's related programs were not funded. [10] Thus, the Fire Marshal Department has been interpreting the term "issuance" within the ordinance as encompassing the costs of the Fire Prevention Program, as well as the cost of physically issuing the permit itself. We defer to the Fire Marshal's interpretation of the ordinance and similarly conclude that the ordinance allows for the recovery of the costs of the Fire Prevention Program in the issuance of the permits.

10 These also are findings of fact that the trial court made, which appellant does not challenge on appeal.

Therefore, given the above analysis, we hold that the trial court did not err by finding no cause of action on appellant's claims related to any alleged violations of city charter or ordinances.

IV. EQUAL PROTECTION

Appellant also argues that the trial court erred by finding no cause of action for its equal-protection claim. We disagree.

A trial court's findings of fact are reviewed for clear error, while its conclusions of law are reviewed de novo. *Walters*, 239 Mich App at 456.

"The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law." *Shepherd Montessori Ctr Milan v Ann Arbor Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010), citing Const. 1963, art. 1, § 2 and U.S. Const., Am. XIV. "Michigan's equal protection provision is coextensive with the Equal Protection Clause of the federal constitution." *Grimes v Van Hook-Williams*, 302 Mich App 521, 532-533; 839 NW2d 237 (2013) (cleaned up). "The essence of the Equal Protection Clauses is that government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment." *Id.* at 533 (quotation marks and citation omitted). Thus, the relevant inquiry is whether there has been discriminatory

intent or purposeful discrimination. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 308; 553 NW2d 377 (1996).

Appellant claims that its "group" has been discriminated against because it did not receive fire inspections, while others who paid the charges at issue did. Because no suspect classification is involved, such as race, national origin, ethnicity, gender, or illegitimacy, the proper level of review is rational basis. See *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004). "The rational basis test considers whether the classification itself is rationally related to a legitimate governmental interest." *Id.* (quotation marks and citations omitted).

Fire Marshal Battle testified that the goal of his department is to inspect every property, but that the lack of funding and manpower makes it impossible to do so. Thus, while some properties in a given year received inspections, some did not, even though both inspected and uninspected properties pay the same charge. It is beyond dispute that a legitimate governmental interest is to provide fire inspections. It also is rationally related to only perform as many inspections as is economically feasible. Knowing that it is impossible to inspect every property, defendant was left with two choices: (1) conduct as many inspections as it could, or (2) conduct zero inspections so everyone was treated equally. Defendant's choice to proceed with the first option is eminently rational.

***9** Therefore, the trial court did not err by finding no cause of action for appellant's equal-protection claim.

V. CONCLUSION

The trial court correctly ruled in favor of defendant on all counts. We affirm.

All Citations

Not Reported in N.W. Rptr., 2023 WL 2436483

End of Document

2014 WL 5358392
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Eugene J. THOMAS, Walter Jamil a/k/a Wisam Jamil a/k/a Walter Thomas, SCD Enterprises, L.L.C., a/k/a TBI Enterprises, L.L.C., CBW Technologies, Inc., a/k/a TBI Technologies, Inc., CBW Enterprises, Inc., a/k/a TBI Franchising, Inc., American Eagle Warranty Corp., a/k/a TBI Warranty, Inc., and Time Square, Inc., a/k/a TBI Marketing, Inc., Plaintiffs–Appellees,

v.

MILLER CANFIELD PADDOCK & STONE, Defendant–Appellant.

Docket No. 314374.

Oct. 21, 2014.

Oakland Circuit Court; LC No.2010–112215–NM.

Before: METER, P.J., and K.F. KELLY and M.J. KELLY, JJ.

Opinion

PER CURIAM.

***1** Defendant appeals by leave granted an order denying its motion in limine to assert a wrongful conduct defense in plaintiffs' legal malpractice action. Because the doctrine of collateral estoppel bars plaintiffs' claims that arise from their own wrongful conduct, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

This is a legal malpractice case. The underlying case giving rise to the malpractice litigation involved an action brought by Computer Business World, L.L.C., against plaintiffs.

Plaintiffs Eugene J. Thomas and Walter Thomas were the owners of plaintiffs American Eagle Warranty Corporation, Times Square, Inc., CBW Enterprises, Inc., CBW Technologies, Inc., and SCD Enterprises, L.L.C. (collectively referred to as "CBW"). CBW entered into an asset purchase agreement with Computer Business World, through which Computer Business World purchased the assets of CBW. Dr. Parviz (Perry) Daneshgari owned Computer Business World. The parties to the purchase agreed to a purchase price consisting of $2 million payable at closing, $700,000 payable by promissory note after closing and the assumption of an outstanding bank debt of nearly $1.4 million. The purchase agreement allocated various amounts of the purchase price to specific categories: working capital, equipment, security deposits and good will, and they agreed to a post closing adjustment of the working capital. The purchase closed in July 2006.

In March 2007, Plante & Moran prepared the post closing adjustment of the working capital and determined that it should be adjusted downward by about $677,500. In around May 2007, Daneshgari discovered that before the parties entered into the purchase agreement, CBW engaged in a practice of fabricating invoices and advertisements, and he immediately stopped the practice. By September 2007, the business failed and a creditor brought a lawsuit against Computer Business World to collect on the outstanding balance of its debt.

Computer Business World commenced an action against plaintiffs, and the matter proceeded to arbitration. In its decision, the arbitrator specifically concluded:

> Prior to the sale of the business of the CBW Entities, the CBW Entities purchased a significant amount of their computer parts from Advanced Micro Devices ("AMD") and Intel Corporation ("Intel"). Both AMD and Intel had a marketing development fund program ("MDF") providing eligibility to purchasers of significant quantities of parts for reimbursement of advertising dollars. In order to qualify for reimbursement of advertising dollars, the purchasers had to meet specific requirements in their advertisements. The evidence reflected that the CBW Entities engaged in a practice of fabricating advertisements and invoices for the purpose of seeking reimbursement under the Intel or AMD MDF programs. Walter and Eugene Thomas authorized and approved this practice. The reimbursements were reported as rebates in the cost of goods sold, rather than advertising expenses, in the financial statements of the CBW Entities.

* * *

***2** The evidence reflected that the CBW Entities annually sold in excess of $2,000,000.00 of computer parts to Viva Computers, which allowed the CBW Entities to purchase significant quantities of parts from AMD and Intel at discounted prices. Both Mr. JR Breslin and Mr. Daneshgari testified that AMD and Intel terminated the favorable pricing program with the CBW Entities, based on the fact that before the closing, products sold by the CBW Entities and purchased from AMD and Intel had been traced to products sold in foreign countries in violation of the policies of AMD and Intel. The loss of favorable pricing programs adversely affected the profitability of the company and the ability to participate in advertising rebate programs.

* * *

... The evidence does not support the Thomas' claims that they disclosed the practice of fabricating invoices and advertisements to Dr. Daneshgari before the closing, and I specifically find that Claimants could not have detected this practice through normal due diligence. In this regard, the evidence was conflicting as to whether an e-mail was sent to Dr. Daneshgari and Lindsey Stetson of Miller Canfield, who represented the CBW Entities, disclosing the practice of fabricating invoices and advertisements before the closing.[1] Nevertheless, even assuming that the e-mail was sent to Dr. Daneshgari before the closing, the fact of the matter is that even Ms. Stetson did not conclude from reading the e-mail that the CBW Entities had fabricated invoices and advertisements. Accordingly, the e-mail itself does not provide sufficient disclosure of the practice before the closing.

[1] At issue was not an email, but a fax. The fax was from chief financial officer Sam Shabander to Daneshgari, and was forwarded to Lindsey Stetson:

> Perry [Daneshgari],
>
> Please find enclosed the Articles of Incorporation for the separate entity, Times Square, Inc. The sole purpose of this stand-alone/shell company is to create and provide advertising, marketing and consulting invoices to Computer Builders Warehouse, who in turn submits these invoices to vendors for Market Development Fund (MDF) reimbursements.
>
> As you are aware from your discussion with Gene and Walter [plaintiffs] yesterday, due to the narrow nature of the Market Development Funds (MDF) system that was created and set-up by our vendors, these submitted invoices may not necessarily reflect what is actually advertised. However, this practiced structure allows CBW to draw 100% of its earned co-op funds from its vendors in which these funds are then reinvested back into Computer Builders Warehouse for market development and operations.
>
> Please feel free to contact me if you have any questions.

* * *

I find that [the CBW Entities] had a legal duty to disclose the practice of fabricating advertisements and invoices for AMD and Intel, as well as the fact that they were purchasing a high volume of parts from Intel and AMD at discounted prices and selling them through improper market channels. I also find that [the CBW Entities] failed to disclose these facts in order to induce reliance by [Computer Business World], that the non-disclosure was misleading, that [Computer Business World] acted in reliance on the misimpression created by [the CBW Entities], and that [Computer Business World was] damaged as a result of [the CBW Entities'] failure to disclose. In this regard, I find that [the CBW Entities] inaccurately reported the reimbursements from the MDF programs as rebates in the cost of goods sold, rather than as advertising expenses, on the companies' financial statements.

The arbitrator awarded $2.8 million in damages to Computer Business World.

Oakland County Circuit Court Judge Wendy Potts granted Computer Business World's motion to confirm the arbitration award on November 12, 2008. This Court affirmed the order confirming arbitration. *Computer Business World, LLC, v. Thomas,* unpublished opinion per curiam of the Court of Appeals, issued September 2, 2010 (Docket Nos. 289396, 290366), lv den 488 Mich. 1047, 794 N.W.2d 610 (2011).

***3** Plaintiffs Eugene and Walter Thomas filed chapter 11 bankruptcy petitions. Computer Business World filed an adversary proceeding against them, arguing that plaintiffs' debts were nondischargeable due to fraud. The bankruptcy court, relying on the arbitrator's finding that plaintiffs' acted fraudulently, applied the principle of collateral estoppel and

concluded that the debt was nondischargeable. *In re Jamil,* 409 B.R. 866, 871 (Bankruptcy Court, ED Mich.2009).

Plaintiffs brought this action against defendant and others[2], alleging legal malpractice. They alleged that during the course of the representation, they told defendant about the AMD practices, as well as other matters, and that defendant failed to disclose this information to Computer Business World. Plaintiffs asserted that in the absence of defendant's "substandard representation, legal malpractice and breach of the standard of practice," the $2.8 million arbitration award would not have been entered against them. They alleged 39 separate breaches of the standard of practice.

2 The individual defendants were attorneys, some of whom worked for defendant. Plaintiffs alleged legal malpractice against them as well as defendant. The trial court dismissed plaintiffs' claims against all other defendants.

On January 20, 2012, defendant filed a motion for summary disposition, seeking dismissal of all claims arising from or related to the MDF practices. It relied on collateral estoppel and the doctrine of *in pari delicto.* Also, on January 13, 2012, defendant moved in limine to preclude plaintiffs from introducing evidence to refute any factual issues resolved by the arbitrator. Defendant parsed the arbitrator's decision into 11 facts, which it asserted were established by virtue of the arbitrator's findings. It argued that pursuant to the doctrine of collateral estoppel, plaintiffs should not be permitted to relitigate those facts.

On March 27, 2012, the trial court issued an opinion and order, denying defendant's motion for summary disposition, but granting defendant's motion in limine to preclude evidence refuting factual issues decided in arbitration. The trial court determined that the following facts had been established:

(1) That Plaintiffs engaged in a practice of fabricating advertisements and invoices for the purpose of seeking reimbursement under the Intel or AMD MDF programs;

(2) That Walter and Eugene Thomas authorized and approved this practice;

(3) That Daneshgari could not have detected the practice of fabricating invoices and advertisements through normal due diligence;

(4) That Plaintiffs failed to disclose the practice to Daneshgari;

(5) That Plaintiffs failed to disclose the practice of purchasing a high volume of parts from Intel and AMD at discounted prices and selling them through improper market channels;

(6) That the nondisclosure was misleading;

(7) That the nondisclosure of selling through improper market channels was misleading;

(8) That Plaintiffs knew the non-disclosures were misleading;

(9) That Daneshgari acted in reliance upon the non-disclosures; and

(10) That Plaintiff's inaccurately reported the reimbursements from the MDF programs as rebates in the cost of goods sold, rather than as advertising expenses on the companies' financial statements.

***4** However, the trial court went on to state the issue of defendant's malpractice was not litigated and defendant was not entitled to summary disposition:

> Even with this ruling as to collateral estoppel, Defendants['] request for summary disposition to dismiss the allegations that Miller Canfield Defendants failed to disclose the MDF practices ..., failed to advise Plaintiffs to not sell their businesses if the MDF created liability ..., and failed to inquire into, use the information found in, or follow up on the information disclosed in Plaintiffs' fax of June 2, 2006 ... is unsupported because **these allegations** were ***not*** litigated in a prior litigation and are the crux of the alleged legal malpractice by Defendants.

In a May 25, 2012 opinion and order, the court also granted defendants' motion to deem additional facts—the valuation of

Computer Business World—admitted on the basis that they were litigated in the arbitration.

Trial commenced, but after several days of proceedings, the court granted defendant's motion for mistrial due, in significant part, to the confusion regarding application of collateral estoppel. The parties were essentially granted a "do over" in which they could re-argue previous motions.

Defendant again moved to deem certain facts established on the basis of collateral estoppel, arguing that plaintiffs were precluded from introducing evidence that contradicted the established facts. It argued that the arbitrator's finding that plaintiffs intentionally defrauded Daneshgari when they sold the business to him precluded plaintiffs from relitigating the issue. Defendant further argued that application of collateral estoppel in this case resulted in a dismissal of plaintiffs' claims based on the wrongful conduct rule and the principle of *in pari delicto.*

Plaintiffs opposed the motion. They argued that collateral estoppel had no application in a legal malpractice action so as to preclude litigation of issues that were decided in a prior arbitration proceeding between the former client and a third party. Plaintiffs maintained that defendant could not satisfy all of the requirements for application of collateral estoppel: (1) actual litigation of essential facts; (2) full and fair opportunity to litigate the issues in the previous lawsuit; and (3) mutuality. Plaintiffs claimed that the issues in the case at bar were different from those in the previous matter and therefore collateral estoppel did not apply.

The court held a hearing on defendant's motion on November 7, 2012. The trial court held that collateral estoppel did not apply:

> Here, the Court finds that the issues of fact relied upon in the arbitration dealt with the conduct of the buyer and seller in the underlying asset purchase agreement and did not deal with the plaintiffs' attorneys [sic] alleged failure to disclose the MDF practices and/or failure by the lawyers, Miller Canfield defendants, to advise plaintiffs not to sell their business, the precise legal malpractice claims, or issues in this case. As argued by plaintiff, the three issues at stake in this litigation were neither addressed in the underlying arbitration nor involved the same parties. Any prior ruling [sic] made by this Court were palpably wrong and based upon an erroneous reading of the doctrine here involved.

***5** The court entered an order denying defendant's motion to have certain facts deemed admitted on November 29, 2012. This Court denied defendant's application for leave to appeal on the collateral estoppel issue. *Eugene J Thomas v. Miller Canfield Paddock & Stone PLC,* unpublished order of the Court of Appeals, entered January 11, 2013 (Docket No. 313650).

While defendant's application was pending in this Court, defendant filed a motion in limine in the trial court, requesting that it be allowed to assert the wrongful conduct rule as a defense and that the trial court instruct the jury on the rule. Defendant argued that there were "two distinct frauds." The first fraud was plaintiffs' act of defrauding their vendors—AMD—by submitting fake advertisements and fake invoices. "The narrow factual dispute for the jury to decide is whether the vendors authorized the scheme." The second fraud was plaintiffs' act of defrauding their buyer—Daneshgari—by failing to disclose the fake invoices, failing to disclose "gray market" sales, and misrepresenting plaintiffs' financial records. Because the trial court previously ruled that collateral estoppel no longer applied, defendant was ready to present the same evidence as was presented at the arbitration hearing. Defendant argued that the wrongful conduct rule may be applied under the circumstances of this case and that the jury should have the opportunity to decide the issue.

In response, plaintiffs argued that the applicability of the wrongful conduct rule was not an issue to be presented to the jury; it was an issue of law to be determined by the judge. Plaintiffs further argued that the wrongful conduct rule did not apply because the alleged prohibited conduct was not a violation of criminal law. In addition, plaintiffs challenged application of the wrongful conduct rule on the ground that a sufficient causal nexus between their alleged conduct and their asserted damages did not exist.

The court addressed defendant's motion at a hearing on January 9, 2013. It explained, in part:

> Plaintiffs' legal malpractice claim against defendants [sic] is that defendants [sic] failed to disclose the MDF practices to the buyer under the buy/sell agreement. Defendants [sic] argue ... that plaintiffs' conduct was a proximate cause of their own illegal conduct under MCL 750.218 which makes it a crime for a person to defraud, cheat, or use false pretenses to obtain from a person money or the like. Again, [*Orzel v. Scott Drug Co.*, 449 Mich. 550, 537 N.W.2d 208 (1995),] states that a sufficient causal nexus must exist between plaintiffs' alleged conduct and plaintiffs' asserted damages.
>
> Here, plaintiffs' allegation of damages against Miller Canfield is based on their failure to disclose the MDF practices that plaintiff admitted it incurred. Important—their being Miller Canfield. Importantly, this Court notes that plaintiffs' position in this case is that their vendor, AMD, allowed plaintiffs to present fake ads and false invoices contrary to defendants' allegations that plaintiffs intended to defraud both AMD and [Daneshgari].
>
> ***6** This case is about whether Miller Canfield failed to disclose the practices and plaintiffs' damages, if any, as a result. Based on the facts alleged, the Court finds that there is not—not a sufficient causal nexus between plaintiffs' MDF practices and the claimed damages in this legal malpractice case to warrant the defense. The Court also agrees and opines that whereas here [sic], a similar approach can be taken through comparative fault. The confusion to the jury would be almost insurmountable particularly where the Court would be—could be asked to draw parallels to a criminal statute in a civil proceeding. That confusion could be for example, the burden of proof, actual elements and the like.

On January 11, 2013, the court entered an order denying defendant's motion in limine requesting the court to permit it to assert the wrongful conduct defense and to instruct the jury accordingly. This Court granted defendant's application for leave to appeal. *Eugene J Thomas v. Miller Canfield Paddock & Stone PLC,* unpublished order of the Court of Appeals, entered January 30, 2013 (Docket No. 314374).

II. ANALYSIS

At oral argument, we asked the parties to revisit the issue of collateral estoppel. After reviewing counsels' well-written supplemental briefs, we now conclude that collateral estoppel applies to the facts of this case and that the wrongful conduct rule precludes plaintiffs from pursuing their malpractice action to the extent their claims touch upon their own misconduct.

The application of collateral estoppel is a legal question, which this Court reviews de novo. *Estes v. Titus,* 481 Mich. 573, 578–579, 751 N.W.2d 493 (2008).

Under the wrongful conduct rule, a plaintiff's claim is barred when his claim is based entirely or partially on his own illegal conduct. *Orzel,* 449 Mich. at 558, 537 N.W.2d 208. The rule also encompasses the "doctrine of *in pari delicto,*" which applies to bar a claim between parties where the parties are equally in the wrong. *Id.*

> The rationale that Michigan courts have used to support the wrongful-conduct rule are rooted in the public policy that courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct. If courts chose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties. As stated by the Court of Appeals, where the plaintiff has engaged in illegal conduct, it should be the "plaintiff's own criminal responsibility which is determinative." [*Id.* at 559–560, 537 N.W.2d 208 (internal citations and footnotes omitted).]

***7** "To implicate the wrongful-conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute." *Id.* at 561, 537 N.W.2d 208. In addition, "[f]or the wrongful-conduct rule to apply, a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Id.* at 564, 537 N.W.2d 208. The *Orzel* Court explained:

> "[The plaintiff's] injury must have been suffered while and as a proximate result of committing an illegal act. The unlawful act must be at once the source of both his criminal responsibility and his civil right. The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case. Where the

> violation of law is merely a condition and not a contributing cause of the injury, a recovery may be permitted." [*Id.* at 565, 537 N.W.2d 208, quoting *Manning v. Bishop of Marquette,* 345 Mich. 130, 136, 76 N.W.2d 75 (1956), quoting *Meador v. Hotel Grover,* 193 Miss. 392, 9 So.2d 782 (Miss, 1942).]

A plaintiff's conduct must only be "a" proximate cause of the damages; it need not be "the" proximate cause. *Orzel,* 449 Mich. at 566–567, 537 N.W.2d 208.

For the wrongful conduct rule to apply in this case, plaintiffs' conduct—their alleged fraud with regard to the asset purchase agreement—must be illegal. [3] It must be prohibited by a penal or criminal statute. Defendant asserts that plaintiffs' conduct with regard to the sale of the businesses to Daneshgari and Computer Business World constituted false pretenses pursuant to MCL 750.218. The crime of false pretenses exists where a person, "with the intent to defraud or cheat makes or uses a false pretense to ... [o]btain from a person any money...." MCL 750.218(1)(c). The elements of the offense include: (1) a false representation as to an existing fact; (2) knowledge that the representation is false; (3) use of the false representation with the intention to deceive; and (4) detrimental reliance on the false representation. *People v. Webbs,* 263 Mich.App. 531, 532, n. 1, 689 N.W.2d 163 (2004).

3 The parties improperly focus on plaintiffs' conduct as it relates to AMD when the proper focus is on plaintiffs' conduct as it relates to the asset purchase agreement. Plaintiffs submitted inaccurate financial statements, which included the false invoices, during the purchase agreement. Plaintiffs induced Daneshgari and Computer Business World to rely on inaccurate financial information.

We conclude that plaintiffs are collaterally estopped from arguing that their conduct was non-fraudulent. Moreover, their fraudulent conduct satisfies the elements of false pretenses. Plaintiffs submitted false financial statements with knowledge of their falsity and with the intent to deceive Daneshgari and Computer Business World during the asset purchase agreement.

"Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v. Michalik,* 244 Mich.App. 569, 577, 625 N.W.2d 462 (2001). The purpose of the principle is "to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.' " *Detroit v. Qualls,* 434 Mich. 340, 357 n. 30, 454 N.W.2d 374 (1990), quoting *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). The principle of collateral estoppel "applies to factual determinations made during ... arbitration proceedings." *Porter v. Royal Oak,* 214 Mich.App. 478, 485, 542 N.W.2d 905 (1995).

***8** Three elements must be established for application of collateral estoppel: "(1) 'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment'; (2) 'the same parties must have had a full [and fair] opportunity to litigate the issue'; and (3) 'there must be mutuality of estoppel.' " *Monat v. State Farm Ins. Co.,* 469 Mich. 679, 682–684, 677 N.W.2d 843 (2004), quoting *Storey v. Meijer, Inc.,* 431 Mich. 368, 373 n. 3, 429 N.W.2d 169 (1988). "[W]here collateral estoppel is being asserted defensively against a party who has already had a full and fair opportunity to litigate the issue, mutuality is not required." *Monat,* 469 Mich. at 680–681, 677 N.W.2d 843.

The first requirement for application of collateral estoppel is that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment. " 'Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between parties in a subsequent action on a different cause of action.' " *Senior Accountants, Analysis & Appraisers Ass'n v. Detroit,* 399 Mich. 449, 458, 249 N.W.2d 121 (1976), quoting Restatement Judgments, § 68, p 293. Collateral estoppel applies only where the ultimate issue in the second proceeding is identical to that determined in the prior action, *Qualls,* 434 Mich. at 357, 454 N.W.2d 374; *Amalgamated Transit Union, Local 1564 v. Southeastern Michigan Transportation Authority,* 437 Mich. 441, 451, 473 N.W.2d 249 (1991). "The issue [ ] must be identical, not merely similar." *Board of County Rd. Comm'rs v. Schultz,* 205 Mich.App. 371, 376, 521 N.W.2d 847 (1994). That issue must also be essential to the final judgment:

> "The issue to be concluded must be the same as that involved in the prior action. In the prior action, the issue must have been raised and litigated, and actually adjudged. The issue must have been material and relevant to the disposition of the prior action. The determination made of

> the issue in the prior action must have been necessary and essential to the resulting judgment." [*Qualls,* 434 Mich. at 357, 454 N.W.2d 374, quoting 1B Moore, Federal Practice, ¶ 0.443[1], p 759.]

The "issue" that is the focus of this matter is plaintiffs' fraud, as found by the arbitrator. The arbitrator made specific findings that plaintiffs engaged in misrepresentation and fraud and those findings must be considered established in this case. The arbitrator specifically concluded:

> I find that [the CBW Entities] had a legal duty to disclose the practice of fabricating advertisements and invoices for AMD and Intel, as well as the fact that they were purchasing a high volume of parts from Intel and AMD at discounted prices and selling them through improper market channels. I also find that [the CBW Entities] failed to disclose these facts in order to induce reliance by [Computer Business World], that the non-disclosure was misleading, that [Computer Business World] acted in reliance on the misimpression created by [the CBW Entities], and that [Computer Business World was] damaged as a result of [the CBW Entities'] failure to disclose. In this regard, I find that [the CBW Entities] inaccurately reported the reimbursements from the MDF programs as rebates in the cost of goods sold, rather than as advertising expenses, on the companies' financial statements.

***9** The arbitrator also determined the amount of damages and awarded Daneshgari and Computer Business World $2.8 million. These findings were essential to the arbitrator's judgment against plaintiffs in that action.

Oakland County Circuit Court Judge Wendy Potts granted Computer Business World's motion to confirm the arbitration award on November 12, 2008, rejecting CBW's claims that the arbitrator exceeded his authority in awarding more damages than the purchase agreement permitted and that its due process rights were violated because relevant evidence from an AMD representative would have revealed that there was no fraud:

> Defendants have raised a multitude of issues. However, the Court finds every one of those issues was waived by the defendants because they never objected to these issues during the lengthy arbitration proceeding. Even with regard to defendants' claim that the arbitrator exceeded a contractual monetary cap on damage, ... the award reflects damages for a claim raised outside the contractual cap, and the defendants never objected to the plaintiff's request to amend its complaint to add a tort claim. Nor, did defendants object to the arbitrator considering this issue during the proceeding.
>
> Based on defendants' failure to make any objections during the proceeding, looking at the face of the award, the Court cannot find any mistakes of fact or law that the arbitrator exceeded his authority or any conduct by the arbitrator which would justify vacating the award as provided in MCR 3.602(K).
>
> Thus, after considering the arguments of the parties, the Court finds the award of the arbitrator should be confirmed and a judgment should be entered consistent with this award.

CBW moved for reconsideration, again arguing that the failure of certain witnesses to testify was the most significant factor that allowed the arbitrator to conclude that the defendants' advertising rebates were a fraud on AMD and that the damages award was inappropriate. The trial court denied CBW's motion for reconsideration:

> Defendants' arguments concerning the witness testimony of whether Defendants defrauded AMD in their purchase of the chips goes to the merits of the case and ask this Court to substitute its judgment for that of the arbitrator, which this Court is not permitted to do. *Gordon Sel–Way, Inc. supra,* 438 Mich. 497. In the award, the arbitrator made specific factual findings concerning the AMD reimbursement for advertising dollars transactions based on the

> evidence presented at the hearing. Moreover, no evidence has been presented in Defendants' motion for reconsideration, through a transcript of the arbitration hearing, that the arbitrator refused to allow Defendant to present evidence via specific witness testimony at the arbitration hearing.

This Court affirmed the order confirming arbitration. *Computer Business World, LLC, v. Thomas,* unpublished opinion per curiam of the Court of Appeals, issued September 2, 2010 (Docket Nos. 289396, 290366). This Court rejected the claim that the arbitrator exceeded his authority in awarding damages for CBW's fraud in the inducement claim. "Because the arbitration defendants' fraud in the inducement assertion presents an impermissible invitation to scrutinize the merits of the arbitration award, we decline to consider any purported error by the arbitrator in this regard." *Id.* at slip op, p 6. Importantly, this Court also rejected the claim that the arbitrator should have postponed the hearing in order to allow CBW to subpoena AMD account representative "Mr. Stein" who would have testified that the practice of fabricating invoices was authorized by AMD. CBW had argued that Stein's testimony would have established that they acted in good faith. This Court concluded otherwise:

> ***10** The arbitrator concluded that the arbitration defendants [CBW] had a legal duty to disclose their practice of fabricating advertisements and invoices relating to AMD and Intel, a practice that [Computer Business World] could not otherwise have detected. The arbitrator also found that the arbitration defendants did not disclose this practice "in order to induce reliance by [Computer Business World], [and] that the non-disclosure was misleading." In light of the arbitrator's findings and logic, it appears highly unlikely that he would have deemed integral or even relevant to his analysis whether an AMD representative had authorized the invoice fabrication practice. At a minimum, especially given the arbitration defendants' neglect to substantiate in any respect any purported information to which Stein could have testified, the record before us offers only speculation to bolster the arbitration defendants' averments that "the arbitrator refused to postpone the hearing on a showing of sufficient cause, [or] refused to hear evidence material to the controversy." And as a general rule, courts will not vacate an arbitrator's award on the basis of speculative concerns. [*Id.* at slip op, pp 8–9.]

The matter was visited again in plaintiffs' Chapter 11 bankruptcy petitions. *In re Jamil,* 409 B.R. 866, 871 (Bankruptcy Court, ED Mich.2009). The bankruptcy court looked to the arbitrator's decision and found all the elements necessary to establish non-dischargeability for reasons of fraud. It concluded that the debts to Computer Business World (the arbitration award) were nondischargeable.

> In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss ...
>
> In the arbitration proceeding, [Computer Business World] alleged fraud in the inducement and breach of contract against the defendants. "Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." ... Following 13 days of hearings, the arbitrator issued his opinion in which he ... determined all of the necessary elements under § 523(a)(2)(A). Accordingly, the Court concludes that the debt of each debtor to the plaintiff is nondischargeable under § 523(a)(2)(A). [*Id.* at 872.]

In the instant action, plaintiffs claim that defendant committed legal malpractice through defendant's representation of plaintiffs during the asset purchase agreement, which resulted in the unfavorable arbitration award. "To state a claim for legal malpractice, a plaintiff must allege (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was the proximate cause of an injury, and (4) the fact and the extent of the injury alleged." *Kloian v. Schwartz,* 272 Mich.App. 232, 240, 725 N.W.2d 671 (2006). To establish proximate cause, plaintiffs must show that defendant's alleged failures were a cause in fact of plaintiff's injury. *Manzo v. Petrella,* 261 Mich.App. 705, 712, 683 N.W.2d 699 (2004). This will require a showing that in the absence of defendant's alleged malpractice plaintiffs would have successfully defended the claims raised in arbitration. *Id.*

***11** In support of their claim, plaintiffs allege in part that they revealed the MDF practices to defendant and that defendant did not disclose those practices or other irregularities to Computer Business World/Daneshgari. To prevail on their legal malpractice claim, plaintiffs must demonstrate that defendant had knowledge of the MDF practices and other irregularities and that if it had disclosed those facts to Computer Business World/Daneshgari, Computer Business World/Daneshgari would not have prevailed in the underlying arbitration.

The arbitrator's findings of fact must be considered established in this action because the issue of plaintiffs' fraud during the asset purchase agreement was actually litigated and determined by a valid and final judgment and was essential to that judgment. The basis of the claims asserted by Computer Business World and Daneshgari was plaintiffs' misrepresentation/fraud. The findings in that regard were actually litigated at arbitration and determined by the arbitrator. Those facts are relevant to determining whether defendant's alleged malpractice was the proximate cause of plaintiffs' injury, which is the $2.8 million arbitration award against it. To the extent that plaintiffs' fraudulent conduct is an issue that must be resolved in the case at bar, relitigation of that issue is barred.

In support of their position that collateral estoppel does not apply, plaintiffs rely on *Computer Business World, LLC v. Simen,* unpublished opinion per curiam of the Court of Appeals, issued March 13, 2012 (Docket No. 301082), 2012 WL 832847. *Computer Business World* involved Computer Business World and Daneshgari's legal malpractice claim against the attorneys who represented them during the asset purchase agreement transaction. This Court explained:

> The arbitrator issued an opinion and award on August 4, 2008. The arbitrator found that prior to the purchase, the sellers had engaged in a scheme to fabricate advertisements and invoices in order to obtain advertisement reimbursement, which they then reported as rebates in the costs of goods sold. The arbitrator further concluded that plaintiffs became aware of the fabrication of invoices and advertisements nine months after the purchase, and that plaintiffs "could not have detected this practice through normal due diligence." The arbitrator also found that the sellers had a legal duty to "disclose the practice of fabricating advertisements and invoices" and the sellers' purchase of "a high volume of parts from Intel and AMD at discounted prices and selling them through improper market channels." Moreover, the arbitrator found that two representatives of the sellers breached the contract when they walked out of a meeting concerning the company's working capital, threatened to bankrupt the company, and refused to work for the company for the agreed upon year after the sale.
>
> Nevertheless, the arbitrator concluded that plaintiffs were "not entitled to rescission of the [asset purchase agreement] because they did not make a seasonable assertion of their rescission right." However, because of the fraudulent concealment and breach of contract by the sellers, the arbitrator awarded plaintiffs damages of $2,800,000, plus interest. The circuit court confirmed the arbitration decision. It was plaintiffs' [Computer Business World and Daneshgari] belief that they "would have had a higher arbitration award [but Simen] missed the deadline for breach of contract suit." [*Id.* at slip op at 2–3.]

***12** The plaintiffs (Computer Business World/Daneshgari) alleged that the attorneys failed to (1) properly perform due diligence; (2) detect, warn or explain the implications of the CBW's failure to properly trademark their name and logo; (3) advise them that due diligence should be conducted regarding trademark issues; (4) negotiate their debt; (5) seek an extension of a lease; and (6) seek rescission and engaged in other acts of malpractice. *Id.,* slip op at 4.

The defendants in *Computer Business World* (attorney Sander Simen and his law firm) moved for summary disposition on collateral estoppel grounds. In rejecting the application of collateral estoppel in that case, this Court explained:

> [T]he issues addressed in the arbitration are plaintiffs' [Computer Business World and Daneshgari] claims relating to the misrepresentations and fraudulent conduct of the sellers, not the conduct of Simen and his firm or their legal representation of plaintiffs in those transactions. Nowhere in the arbitrator's opinion is there any reference to intellectual property, intellectual property due diligence, or whether defendants bore any legal responsibility for the failure to perform intellectual property due diligence. The only mention of the term "due diligence" is a statement that plaintiffs [Computer Business World and Daneshgari] could not have discovered the fabrication of invoices and advertisements through due diligence, and plaintiffs [Computer Business World and Daneshgari] are not asserting any claim relating to the fabrication of invoices and advertisements in this lawsuit. Thus, the issue of defendants' [the attorneys] responsibility

> for intellectual property due diligence was not actually litigated and was not subject to any final judgment.
>
> With regard to plaintiffs' [Computer Business World and Daneshgari] claim of legal malpractice relating to the Madison Heights lease, there is likewise no mention in the arbitration opinion of the lease or of the events surrounding plaintiffs' eviction. Thus, collateral estoppel does not bar this claim, because the issue has not been actually litigated and has not been subject to a final judgment. As for rescission, the arbitrator did state that rescission of the contract was not seasonably sought. However, the arbitrator made no findings of fact relating to why rescission was not sought, at what point rescission should have been sought, or the role defendants [the attorneys] played in failing to seek rescission. Moreover, as plaintiffs [Computer Business World and Daneshgari] acknowledge, even if collateral estoppel did apply, this would not justify granting defendants' [the attorneys] motion for summary disposition because a finding that rescission was not seasonably sought actually bolsters plaintiffs' [Computer Business World and Daneshgari] claim that defendants [the attorneys] committed legal malpractice. [*Id.,* slip op at 6.]

Computer Business World is easily distinguishable from the case at bar. Although the arbitrator did not address the issues that form the basis of plaintiffs' claim of legal malpractice in this action (i.e., defendant's representation leading up to the asset purchase agreement), the arbitrator *did* address the key issue of plaintiffs' fraud. Plaintiffs' fraud and misrepresentation are issues that must be determined in order to resolve plaintiffs' legal malpractice action because, under the wrongful conduct rule, plaintiffs are precluded from asserting a claim against defendant for their own misconduct. The trial court erred in denying defendant's request that it deem the facts as determined by the arbitrator as established for purposes of this action. [4]

4 We reject plaintiffs' attempt to reference an affidavit authored by their former attorney, Sander Simen. Plaintiffs sued Daneshgari, Computer Business World and others in federal district court, alleging, inter alia, claims under the Racketeer Influenced and Corrupt Organizations Act and the Fair Debt Collection Practices Act. *Thomas v. Daneshgari,* 997 F Supp 2d 754 (E.D.Mich.2014). They argued that Daneshgari perjured himself during the arbitration proceeding and, therefore, fraudulently procured a judgment against them. In the affidavit, Simen avers that he was present when plaintiffs advised Daneshgari of the invoice practice. The district court dismissed plaintiffs' federal claims as without merit and declined to exercise supplemental jurisdiction over plaintiffs' remaining state claims. The district court noted:

> Plaintiffs could theoretically return to state court and move to amend the state court judgment, or request relief from the judgment. The Michigan Court Rules authorize the state court to grant a new trial based upon "irregularity in the proceedings" or "misconduct ... of the prevailing party." MCR 2.611(A)(1)(a), (b). The Michigan Court Rules authorize "relief from judgment" based on "[n]ewly discovered evidence" or "[f]raud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." MCR 2.612(C)(1)(a), (c). Plaintiff's counsel conceded at the hearing that this kind of relief was available. [*Thomas,* 997 F Supp 2d at 761, n. 4.]
>
> Similarly, we conclude that the arbitration award (and prior judgments arising therefrom) continue to be valid absent an order setting it aside.

***13** Plaintiffs argue that, even if certain facts are deemed established, the wrongful conduct rule does not apply because there is no causal nexus between a plaintiffs' wrongful conduct and their claim for damages.

As noted by defendant, there is support for applying the wrongful conduct rule in the context of a legal malpractice action. In *Pantely v. Garris & Garris, PC,* 180 Mich.App. 768, 447 N.W.2d 864 (1989), which predated *Orzel,* this Court applied the doctrine of *in pari delicto* to bar the plaintiff's legal malpractice claim against the attorneys and law firm that represented her in her divorce proceedings. The plaintiff, on advice from her attorneys, perjured herself, claiming that she had lived in Livingston County for at least 10 days before filing her complaint. She obtained a divorce judgment, which was later set aside for lack of jurisdiction. The plaintiff then filed a legal malpractice action against her attorneys, alleging that they were negligent by filing the action in Livingston County, alleging that she was a resident of Livingston County, and advising her to testify falsely that she lived in Livingston County. *Id.* at 770–771, 447 N.W.2d 864.

The defendants moved for summary disposition, asserting that the plaintiff was *in pari delicto* with them and may not profit from her unsuccessful fraud. *Id.* at 772, 447 N.W.2d 864. The plaintiff argued against application of the doctrine of in pari delicto, asserting that she lied at her attorneys' direction and was emotionally distraught and desperate to obtain the divorce. She asserted that "she acted 'under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition' " and that her misconduct was not as reprehensible as that of the defendants. *Id.* at 775–776, 447 N.W.2d 864. The Court found the doctrine applicable. It held that because "all of the losses claimed resulted from the Supreme Court's decision to set aside the Livingston County judgment and since that decision was premised solely upon [the plaintiff's] perjury, that perjury bars all claims against [the] defendants...." *Id.* at 778, 447 N.W.2d 864. This Court wrote:

> We can readily envision legal matters so complex and ethical dilemmas so profound that a client could follow an attorney's advice, do wrong and still maintain suit on the basis of not being equally at fault. But perjury is not complex; and telling the truth poses no dilemma. Even against the backdrop of a moral relativism that passes for intellectual sophistication in contemporary America, perjury is wrong. More pointedly, it is a crime. MCL 750.422; MSA 28.664. A law degree does not add to one's awareness that perjury is immoral and illegal, any more than an accounting degree adds to one's awareness that tax fraud is immoral and illegal. We agree with the views expressed by the Wisconsin Supreme Court in *Evans [v Cameron,* 121 Wis.2d 421, 360 N.W.2d 25, 28–29 (Wis, 1985)]:
>
> > "There may be circumstances in which the advice given by an attorney is so complex that the client would be unaware of the wrongfulness involved in following that advice. In such circumstances, more weight may be given to the influence an attorney will have over the client and the amount of reliance which the client can justifiably place in the attorney. The wrongfulness of lying while under oath, however, is apparent. Absent some allegation of special circumstances constituting an exception to the rule of *in pari delicto* independent of the attorney-client relationship, the client's deliberate act of lying under oath places that client *in pari delicto* with the attorney who advised that client to lie."
>
> ***14** [*Pantely, supra* 180 Mich.App. at 776, 447 N.W.2d 864.]

The Court agreed that the attorneys' misconduct harmed the profession, the courts and the public. However, it noted that there exist means to account for those harms: discipline or disbarment; contempt proceedings; and criminal prosecution. *Id.* It commented, "To argue that an equal partner in the alleged perjury can clothe herself in the vicarious virtue of the public interest and recover damages caused by her own perjury is to willingly suspend disbelief." *Id.* at 777–778, 447 N.W.2d 864.

Plaintiffs brought this malpractice claim against defendant, alleging that defendant failed to disclose their MDF practices to Daneshgari and that as a result of that failure, they were held liable to Daneshgari and Computer Business World for a $2.8 million judgment. Plaintiffs can only establish their malpractice claim against defendant by relying on their own misconduct. The arbitration award against plaintiffs was based on their fraud, and this legal malpractice claim is premised on the fact that they were held liable for fraud. Therefore, a sufficient causal nexus exists between plaintiffs' fraudulent activity and the damages they claim in this action.

In conclusion, the doctrine of collateral estoppel bars plaintiff's claims against defendant to the extent those claims arise from their own wrongful conduct. Plaintiffs brought this legal malpractice action against defendant, arguing that defendant was negligent either because it knew about the false invoices and failed to include the information in the closing documents or because it did not know about the false invoices and failed to exercise due diligence in uncovering the practice and advising plaintiffs accordingly. Applying the doctrine of collateral estoppel, plaintiffs' conduct has been found fraudulent and the wrongful conduct rule precludes their recovery. Because plaintiffs have admitted to fabricating false invoices and their conduct in the asset purchase sale was found fraudulent by the arbitrator, there are no issues of fact remaining. As a matter of law, plaintiffs cannot proceed

on any of their malpractice claims that touch upon their own misconduct. [5]

5 Having found that collateral estoppel and the wrongful conduct rule apply, we need not address defendant's claim that the wrongful conduct rule is a matter of fact for the jury to decide. Nor need we determine whether comparative fault would adequately protect defendant in a manner similar to the wrongful conduct rule. Nor need we consider whether the wrongful conduct rule was unnecessarily confusing for a jury.

We vacate the trial court's order denying defendant's motion in limine to assert a wrongful conduct defense and remand for further proceedings to determine what, if any, of plaintiff's claims remain. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2014 WL 5358392

End of Document

Exhibit 5

LIBER 15512 PAGE 283

JUL 12 95 12:37 05

$ 17.00 MORTGAGE
$ 2.00 REMONUMENTATION
12 JUL 95 3:38 P.M. RECEIPT# 1218
PAID RECORDED - OAKLAND COUNTY
LYNN D. ALLEN, CLERK/REGISTER OF DEEDS

[Space Above This Line For Recording Data]

Loan No: 8017

MORTGAGE

THIS MORTGAGE ("Security Instrument") is given on June 30th, 1995 . The mortgagor is JEFFREY L. EISENBERG, and KAREN A. EISENBERG, Husband and Wife

whose address is 2040 FARROW, FERNDALE MI 48220 ("Borrower"). This Security Instrument is given to GROUP ONE MORTGAGE CORPORATION

which is organized and existing under the laws of the State of Michigan , and whose address is 19500 VICTOR PARKWAY SUITE 120 LIVONIA, MICHIGAN 48152 ("Lender"). Borrower owes Lender the principal sum of ONE HUNDRED TWENTY THOUSAND AND 00/100 Dollars (U.S. $ 120000.00). This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on July 01st , 2025 . This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, warrant, grant and convey to Lender, with power of sale, the following described property located in OAKLAND County, Michigan:

LOCATED IN THE CITY OF ROYAL OAK, COUNTY OF OAKLAND, STATE OF MICHIGAN, DESCRIBED AS FOLLOWS:
THE NORTH PART OF LOT 44 MEASURED 32.04 FEET IN FRONT AND 32 FEET IN REAR, ALSO SOUTH PART OF LOT 45 MEASURED 35.19 FEET IN FRONT AND 35 FEET IN REAR, KENSINGTON HIGHLANDS AS RECORDED IN LIBER 23, PAGE 10 OF PLATS, OAKLAND COUNTY RECORDS.
TAX CODE NO. 25-06-401-006

17.00
2.00 RMT

23010

which has the address of 4031 DUKESHIRE, ROYAL OAK [Street, City], Michigan 48073 ("Property Address");

U.K. -S.H.

[Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal and Interest; Prepayment and Late Charges. Borrower shall promptly pay when due the principal of and interest on the debt evidenced by the Note and any prepayment and late charges due under the Note.

2. Funds for Taxes and Insurance. Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum ("Funds") for: (a) yearly taxes and assessments which may attain priority over this Security Instrument as a lien on the Property; (b) yearly leasehold payments or ground rents on the Property, if any; (c) yearly hazard or property insurance premiums; (d) yearly flood insurance premiums, if any; (e) yearly mortgage insurance premiums, if any; and (f) any sums payable by Borrower to Lender, in accordance with the provisions of paragraph 8, in lieu of the payment of mortgage insurance premiums. These items are called "Escrow Items." Lender may, at any time, collect and hold Funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may require for Borrower's escrow account under the federal Real Estate Settlement Procedures Act of 1974 as amended from time to time, 12 U.S.C. Section 2601 *et seq.* ("RESPA"), unless another law that applies to the Funds sets a lesser amount. If so, Lender may, at any time, collect and hold Funds in an amount not to exceed the lesser amount. Lender may estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with applicable law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is such an institution) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items. Lender may not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. However, Lender may require Borrower to pay a one-time charge for an independent real estate tax reporting service used by Lender in connection with this loan, unless applicable law provides otherwise. Unless an agreement is made or applicable law requires interest to be paid, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender may agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds, showing credits and debits to the Funds and the purpose for which each debit to the Funds was made. The Funds are pledged as additional security for all sums secured by this Security Instrument.

If the Funds held by Lender exceed the amounts permitted to be held by applicable law, Lender shall account to Borrower for the excess Funds in accordance with the requirements of applicable law. If the amount of the Funds held by Lender at any time is not sufficient to pay the Escrow Items when due, Lender may so notify Borrower in writing, and, in such case Borrower shall pay to Lender the amount necessary to make up the deficiency. Borrower shall make up the deficiency in no more than twelve monthly payments, at Lender's sole discretion.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender. If, under paragraph 21, Lender shall acquire or sell the Property, Lender, prior to the acquisition or sale of the Property, shall apply any Funds held by Lender at the time of acquisition or sale as a credit against the sums secured by this Security Instrument.

3. Application of Payments. Unless applicable law provides otherwise, all payments received by Lender under paragraphs 1 and 2 shall be applied: first, to any prepayment charges due under the Note; second, to amounts payable under paragraph 2; third, to interest due; fourth, to principal due; and last, to any late charges due under the Note.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines and impositions attributable to the Property which may attain priority over this Security Instrument, and leasehold payments or ground rents, if any. Borrower shall pay these obligations in the manner provided in paragraph 2, or if not paid in that manner, Borrower shall pay them on time directly to the person owed payment. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this paragraph. If Borrower makes these payments directly, Borrower shall promptly furnish to Lender receipts evidencing the payments.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

5. Hazard or Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage" and any other hazards, including floods or flooding, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's approval which shall not be unreasonably withheld. If Borrower fails to maintain coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property in accordance with paragraph 7.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard mortgage clause. Lender shall have the right to hold the policies and renewals. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. If Borrower abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds. Lender may use the proceeds to repair or restore the Property or to pay sums secured by this Security Instrument, whether or not then due. The 30-day period will begin when the notice is given.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of the payments. If under paragraph 21 the Property is acquired by Lender, Borrower's right to any insurance policies and proceeds resulting from damage to the Property prior to the acquisition shall pass to Lender to the extent of the sums secured by this Security Instrument immediately prior to the acquisition.

6. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate, or commit waste on the Property. Borrower shall be in default if any forfeiture action or proceeding, whether civil or criminal, is begun that in Lender's good faith judgment could result in forfeiture of the Property or otherwise materially impair the lien created by this Security Instrument or Lender's security interest. Borrower may cure such a default and reinstate, as provided in paragraph 18, by causing the action or proceeding to be dismissed with a ruling that, in Lender's good faith determination, precludes forfeiture of the Borrower's interest in the Property or other material impairment of the lien created by this Security Instrument or Lender's security interest. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

7. Protection of Lender's Rights in the Property. If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. Although Lender may take action under this paragraph 7, Lender does not have to do so.

Any amounts disbursed by Lender under this paragraph 7 shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

8. Mortgage Insurance. If Lender required mortgage insurance as a condition of making the loan secured by this Security Instrument, Borrower shall pay the premiums required to maintain the mortgage insurance in effect. If, for any reason, the mortgage insurance coverage required by Lender lapses or ceases to be in effect, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the mortgage insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the mortgage insurance previously in effect, from an alternate mortgage insurer approved by Lender. If substantially equivalent mortgage insurance coverage is not available, Borrower shall pay to Lender each month a sum equal to one-twelfth of the yearly mortgage insurance premium being paid by Borrower when the insurance coverage lapsed or ceased to be in effect. Lender will accept, use and retain these payments as a loss reserve in lieu of mortgage insurance. Loss reserve

payments may no longer be required, at the option of Lender, if mortgage insurance coverage (in the amount and for the period that Lender requires) provided by an insurer approved by Lender again becomes available and is obtained. Borrower shall pay the premiums required to maintain mortgage insurance in effect, or to provide a loss reserve, until the requirement for mortgage insurance ends in accordance with any written agreement between Borrower and Lender or applicable law.

9. Inspection. Lender or its agent may make reasonable entries upon and inspections of the Property. Lender shall give Borrower notice at the time of or prior to an inspection specifying reasonable cause for the inspection.

10. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender.

In the event of a total taking of the Property, the proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. In the event of a partial taking of the Property in which the fair market value of the Property immediately before the taking is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the taking, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the taking, divided by (b) the fair market value of the Property immediately before the taking. Any balance shall be paid to Borrower. In the event of a partial taking of the Property in which the fair market value of the Property immediately before the taking is less than the amount of the sums secured immediately before the taking, unless Borrower and Lender otherwise agree in writing or unless applicable law otherwise provides, the proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the condemnor offers to make an award or settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the proceeds, at its option, either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of such payments.

11. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower or Borrower's successors in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 17. Borrower's covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower may agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

13. Loan Charges. If the loan secured by this Security Instrument is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge under the Note.

14. Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any other address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

15. Governing Law; Severability. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

16. Borrower's Copy. Borrower shall be given one conformed copy of the Note and of this Security Instrument.

17. Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

18. Borrower's Right to Reinstate. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earlier of: (a) 5 days (or such other period as applicable law may specify for reinstatement) before sale of the Property pursuant to any power of sale contained in this Security Instrument; or (b) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees; and (d) takes such action as Lender may reasonably require to assure that the lien of this Security Instrument, Lender's rights in the Property and Borrower's obligation to pay the sums secured by this Security Instrument shall continue unchanged. Upon reinstatement by Borrower, this Security Instrument and the obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under paragraph 17.

19. Sale of Note; Change of Loan Servicer. The Note or a partial interest in the Note (together with this Security Instrument) may be sold one or more times without prior notice to Borrower. A sale may result in a change in the entity (known as the "Loan Servicer") that collects monthly payments due under the Note and this Security Instrument. There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change in accordance with paragraph 14 above and applicable law. The notice will state the name and address of the new Loan Servicer and the address to which payments should be made. The notice will also contain any other information required by applicable law.

20. Hazardous Substances. Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 20, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 20, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

21. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under paragraph 17 unless applicable law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender, at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by applicable law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 21, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall give notice of sale to Borrower in the manner provided in paragraph 14. Lender shall publish and post the notice of sale, and the Property shall be sold in the manner prescribed by applicable law. Lender or its designee may purchase the Property at any sale. The proceeds of the sale shall be applied in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

22. Release. Upon payment of all sums secured by this Security Instrument, Lender shall prepare and file a discharge of this Security Instrument without charge to Borrower.

23. Riders to this Security Instrment. If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants and agreements of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument.
[Check applicable box(es)]

- ☐ Adjustable Rate Rider
- ☐ Graduated Payment Rider
- ☐ Balloon Rider
- ☐ V.A. Rider
- ☐ Condominium Rider
- ☐ Planned Unit Development Rider
- ☐ Rate Improvement Rider
- ☐ Other(s) [specify]
- ☐ 1-4 Family Rider
- ☐ Biweekly Payment Rider
- ☐ Second Home Rider

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

Witnesses:

Sharon Stewart
SHARON STEWART

Wendy Wojtkowski
WENDY WOJTKOWSKI

JEFFREY L. EISENBERG (Seal) -Borrower

KAREN A. EISENBERG (Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

STATE OF MICHIGAN, OAKLAND County ss:

The foregoing instrument was acknowledged before me this June 30th, 1995 (date)
by JEFFREY L. EISENBERG, and KAREN A. EISENBERG, Husband and Wife
(person acknowledging)

My Commission Expires: SHARON STEWART
NOTARY PUBLIC - MACOMB COUNTY, MICH.
MY COMMISSION EXPIRES 2-1-99

Sharon Stewart
Notary Public, acting in Oakland County, Michigan

This instrument was prepared by MARILYN J.F. GARRETT
GROUP ONE MORTGAGE CORPORATION
19500 VICTOR PARKWAY SUITE 120
LIVONIA, MICHIGAN 48152

Record And Return To:
GROUP ONE MORTGAGE CORP
19500 VICTOR PKWY STE 120
LIVONIA MI 48152

Exhibit 6

Account Service Listing

Monday, May 04, 2015

Location ID | Account # | Cycle | Route / Book | Class
Status | Parcel Number | Service Address

Service Name / Meter Type	Sequence # / Meter Size	Current Read / Meter ID	Previous Read / Serial Number	Current Usage / Install Date
[redacted] Active	[redacted]	[redacted]	[redacted]	[redacted]
Sewer		0	0	0
Water RADIO READ	[redacted]	[redacted]	[redacted]	[redacted]
[redacted] Active	[redacted]	[redacted]	[redacted]	[redacted]
Sewer		0	0	0
Water RADIO READ	[redacted]	[redacted]	[redacted]	[redacted]
[redacted] Active	[redacted]	[redacted]	[redacted]	[redacted]
Sewer		0	0	0
Water T-PAD	[redacted]	[redacted]	[redacted]	[redacted]
[redacted] Active	[redacted]	[redacted]	[redacted]	[redacted]
Sewer		0	0	0
Water VISUAL	[redacted]	[redacted]	[redacted]	[redacted]
[redacted] Active	[redacted]	[redacted]	[redacted]	[redacted]
Sewer		[redacted]	[redacted]	[redacted]
Water T-PAD	[redacted]	[redacted]	[redacted]	[redacted]
[redacted] Active	[redacted]	[redacted]	[redacted]	[redacted]
Sewer		0	0	0
Water RADIO READ	[redacted]	[redacted]	[redacted]	[redacted]
[redacted] Active	[redacted]	[redacted]	[redacted]	[redacted]
Sewer		0	0	0

Location ID	Account #	Cycle	Route / Book	Class
Status	Parcel Number	Service Address		

Service Name	Sequence #	Current Read	Previous Read	Current Usage
Meter Type	Meter Size	Meter ID	Serial Number	Install Date
Sewer		0	0	0
Water	[redacted]	[redacted]	[redacted]	[redacted]
DUKE-004031-0000-01	[redacted]0301	15	2	RES
Active	72-25-06-401-006	4031 DUKESHIRE HWY		
Sewer		0	0	0
Water	2820	0	3056	0
VISUAL	58	84772059	84772059	11/27/1985
[redacted]	[redacted]	[redacted]		[redacted]
Active				
Sewer		0	0	0
Water	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]		[redacted]
Active				
Sewer		0	0	0
Water	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]		[redacted]
Active				
Sewer		0	0	0
Water	[redacted]	[redacted]	[redacted]	[redacted]
VISUAL				
[redacted]	[redacted]	[redacted]		[redacted]
Sewer		0	0	0
Water	[redacted]	[redacted]	[redacted]	[redacted]
VISUAL				
[redacted]	[redacted]	[redacted]		[redacted]
Active				
Sewer		[redacted]	[redacted]	[redacted]
Water	[redacted]	[redacted]	[redacted]	[redacted]
VISUAL				
[redacted]	[redacted]	[redacted]		[redacted]
Active				
Sewer		[redacted]	[redacted]	[redacted]

Exhibit 7

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

ANDREW SCHROEDER,
individually, and as representative
of a class of similarly-situated persons
and entities,

Plaintiff,

v.

CITY OF ROYAL OAK,
a municipal corporation,

Defendant.

Case No. 2014-138919-CZ
Hon. Shalina Kumar

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff

Ray M. Toma (P48840)
Ray M. Toma PC
2550 South Telegraph Road, Suite 255
Bloomfield Hills, Michigan 48302
248-594-4544
Co-Counsel for Plaintiff

Sonal Hope Mithani (P51984)
Caroline B. Giordano (P76558)
Miller, Canfield, Paddock and Stone, P.L.C.
101 North Main Street, Seventh Floor
Ann Arbor, MI 48104
(734) 668-7786
Attorneys for Defendant

NOTICE OF FILING OF PROPOSED DISTRIBUTION REPORT

PLEASE TAKE NOTICE that on May 31, 2017 and in accordance with ¶ 11 of the Class Action Settlement Agreement in this matter, Plaintiff filed with the Court the proposed distribution report which contains the proposed disposition of the Net Settlement Fund. *See* Exhibit A.

KICKHAM HANLEY PLLC

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
Counsel for Plaintiff

Date: May 31, 2017

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2017 I electronically filed the ***Notice of Filing of Proposed Distribution Report*** with the Clerk of the Court using the electronic filing system.

/s/ Kim Plets
Kim Plets

KH150958

EXHIBIT A

City of Royal Oak Settlement

GCG ID No.	Account No.	Total Payment Amount	Pro Rata Percentage
[redacted]	[redacted]	$4,628.61	0.000054092
[redacted]	[redacted]	$5,043.25	0.000058937
[redacted]	[redacted]	$10,785.42	0.000126043
[redacted]	[redacted]	$4,274.68	0.000049956
[redacted]	[redacted]	$2,169.28	0.000025351
[redacted]	[redacted]	$3,584.15	0.000041886
[redacted]	[redacted]	$6,772.75	0.000079149
[redacted]	[redacted]	$8,204.35	0.000095879
[redacted]	[redacted]	$4,788.75	0.000055963
[redacted]	[redacted]	$7,880.82	0.000092098
[redacted]	[redacted]	$3,641.25	0.000042553
[redacted]	[redacted]	$7,929.68	0.000092669
[redacted]	[redacted]	$5,711.20	0.000066743
[redacted]	[redacted]	$3,027.92	0.000035385
[redacted]	[redacted]	$8,303.12	0.000097033
[redacted]	[redacted]	$11,102.13	0.000129744
[redacted]	[redacted]	$3,003.78	0.000035103
[redacted]	[redacted]	$2,847.43	0.000033276
[redacted]	[redacted]	$6,215.21	0.000072633
[redacted]	[redacted]	$3,045.12	0.000035586
[redacted]	[redacted]	$3,238.67	0.000037848
[redacted]	[redacted]	$3,092.02	0.000036135
[redacted]	[redacted]	$5,110.53	0.000059724
[redacted]	[redacted]	$6,439.69	0.000075257
[redacted]	[redacted]	$12,823.89	0.000149865
[redacted]	[redacted]	$4,124.83	0.000048204
[redacted]	[redacted]	$6,565.89	0.000076731
[redacted]	[redacted]	$10,536.86	0.000123138
[redacted]	[redacted]	$6,266.15	0.000073229
[redacted]	[redacted]	$7,239.40	0.000084602
[redacted]	[redacted]	$16,663.62	0.000194737
[redacted]	[redacted]	$3,447.05	0.000040284
[redacted]	[redacted]	$6,861.73	0.000080189
[redacted]	[redacted]	$2,618.70	0.000030603
[redacted]	[redacted]	$6,170.47	0.000072110
[redacted]	[redacted]	$1,524.70	0.000017818
[redacted]	[redacted]	$5,517.87	0.000064484
[redacted]	[redacted]	$13,221.72	0.000154514
[redacted]	[redacted]	$4,286.34	0.000050092
[redacted]	[redacted]	$7,517.62	0.000087854
[redacted]	[redacted]	$11,890.17	0.000138953
[redacted]	[redacted]	$8,066.54	0.000094269
1000640	[redacted]0301	$6,032.18	0.000070494
[redacted]	[redacted]	$5,926.25	0.000069256
[redacted]	[redacted]	$5,062.97	0.000059168
[redacted]	[redacted]	$7,588.65	0.000088684

Exhibit 8

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

ANDREW SCHROEDER,
individually, and as representative
of a class of similarly-situated persons
and entities,

Plaintiff,

v.

CITY OF ROYAL OAK,
a municipal corporation,

Defendant.

Case No. 2014-138919-CZ
Hon. Shalina Kumar

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff

Ray M. Toma (P48840)
Ray M. Toma PC
2550 South Telegraph Road, Suite 255
Bloomfield Hills, Michigan 48302
248-594-4544
Co-Counsel for Plaintiff

Sonal Hope Mithani (P51984)
Caroline B. Giordano (P76558)
Miller, Canfield, Paddock and Stone, P.L.C.
101 North Main Street, Seventh Floor
Ann Arbor, MI 48104
(734) 668-7786
Attorneys for Defendant

FINAL JUDGMENT AND ORDER APPROVING CLASS SETTLEMENT

At a session of said Court held in the
City of Pontiac, County of Oakland
State of Michigan on 6/14/2017
PRESENT: HON. SHALINA KUMAR
Circuit Court Judge

WHEREAS, Plaintiff and Defendant in this action have moved this Court pursuant to MCR 3.501(E), for an order approving the settlement of this class action in accordance with the terms set forth in the Class Action Settlement Agreement ("Agreement") executed by counsel for the parties, and

WHEREAS, this Court having held a hearing, as noticed, on June 14, 2017 pursuant to the Order Regarding Preliminary Approval of Settlement, Notice and Scheduling, dated March 22, 2017 (the "Order"), to determine the fairness, adequacy and reasonableness of a proposed settlement of the Class Action; and due and adequate notice (the "Notice") having been made by mailing in a manner consistent with Paragraphs 4 and 6 of the Order; and all such persons (excluding those who previously requested exclusion from the applicable Class) having been given an opportunity to object to or participate in the settlement; and the Court having heard and considered the matter, including all papers filed in connection therewith and the oral presentations of counsel at said hearing; and good cause appearing therefor,

WHEREAS, Defendant has funded the settlement by providing a check in the amount of Two Million Dollars ($2,000,000), which has been deposited into and remains in the Kickham Hanley PLLC Client Trust Account pending this Court's final approval of the settlement, and which will be disbursed in accordance with the Agreement,

For the reasons stated on the record, IT IS HEREBY FOUND, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The terms of the Agreement are fair, reasonable and adequate and in the best interests of the members of the Class and are hereby approved.

2. Plaintiff and Defendant are hereby ordered and directed to perform and consummate the settlement set forth in the Agreement in accordance with the terms and conditions of the Agreement.

3. The notification to the Class members regarding the Settlement is the best notice practicable under the circumstances and is in compliance with MCR 3.501(E) and the requirements of due process of law.

4. This Lawsuit is hereby dismissed with prejudice, and without costs to any party except as provided for in the Agreement. Insofar as this Final Judgment dismisses the Class claims relating to the Stormwater Charges (as that term is defined in the Agreement), this portion of this Final Judgment is a judgment on the merits.

5. Kickham Hanley PLLC, counsel for the Class and Claims-Escrow Administrator, is hereby awarded attorneys' fees, costs and expenses in the amount of $809,398.55, to be paid as set forth in the Agreement. Plaintiff Andrew Schroeder is granted an incentive award of $10,000, to be paid as set forth in the Agreement.

6. The Court takes specific notice of provisions of the Agreement which identify certain alleged overcharges by Oakland County or its agencies for storm water management services provided to Defendant ("Overcharges"). Pursuant to the Agreement, Defendant will assign to the Class members or for their benefit any and all claims for refund of the Overcharges that it has or may have against Oakland County Michigan and its affiliates, political subdivisions, agents, employees or officers including, but not limited to, the Oakland County Water Resources Commissioner, the Southeast Oakland County Sewage Disposal District, the George W. Kuhn Drainage Districts, and any other entity that imposed or imposes the Overcharges. Kickham Hanley PLLC is hereby appointed trustee of a litigation trust hereby established for the benefit of the Class members. As trustee, Kickham Hanley PLLC is authorized to pursue the claim for a refund of the Overcharges by lawsuit against Oakland County or its aforesaid agencies. Kickham Hanley PLLC is approved as counsel to the trust. Any monetary recovery from pursuit of the claim will be distributed, after counsel fees and costs, to the Class members based upon the methodology used for distributing the Settlement Fund. In the event the Oakland County Action is resolved through a settlement, that settlement, and any request by Class Counsel for an award of fees and expenses, will be subject to the same Court approval processes as those applied to the Settlement Fund. In the

event that there is a monetary recovery in Oakland County Action by way of a litigated judgment, any request by Class Counsel for an award of fees and expenses will be subject to the same Court approval processes as those applied to the Settlement Fund.

7. Without any further action by anyone, Plaintiffs and all members of the Class as certified by the Order dated April 1, 2015 who previously did not submit a timely and valid Request for Exclusion are deemed to have executed the following Release and Covenant not to Sue which is hereby approved by the Court:

> In executing the Release and Covenant Not To Sue, each Class Member, on behalf of himself, herself or itself, and his, her or its parents, subsidiaries, affiliates, members, shareholders, predecessors, heirs, administrators, officers, directors, successors, assigns, and any person the Class Member represents, intending to be legally bound hereby, for good and valuable consideration, the receipt of which is hereby acknowledged, hereby absolutely, fully and forever releases, relieves, remises and discharges the City, and each of its successors and assigns, present and former agents, elected and appointed officials, representatives, employees, insurers, affiliated entities, attorneys and administrators, of and from any and all manner of actions, causes of action, suits, debts, accounts, understandings, contracts, agreements, controversies, judgments, consequential damages, compensatory damages, punitive damages, claims, liabilities, and demands of any kind or nature whatsoever, known or unknown, which arise from the beginning of time through January 31, 2017 concerning (a) the City's calculation or assessment of Rates or Charges; (b) the components of costs included in the Rates; and/or (c) the City's Water and Sewer Fund balance. This release is intended to include all claims that were asserted or could have been asserted in the Lawsuit concerning the City's Rates and/or Charges. In executing the Release and Covenant Not to Sue, each Class Member also covenants that: (a) except for actions or suits based upon breaches of the terms of this Agreement or to enforce rights provided for in this Agreement, he, she or it will refrain from commencing any action or suit, or prosecuting any pending action or suit, in law or in equity, against the City on account of any action or cause of action released hereby; (b) none of the claims released under the Release and Covenant Not To Sue has been assigned to any other party; and (c) he, she or it accepts and assumes the risk that if any fact or circumstance is found, suspected, or claimed hereinafter to be other than or different from the facts or circumstances now believed to be true, the Release and Covenant Not To Sue shall be and remain effective notwithstanding any such difference in any such facts or circumstances. The foregoing shall not affect the claims of any Class Member whose individual water and sewer bills were calculated in error on the basis of facts or circumstances unique to such class Member and not based on the claims that were or could have been asserted by the Class in the Lawsuit.

8. If the City complies with the prospective relief described in the Agreement for the duration of the Prospective Relief Period as defined in the Agreement, the Class Members who receive refunds as part of the settlement shall then release and waive any and all claims which arise during the FY 2017 (July 1, 2016 through June 30, 2017) and FY 2018 (July 1, 2017 through June 30, 2018) Periods that could be brought challenging the City's inclusion of the Kuhn Facility Debt Charge in establishing the Rates for the FY 2017 and FY 2018 Periods.

9. This Court retains continuing jurisdiction to effectuate the provisions of the Agreement and the terms of this Order.

10. The provisions of paragraph 9 hereof respecting the retention of jurisdiction shall not affect the finality of this judgment as to matters not reserved.

IT IS SO ORDERED:

Dated: June 14, 2017.

/s/ Shalina Kumar
Oakland County Circuit Court Judge
SHALINA KUMAR
BB

We hereby stipulate to the entry of the above order.
Approved as to form and substance:

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff and the Class
KH151025

/s/ Sonal Hope Mithani
Sonal Hope Mithani (P51984)
Caroline B. Giordano (P76558)
Miller, Canfield, Paddock and Stone, P.L.C.
101 North Main Street, Seventh Floor
Ann Arbor, MI 48104
(734) 668-7786
Attorneys for Defendant

Exhibit 9

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

KICKHAM HANLEY PLLC,
as Trustee for a Certified Class of Persons Defined in the Final Judgment and Order Approving Class Settlement Dated June 14, 2017 Entered in Oakland County Circuit Court Case No. 14-138919-CZ,

Plaintiff,

v.

OAKLAND COUNTY, MICHIGAN,
a municipal corporation, and
GEORGE W. KUHN DRAINAGE DISTRICT,
a component unit,

Defendants.

2017-159351-CZ
JUDGE DANIEL OBRIEN
Case No CZ
Hon.

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham III (P70332)
Kickham Hanley PLLC
32121 Woodward, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff

There was a pending civil action that is related to, but not arising out of, the transaction or occurrence alleged in this complaint. This prior case was a certified class action and styled *Schroeder v. The City of Royal Oak*, Oakland County Circuit Court Case No. 14-138919-CZ. This action is no longer pending. BD

PLAINTIFF'S COMPLAINT

Plaintiff Kickham Hanley PLLC, as Trustee for a Certified Class of Persons Defined in the Final Judgment and Order Approving Class Settlement Dated June 14, 2017 Entered in Oakland County Circuit Court Case No. 14-138919-CZ (hereinafter, "Plaintiff") states as follows for its Complaint against Defendants Oakland County, Michigan and the George W. Kuhn Drainage District (collectively "Oakland County"):

INTRODUCTION

1. This is an action challenging the amount charged by Defendant Oakland County (hereinafter, the "County") to the City of Royal Oak (the "City") for stormwater disposal service (hereinafter, the "Stormwater Management Overcharge").

2. The County has systematically overcharged the City for stormwater disposal services by imposing the Stormwater Management Overcharge for at least the last six years.

3. The City passed on the Stormwater Management Overcharge to its water and sewer customers (the "Class") by incorporating it into the City's water and sewer rate.

4. The City's water and sewer customers then paid the City for the Stormwater Management Overcharge by virtue of paying their water and sewer bills.

5. As part of the settlement agreement in a related case, *Schroeder v. The City of Royal Oak* Oakland County Circuit Court Case No. 14-138919-CZ (the "Royal Oak Class Action"), the City assigned its claims against the County to Plaintiff to achieve a refund of the Stormwater Management Overcharges owed by the County to Royal Oak for disbursement to the Class members who submitted claims for refunds in the Royal Oak Class Action (the "Class"). *See* Assignment, attached as Exhibit A.

6. Plaintiff, on behalf of the Class, seeks, among other things, a refund of all Stormwater Management Overcharges received by the County in the six years preceding the filing of this action and all such Overcharges collected during the pendency of this action.

JURISDICTION AND VENUE

7. Plaintiff is the Trustee for the Class, defined in the Final Judgment and Order Approving Class Settlement Dated June 14, 2017 entered in Oakland County Circuit Court Case No. 14-138919-CZ. Exhibit B hereto. Pursuant to the Final Judgment and Order Approving Settlement

dated June 14, 2017, this Court authorized Plaintiff to institute and prosecute this action on behalf of the Class.

8. Defendant Oakland County (the "County") is political subdivision of the State of Michigan. Defendant George W. Kuhn Drainage District (the "District") is a component unit of the County. The City lies within the geographical boundaries of the District.

9. Venue and jurisdiction are proper with this Court because all parties are present here and the actions which give rise to Plaintiff's claims occurred in the County.

GENERAL ALLEGATIONS

10. Like many older communities in Southeast Michigan, the City has a combined sanitary and storm sewer system, which is a system that is designed to collect both (i) snowmelt and rainwater ("stormwater") runoff and (ii) domestic sewage and industrial wastewater ("sanitary sewage"), in the same pipe.

11. Sanitary sewage – i.e., spent water from a municipal water supply system which may be a combination of liquid and water-carried wastes -- enters a combined system directly from residences, commercial buildings, industrial plants, institutions and other structures. Owners and/or occupiers of such structures which generate the sewage are "users" of the sanitary sewage disposal services provided by the City.

12. Stormwater, in contrast, does not originate from any use of the water supply system or sanitary sewer system, and its presence in the combined system is wholly unrelated to the amount of tap water used, or sanitary sewage generated, by users of the system whose structures are physically connected to that system.

13. Stormwater collects on both private and public land, roads and other physical surfaces during rainfall events, and the runoff enters the combined sewer system through catch-basins and other collection devices.

14. Even though they have different origins, both sanitary sewage and stormwater collected in a combined sewer system need to be disposed of.

15. The City's combined sewer system flows to the Southeastern Oakland County Sewage Disposal System (the "County System"), which is owned and maintained by the County.

16. Except during heavy rainfall (when high volumes of combined sanitary sewage and stormwater exceed the outlet capacity causing excess flow to be diverted to the George W. Kuhn Retention Treatment Basin), the entire stormwater flow of the District, (*i.e.* the City's stormwater and the stormwater of various other communities in the area) is conveyed by the County to a treatment plant operated by (depending upon the year at issue) the Detroit Water and Sewerage Department ("DWSD") or the Great Lakes Water Authority ("GLWA") for ultimate disposal.

17. The County's stormwater flow (including the portion of stormwater flow that originates in the City) passes through Detroit's Dequindre Interceptor, which contains a master meter which measures the total flow passing from the County System into the DWSD/GLWA treatment plant.

18. The DWSD/GLWA charges the County a flat annual rate to dispose of the stormwater.

19. The County, in turn, allocates the annual DWSD/GLWA stormwater charge among all of the municipalities in the district, including the City, and charges each municipality a flat annual rate for stormwater disposal.

20. The County charges the City in excess of $7 million per year for stormwater disposal services.

21. The City passes on that cost to its Water and Sewer Customers by imposing stormwater charges in its water and sewer rates to recover the entire $7 million plus per year imposed upon the City by the County on an annual basis.

22. The DWSD/GLWA stormwater charge to the County, and the County's pass-through stormwater charge to the City, are based on a formula tied to the amount of rainfall and the volume of surface water that enters the County system for ultimate disposal by DWSD/GLWA.

23. Those municipalities which have a combined sewer system, including the City, are charged a flat rate per month for stormwater disposal per a formula determined by the County. Those municipalities serviced by separate sanitary and stormwater systems do not incur charges from the County for stormwater disposal, since the stormwater collected by those municipalities does not enter the DWSD system but rather is discharged into neighboring watercourses.

24. For a number of years, the County has charged the City substantially more than the amount that DWSD/GLWA charges the County for the disposal of the portion of the County's stormwater flow that originates in the City. The County has therefore overcharged the City for stormwater disposal service for a number of years.

25. The County's Final Order of Apportionment dated April 19, 2005 (Exhibit C hereto), provides that the stormwater charges to the City consist of two components: (1) the DWSD's charges to the George W. Kuhn Drain to treat the total storm water flow, and (2) the administrative costs of operating and maintaining the balance of the George W. Kuhn Drain System not included in the sanitary sewage portion of the charges. The Final Order of Apportionment was imposed pursuant to a Resolution of the Board of the District dated April 19, 2005 (the "Resolution"). Exhibit D hereto.

26. The Resolution obligated the County to pass through to the City the City's proportionate share of DWSD/GLWA's actual charges to the County for treating the storm water. The County has breached its obligations, and continues to breach its obligations, under the Resolution because, in assessing storm water charges to the City, the County has **not** passed on to the City the City's proportionate share of the actual costs the County has incurred to

DWSD/GLWA for storm water disposal. Instead, the County has grossly increased the DWSD/GLWA stormwater treatment charges. For example, for the fiscal year ending July 31, 2013:

> DWSD charged the County **$40.18** million in total disposal charges;
>
> DWSD charged the County **$24.31** million for sanitary sewage disposal; and
>
> DWSD charged the County **$15.87** million in fixed charges for storm water and infiltration water disposal.

See Exhibit E. In contrast, the County represented to the City that, for the fiscal year ending July 31, 2013:

> DWSD charged the County **$41.38** million in total disposal charges;
>
> DWSD charged the County **$19.54** million for sanitary sewage disposal; and
>
> DWSD charged the County **$21.84** million in fixed charges for storm water and infiltration water disposal. [Exhibit F hereto].

27. The County has reallocated the total charges imposed by DWSD to increase the amount of the storm water charges by almost $6 million. Because the County allocated to the City a higher percentage of the storm water disposal charges (29.7%) than sanitary sewage disposal charges (20.89%), the more of the total DWSD/GLWA charges that the County allocates to storm water charges, the more the City pays in the aggregate.

28. In other words, for each dollar of storm water disposal charges the County allegedly incurs, the City pays 29.7 cents. But for each dollar of sanitary sewage disposal charges the County allegedly incurs, the City pays only 20.89 cents.

29. Based upon the County's representations and the allocation percentage assigned to the City, the County charged the City aggregate disposal costs of **$11.45** million for the fiscal year ending June 30, 2013. This was calculated as follows:

- Sanitary -- $20.898 million ($19.544 million in DWSD charges plus $1.65 million in OCWRC operating expenses less $298k in interest income) x .19098 = $4.04 million

- Storm water -- $24.96 million ($21.847 million in DWSD charges plus $3.317 million in OCWRC operating expenses less $203k in interest income) x .297028 = $7.41 million

30. Given DWSD's actual charges to the County, however, the County should have charged the City only **$10.54** million for the fiscal year ending June 30, 2013. This is calculated as follows:

- Sanitary -- $25.665 million ($24.31 million in DWSD charges plus $1.65 million in OCWRC operating expenses less $298k in interest income) x .19098 = $4.90 million

- Storm water -- $18.984 million ($15.87 million in DWSD charges plus $3.317 million in OCWRC operating expenses less $203k in interest income) x .297028 = $5.64 million

31. Based upon the foregoing, the County overcharged the City by $910,000 for the fiscal year ending June 30, 2013.[1]

32. There are similar overcharges for prior years and for the years since.

COUNT I
BREACH OF CONTRACT

33. Plaintiff incorporates each of their preceding allegations as if fully set forth herein.

34. The Resolution creates an express contract between the County and the City.

35. The Resolution obligates the County to charge the City for stormwater disposal by passing through the City's proportionate share of "DWSD's charges to the George W. Kuhn Drain treat the total storm water flow," and the City's proportionate share of "the administrative cost of operating and maintaining the balance of the George W. Kuhn Drainage System not included in the sanitary sewage portion of the charges."

36. The County has breached the terms of the Resolution by failing to charge the City its proportionate share of "DWSD's charges to the George W. Kuhn Drain to treat the total storm

water flow." The County has not passed through DWSD/GLWA's actual charges for storm water disposal but instead has grossly inflated the amount of the DWSD/GLWA stormwater charges.

37. The City has been damaged by the County's breach of the Resolution because the City has been required to pay the Stormwater Management Overcharges.

COUNT II
ASSUMPSIT/MONEY HAD AND RECEIVED

38. Plaintiff incorporates each of the preceding paragraphs as if fully set forth herein.

39. In the alternative, in the event that the Court finds that there was no express contract between the City and the County governing stormwater charges, the County still is legally obligated to refund the Stormwater Management Overcharges. This is because the Overcharges were imposed in violation of the April 19, 2005 Resolution.

40. The County is legally required to comply with the terms of the Resolution.

41. A claim to recover amounts paid to a governmental unit in excess of the amount allowed under law is properly filed as an equitable action in assumpsit for money had and received.

42. The County has collected amounts in excess of the amounts it was legally entitled to collect from the City for stormwater disposal services.

43. The City passed the Stormwater Management Overcharges onto its water and sewer customers in the City's sewer rates.

44. The City assigned its claim against the County to Plaintiff on behalf of the Class. Therefore, Plaintiff is entitled to maintain an equitable action of assumpsit against the County to recover back the amount of the illegal exaction. *See, e.g., Bond v. Public Schools of Ann Arbor*, 383 Mich. 693, 704, 178 N.W.2d 484 (1970).

---

[1] The foregoing calculations are given for illustration purposes only to describe the nature of the overcharge, and are not intended to limit the scope or size of the claim assigned to the Class.

45. The County should be required to disgorge the amounts it has illicitly collected through the imposition of the Stormwater Management Overcharges and refund the Class for this overcharge.

PRAYER FOR RELIEF

Plaintiffs request that the Court grant the following relief:

A. With respect to Count I and Count II, enter judgment in favor of Plaintiff and against the County, and order and direct the County to disgorge and refund all Stormwater Management Overcharges collected during the six-year prior to commencement of this action and all Stormwater Management Overcharges collected during the pendency of this action, and order the County to pay into a common fund for the benefit of the Class the total amount of the Stormwater Management Overcharges to which the Class is entitled for this time period;

C. Permit Plaintiff, as Trustee, to manage and distribute in an orderly manner the common fund thus established, subject to this Court's oversight and approval; and

D. Grant any other appropriate relief.

KICKHAM HANLEY PLLC

By: */s/Gregory D. Hanley*
Gregory D. Hanley (P51204)
Jamie Warrow (P61521)
Edward F. Kickham III (P70332)
Attorneys and Trustees for the Class
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073

Date: June 20, 2017
KH151048

Approved, SCAO | Original - Court; 1st copy - Defendant | 2nd copy - Plaintiff; 3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT Sixth JUDICIAL CIRCUIT COUNTY PROBATE	SUMMONS AND COMPLAINT	CASE NO.

Court address: 1200 N. Telegraph, Pontiac, Michigan 48341

Court telephone no.: (248) 858-1000

Plaintiff's name(s), address(es), and telephone no(s).		Defendant's name(s), address(es), and telephone no(s).
Kickham Hanley PLLC, as Trustee for a Certified Class of Persons Defined in the Final Judgment and Order Approving Class Settlement Dated June 14, 2017 Entered in Oakland County Circuit Court Case No. 14-138919-CZ	v	Oakland County, Michigan, a municipal corporation, and George W. Kuhn Drainage District, a component unit Oakland County Clerk 1200 N. Telegraph, Building 12 East Pontiac, Michigan, USA, 48341 (248) 858-0581
Plaintiff's attorney, bar no., address, and telephone no. Gregory D. Hanley (P51204), Jamie K. Warrow (P61521) Edward F. Kickham III (P70332) Kickham Hanley PLLC 32121 Woodward Avenue, Suite 300 Royal Oak, Michigan 48073 (248) 544-1500		

SUMMONS **NOTICE TO THE DEFENDANT**: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside this state).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.

Issued	This summons expires	Court clerk

Family Division Cases (The following is information required in the caption of every complaint and is to be completed by the plaintiff.)

☐ This case involves a minor who is under the continuing jurisdiction of another Michigan court. The name of the court, file number, and details are on page ____ of the attached complaint.

☐ There is no other pending or resolved action within the jurisdiction of the family division of circuit court involving the family or family members of the parties.

☐ An action within the jurisdiction of the family division of the circuit court involving the family or family members of the parties has been previously filed in _____ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.

Civil Cases (The following is information required in the caption of every complaint and is to be completed by the plaintiff.)

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.

☐ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

☑ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in Oakland County Circuit Court Court.

The action ☐ remains ☑ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.
14-138919-CZ	Shalina D. Kumar	P56595

VENUE

Plaintiff(s) residence (include city, township, or village)	Defendant(s) residence (include city, township, or village)
Royal Oak, Oakland County, MI	Pontiac, Oakland County, MI
Place where action arose or business conducted Oakland County, MI	

June 20, 2017
Date

Signature of attorney/plaintiff

If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Note to Plaintiff: The summons is invalid unless served on or before its expiration date.

SUMMONS AND COMPLAINT
Case No.

PROOF OF SERVICE

TO PROCESS SERVER: You are to serve the summons and complaint not later than 91 days from the date of filing or the date of expiration on the order for second summons. You must make and file your return with the court clerk. If you are unable to complete service you must return this original and all copies to the court clerk.

CERTIFICATE / AFFIDAVIT OF SERVICE / NONSERVICE

☐ **OFFICER CERTIFICATE**	OR	☐ **AFFIDAVIT OF PROCESS SERVER**
I certify that I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party (MCR 2.104[A][2]), and that: (notarization not required)		Being first duly sworn, I state that I am a legally competent adult who is not a party or an officer of a corporate party, and that: (notarization required)

☐ I served personally a copy of the summons and complaint.

☐ I served by registered or certified mail (copy of return receipt attached) a copy of the summons and complaint, together with _____
List all documents served with the Summons and Complaint

_____

_____ on the defendant(s):

Defendant's name	Complete address(es) of service	Day, date, time

☐ I have personally attempted to serve the summons and complaint, together with any attachments, on the following defendant(s) and have been unable to complete service.

Defendant's name	Complet address(es) of service	Day, date, time

I declare that the statements above are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Fee	
$		$	
Incorrect address fee	**Miles traveled**	**Fee**	**TOTAL FEE**
$		$	$

_____
Signature

_____
Name (type or print)

_____
Title

Subscribed and sworn to before me on _____ (Date), _____ County, Michigan.

My commission expires: _____ (Date) Signature: _____ (Deputy court clerk/Notary public)

Notary public, State of Michigan, County of _____

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of the summons and complaint, together with _____ (Attachments)

_____ on _____ (Day, date, time)

_____ on behalf of _____.
Signature

EXHIBIT A

ASSIGNMENT OF CLAIMS

THIS ASSIGNMENT OF CLAIMS (this "Assignment") is made this 19th day of June, 2017, by the City of Royal Oak, Oakland County, Michigan (the "City") based on the following recitals:

A. A class action lawsuit is pending against the City entitled *Andrew Schroeder vs The City of Royal Oak* in Oakland County Circuit Court in which the plaintiff alleges that the City has overcharged for storm water management services (the "Lawsuit").

B. The Court has certified a class consisting of all persons or entities who/which paid the City for Water and Sewer Service on or after February 14, 2008. For settlement purposes, the parties agreed that the Class will include all persons or entities who/which paid the City for Water and Sewer Service between February 14, 2008 and January 31, 2017 (the "Class" and/or the "Plaintiff")).

C. The City and the Class have resolved the lawsuit by entering into a Settlement Agreement, dated March 22, 2017, and the Court has approved the Settlement Agreement by Final Judgment and Order Approving Class Settlement dated June 14, 2017.

D. Counsel to the Plaintiff Class is Kickham Hanley PLLC ("Class Counsel").

E. Plaintiff believes, based upon the advice of Class Counsel, that Oakland County has and continues to overcharge the City for the storm water component of the total flow of storm water and sanitary sewer discharge which flows into the Oakland County sewer system (the "Overcharges"). A more specific description of Plaintiff's position regarding the Overcharges and its illustration of the Overcharges is attached hereto as Exhibit A. Plaintiff further believes that the City (and its water and sewer customers) are entitled to a refund of the amount of the Overcharges.

F. The Court has appointed Class Counsel as Trustee of a litigation trust for the benefit of the Class members.

NOW, THEREFORE, in consideration of the terms and conditions of the Settlement Agreement, the City makes the following assignment subject to the conditions stated herein:

1. The term "Oakland County" shall mean Oakland County, Michigan, and all of its affiliates, political subdivisions, agents, employees or officers, including, but not limited to, the Oakland County Water Resources Commissioner, the Southeast Oakland County Sewage Disposal District, the George W. Kuhn Drainage District, and any other entity that imposed or imposes the Overcharges.

2. The City hereby assigns and transfers to Kickham Hanley PLLC, as trustee ("Assignee"), the City's entire right, title and interest in and to any refund which may be owing to the City or to which the City is entitled by reason of Oakland County's Overcharges, including, without limitation, all past Overcharges and all Overcharges imposed upon the City (and its water and sewer customers) hereafter until the Assignee's intended suit against Oakland County for the Overcharges is resolved either by settlement or by a final nonappealable order of the Michigan Court having jurisdiction.

3. The City has not made and does not make any warranty or representation, express or implied, that Oakland County has, in fact, imposed any Overcharges or that any refund is owed. Through its counsel, the Assignee will rely solely on its own analysis of Oakland County's practices with regard to billing for the County's storm water and sanitary sewer disposal and management services. In determining to give this Assignment, the City has relied on the advice of its own consultants and not on any advice or information from the Class, Class Counsel, or Assignee.

4. The City does warrant and represent that (i) the City has not heretofore assigned or otherwise transferred its rights to a refund of Oakland County's Overcharges to any third party, (ii) the City has not entered into any express agreement with Oakland County by means of which the City for adequate consideration has surrendered or waived its claim for a refund of the County's Overcharges, (iii) the City will maintain and preserve its records of the Overcharges and make them available through a qualified record keeper to the Class in its litigation against Oakland County, and (iv) to the best of its knowledge, the City is duly and legally authorized to enter into this Assignment.

5. The City will hereafter take no action to waive, surrender or compromise its right to a refund of the Overcharges.

6. Assignee, through Class Counsel, intends to bring an action against Oakland County. The City will pay the invoices it receives from the County in the ordinary course, notwithstanding the Overcharges, until the Assignee completes its litigation by settlement or final nonappealed judgment. Such payments shall be made without intention to prejudice Assignee's rights against Oakland County and shall be deemed to be made "under protest."

7. This Assignment represents the Class Counsel's best judgment as to the proper and lawful way to give effect to the parties' intentions; to wit: that the Class members shall be the owners or beneficial owners through the Assignee of the right to a refund of the Overcharges and have standing and are otherwise entitled to assert the claim to a refund against Oakland County. If for any reason it appears that Assignee or the Class will be unable to assert the claim to a refund by reason of some defect in this Assignment or the failure to follow some other procedure, the City will cooperate in a modification of this Assignment and in the fulfilling of some alternate procedure to

give effect to the intentions hereof except to the extent that compliance with the alternative procedure would conflict with the terms and provisions of the Settlement Agreement.

8. This Assignment, together with the Settlement Agreement, constitutes the entire agreement between the parties with respect to the subject matter hereof, and supersedes all prior or contemporaneous agreements, representations or warranties of the parties. No alteration, amendment, modification or waiver of any of the terms or provisions hereof, and no future representation or warranty by either party with respect to this transaction, shall be valid or enforceable unless the same be in writing and signed by the party against whom enforcement of same is sought.

9. This Assignment may be executed and delivered by the parties in facsimile format and in any number of separate counterparts, all of which, when delivered, shall together constitute one and the same document

10. The Assignment given herein is irrevocable and unconditional except as expressly stated herein.

City of Royal Oak

By: _____

Its: Mayor

City of Royal Oak

By: Melanie Halas

Its: City Clerk

ACCEPTED:

_____

Kickham Hanley PLLC, Trustee

KH149751

EXHIBIT A

PLAINTIFF'S DESCRIPTION OF OVERCHARGES

The City of Royal Oak's sanitary sewage and storm water are collected in a combined sewer system and need to be disposed of. The City's combined sewer system flows to the Southeastern Oakland County Sewage Disposal System (the "County System"), which is owned and maintained by Oakland County.

Except during heavy rainfall when high volumes of combined sanitary sewage and storm water exceed the outlet capacity to Detroit causing excess flow to be diverted to the Kuhn Facility, the entire flow from the County System is conveyed to the Detroit Water and Sewer Department ("DWSD") treatment plant.

DWSD charges Oakland County for disposing of the sanitary sewage and storm water. In turn, Oakland County charges the municipalities which contribute flow to the County System for such disposal. Those municipalities which have a combined sewer system, including the City, are charged a flat rate per month for storm water disposal per a formula determined by the County.

Based upon information made available to Plaintiff's counsel, it appears that Oakland County has overcharged the City for storm water disposal.

The County's Final Order of Apportionment dated April 19, 2005, provides that the storm water charges to the City consist of two components: (1) the DWSD's charges to the George W. Kuhn Drain to treat the total storm water flow, and (2) the administrative costs of operating and maintaining the balance of the George W. Kuhn Drain System not included in the sanitary sewage portion of the charges. The County, therefore, was obligated to pass through to the City the City's proportionate share of DWSD's actual charges to the County for treating the storm water.

For example, for the fiscal year ending July 31, 2013:

DWSD apparently charged the County **$40.18** million in total disposal charges;

DWSD apparently charged the County **$24.31** million for sanitary sewage disposal; and

DWSD apparently charged the County **$15.87** million in fixed charges for storm water and infiltration water disposal.

In contrast, the County represented to the City that, for the fiscal year ending July 31, 2013:

DWSD charged the County **$41.38** million in total disposal charges;

DWSD charged the County **$19.54** million for sanitary sewage disposal; and

DWSD charged the County **$21.84** million in fixed charges for storm water and infiltration water disposal.

The County appears to have reallocated the total charges imposed by DWSD to increase the amount of the storm water charges by almost $6 million. Because they allocated a higher percentage of the storm water disposal charges (29.7%) than sanitary sewage disposal charges (20.89%), the more of the total DWSD charges that the County allocates to storm water charges, the more the City pays in the aggregate.

Based upon the County's representations and the allocation percentage assigned to the City, the County charged the City aggregate disposal costs of **$11.45** million for the fiscal year ending June 30, 2013. This was calculated as follows:

Sanitary -- $20.898 million x .19098 = $4.04 million

Storm water -- $24.96 million x .297028 = $7.41 million

If the DWSD records accurately reflect the amounts charged by DWSD to the City, however, the County should have charged the City **$10.54** million for the fiscal year ending June 30, 2013. This is calculated as follows:

Sanitary -- $25.665 million x .19098 = $4.90 million

Storm water -- $18.984 million x .297028 = $5.64 million

Therefore, it appears that the County overcharged the City by $910,000 for the fiscal year ending June 30, 2013. There appear to be similar overcharges for prior years and for the years since. The foregoing calculations are given for illustration purposes only to describe the nature of the overcharge, and are not intended to limit the scope or size of the claim assigned to the Class.

EXHIBIT B

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

ANDREW SCHROEDER,
individually, and as representative
of a class of similarly-situated persons
and entities,

Plaintiff,

v.

CITY OF ROYAL OAK,
a municipal corporation,

Defendant.

Case No. 2014-138919-CZ
Hon. Shalina Kumar

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff

Ray M. Toma (P48840)
Ray M. Toma PC
2550 South Telegraph Road, Suite 255
Bloomfield Hills, Michigan 48302
248-594-4544
Co-Counsel for Plaintiff

Sonal Hope Mithani (P51984)
Caroline B. Giordano (P76558)
Miller, Canfield, Paddock and Stone, P.L.C.
101 North Main Street, Seventh Floor
Ann Arbor, MI 48104
(734) 668-7786
Attorneys for Defendant

FINAL JUDGMENT AND ORDER APPROVING CLASS SETTLEMENT

At a session of said Court held in the
City of Pontiac, County of Oakland
State of Michigan on 6/14/2017
PRESENT: HON. SHALINA KUMAR
Circuit Court Judge

WHEREAS, Plaintiff and Defendant in this action have moved this Court pursuant to MCR 3.501(E), for an order approving the settlement of this class action in accordance with the terms set forth in the Class Action Settlement Agreement ("Agreement") executed by counsel for the parties, and

WHEREAS, this Court having held a hearing, as noticed, on June 14, 2017 pursuant to the Order Regarding Preliminary Approval of Settlement, Notice and Scheduling, dated March 22, 2017 (the "Order"), to determine the fairness, adequacy and reasonableness of a proposed settlement of the Class Action; and due and adequate notice (the "Notice") having been made by mailing in a manner consistent with Paragraphs 4 and 6 of the Order; and all such persons (excluding those who previously requested exclusion from the applicable Class) having been given an opportunity to object to or participate in the settlement; and the Court having heard and considered the matter, including all papers filed in connection therewith and the oral presentations of counsel at said hearing; and good cause appearing therefor,

WHEREAS, Defendant has funded the settlement by providing a check in the amount of Two Million Dollars ($2,000,000), which has been deposited into and remains in the Kickham Hanley PLLC Client Trust Account pending this Court's final approval of the settlement, and which will be disbursed in accordance with the Agreement,

For the reasons stated on the record, IT IS HEREBY FOUND, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The terms of the Agreement are fair, reasonable and adequate and in the best interests of the members of the Class and are hereby approved.

2. Plaintiff and Defendant are hereby ordered and directed to perform and consummate the settlement set forth in the Agreement in accordance with the terms and conditions of the Agreement.

3. The notification to the Class members regarding the Settlement is the best notice practicable under the circumstances and is in compliance with MCR 3.501(E) and the requirements of due process of law.

4. This Lawsuit is hereby dismissed with prejudice, and without costs to any party except as provided for in the Agreement. Insofar as this Final Judgment dismisses the Class claims relating to the Stormwater Charges (as that term is defined in the Agreement), this portion of this Final Judgment is a judgment on the merits.

5. Kickham Hanley PLLC, counsel for the Class and Claims-Escrow Administrator, is hereby awarded attorneys' fees, costs and expenses in the amount of $809,398.55, to be paid as set forth in the Agreement. Plaintiff Andrew Schroeder is granted an incentive award of $10,000, to be paid as set forth in the Agreement.

6. The Court takes specific notice of provisions of the Agreement which identify certain alleged overcharges by Oakland County or its agencies for storm water management services provided to Defendant ("Overcharges"). Pursuant to the Agreement, Defendant will assign to the Class members or for their benefit any and all claims for refund of the Overcharges that it has or may have against Oakland County Michigan and its affiliates, political subdivisions, agents, employees or officers including, but not limited to, the Oakland County Water Resources Commissioner, the Southeast Oakland County Sewage Disposal District, the George W. Kuhn Drainage Districts, and any other entity that imposed or imposes the Overcharges. Kickham Hanley PLLC is hereby appointed trustee of a litigation trust hereby established for the benefit of the Class members. As trustee, Kickham Hanley PLLC is authorized to pursue the claim for a refund of the Overcharges by lawsuit against Oakland County or its aforesaid agencies. Kickham Hanley PLLC is approved as counsel to the trust. Any monetary recovery from pursuit of the claim will be distributed, after counsel fees and costs, to the Class members based upon the methodology used for distributing the Settlement Fund. In the event the Oakland County Action is resolved through a settlement, that settlement, and any request by Class Counsel for an award of fees and expenses, will be subject to the same Court approval processes as those applied to the Settlement Fund. In the

event that there is a monetary recovery in Oakland County Action by way of a litigated judgment, any request by Class Counsel for an award of fees and expenses will be subject to the same Court approval processes as those applied to the Settlement Fund.

7. Without any further action by anyone, Plaintiffs and all members of the Class as certified by the Order dated April 1, 2015 who previously did not submit a timely and valid Request for Exclusion are deemed to have executed the following Release and Covenant not to Sue which is hereby approved by the Court:

> In executing the Release and Covenant Not To Sue, each Class Member, on behalf of himself, herself or itself, and his, her or its parents, subsidiaries, affiliates, members, shareholders, predecessors, heirs, administrators, officers, directors, successors, assigns, and any person the Class Member represents, intending to be legally bound hereby, for good and valuable consideration, the receipt of which is hereby acknowledged, hereby absolutely, fully and forever releases, relieves, remises and discharges the City, and each of its successors and assigns, present and former agents, elected and appointed officials, representatives, employees, insurers, affiliated entities, attorneys and administrators, of and from any and all manner of actions, causes of action, suits, debts, accounts, understandings, contracts, agreements, controversies, judgments, consequential damages, compensatory damages, punitive damages, claims, liabilities, and demands of any kind or nature whatsoever, known or unknown, which arise from the beginning of time through January 31, 2017 concerning (a) the City's calculation or assessment of Rates or Charges; (b) the components of costs included in the Rates; and/or (c) the City's Water and Sewer Fund balance. This release is intended to include all claims that were asserted or could have been asserted in the Lawsuit concerning the City's Rates and/or Charges. In executing the Release and Covenant Not to Sue, each Class Member also covenants that: (a) except for actions or suits based upon breaches of the terms of this Agreement or to enforce rights provided for in this Agreement, he, she or it will refrain from commencing any action or suit, or prosecuting any pending action or suit, in law or in equity, against the City on account of any action or cause of action released hereby; (b) none of the claims released under the Release and Covenant Not To Sue has been assigned to any other party; and (c) he, she or it accepts and assumes the risk that if any fact or circumstance is found, suspected, or claimed hereinafter to be other than or different from the facts or circumstances now believed to be true, the Release and Covenant Not To Sue shall be and remain effective notwithstanding any such difference in any such facts or circumstances. The foregoing shall not affect the claims of any Class Member whose individual water and sewer bills were calculated in error on the basis of facts or circumstances unique to such class Member and not based on the claims that were or could have been asserted by the Class in the Lawsuit.

8. If the City complies with the prospective relief described in the Agreement for the duration of the Prospective Relief Period as defined in the Agreement, the Class Members who receive refunds as part of the settlement shall then release and waive any and all claims which arise during the FY 2017 (July 1, 2016 through June 30, 2017) and FY 2018 (July 1, 2017 through June 30, 2018) Periods that could be brought challenging the City's inclusion of the Kuhn Facility Debt Charge in establishing the Rates for the FY 2017 and FY 2018 Periods.

9. This Court retains continuing jurisdiction to effectuate the provisions of the Agreement and the terms of this Order.

10. The provisions of paragraph 9 hereof respecting the retention of jurisdiction shall not affect the finality of this judgment as to matters not reserved.

IT IS SO ORDERED:

Dated: June 14, 2017.

/s/ Shalina Kumar
Oakland County Circuit Court Judge
SHALINA KUMAR BB

We hereby stipulate to the entry of the above order.
Approved as to form and substance:

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff and the Class
KH151025

/s/ Sonal Hope Mithani
Sonal Hope Mithani (P51984)
Caroline B. Giordano (P76558)
Miller, Canfield, Paddock and Stone, P.L.C.
101 North Main Street, Seventh Floor
Ann Arbor, MI 48104
(734) 668-7786
Attorneys for Defendant

EXHIBIT C

FINAL ORDER OF APPORTIONMENT

OF COST OF ADMINISTRATION, OPERATIONS AND MAINTENANCE

IN RE GEORGE W. KUHN DRAIN

In accordance with a resolution adopted by the Drainage Board for the George W. Kuhn Drain on the 19th day of April, 2005, the apportionments of the cost of administration, operations and maintenance of the George W. Kuhn Drain shall be borne by the several public corporations are as follows:

The combined total volume of storm water and sewage disposal effluent flowing from the George W. Kuhn Drain into the City of Detroit treatment facilities is and will continue to be calculated through master meter charges ("Master Meter Charges") by the City of Detroit to the George W. Kuhn Drainage District.

In order to allocate the total costs of combined storm water and sewerage disposal and treatment by the City of Detroit, it is necessary to establish which portion of the flow from the George W. Kuhn Drain to the City of Detroit is sewage disposal and which portion is storm water runoff. This allocation will be made by assuming that all water purchased from the City of Detroit Water and Sewerage Department (DWSD) by the cities of Berkley, Birmingham, Clawson, Ferndale, Hazel Park, Huntington Woods, Madison Heights, Oak Park, Pleasant Ridge, Royal Oak, Southfield and Troy, the Township of Royal Oak and Village of Beverly Hills (the "Local Public Corporations") located within the George W. Kuhn Drainage District is returned as sanitary flow. Therefore, the difference between such purchased and metered water sales to the Local Public Corporations located within the George W. Kuhn Drainage District and the Master Meter Charges is, by definition, storm water flow.

A sewage disposal rate will be used to charge the Local Public Corporations for their respective sanitary sewage disposal flow into the George W. Kuhn Drain. Such a charge will be composed of the administrative costs of the costs of the sewage disposal portion of the George W. Kuhn Drain, together with the appropriate total sewage disposal rate per 1,000 cubic feet (MCF) of sewage flow for each Local Public Corporation.

The total storm water operation and maintenance component consists of two (2) categories. The first component is the DWSD's charges to the George W. Kuhn Drain to treat the total storm water flow. The second cost component is the administrative cost of operating and maintaining the balance of the George W. Kuhn Drain System not included in the sanitary sewage portion of the charges. An engineering study, utilizing area and land use, has been used to determine each Local Public Corporation's percentage of storm water contribution into the George W. Kuhn Drain System. These percentages will be utilized to apportion the storm water charges to the George W. Kuhn Drain communities. The percentages are finally apportioned as follows:

The costs of administration, operations and maintenance for that portion of the George W. Kuhn Drain, excluding the separate storm drains constructed as a part of Contracts 1 and 4, to be located in the County of Oakland and to serve land located in the following public corporations, are finally apportioned as follows, to wit:

Public Corporation (Community)	Tentative Percentage of Cost
City of Berkley	6.4895%
City of Birmingham	4.8837%
City of Clawson	5.9262%
City of Ferndale	10.2885%
City of Hazel Park	2.2554%
City of Huntington Woods	2.9061%
City of Madison Heights	6.5410%
City of Oak Park	13.6383%
City of Pleasant Ridge	1.3390%
City of Royal Oak	29.7915%
City of Southfield	7.7156%
City of Troy	2.4799%
Township of Royal Oak	1.2775%
Village of Beverly Hills	0.8369%
County of Oakland, on account of Drainage of county highways	1.5274%
State of Michigan, on account of Drainage of state highways	2.1035%
	100.0000%

The costs of administration, operations and maintenance for that portion of the George W. Kuhn Drain, inclusive of the separate storm drains constructed as a part of Contracts 1 and 4, to be located in the County of Oakland and to serve land located in the following public corporations, are finally apportioned as follows, to wit:

Public Corporation	Tentative Percentage of Cost
City of Madison Heights	94.4820%
County of Oakland, on account of Drainage of county highways	1.3065%
State of Michigan, on account of Drainage of state highways	4.2115%
	100.0000%

DRAINAGE BOARD FOR THE
GEORGE W. KUHN DRAIN

By: _____
John P. McCulloch, Chairperson

Dated and Filed: April 19, 2005

BLOOMFIELD 9007-326 684648v1 4/12/2005

EXHIBIT D

MINUTES OF THE MEETING OF THE DRAINAGE BOARD FOR THE GEORGE W. KUHN DRAIN

April 19, 2005

At a meeting of the Drainage Board for the George W. Kuhn Drain held in the office of the Oakland County Drain Commissioner, Public Works Building, One Public Works Drive, Waterford, Michigan, on the 19th day of April, 2005.

The meeting was called to order by the Chairperson.

PRESENT: John P. McCulloch, Chairperson and
Oakland County Drain Commissioner

Bill Bullard, Chairperson of the
Oakland County Board of Commissioners

Chuck Moss, Chairperson of the
Finance Committee of the
Oakland County Board of Commissioners

ALSO
PRESENT: Joseph P. Kozma,
Deputy & Manager, Engineering & Construction

Philip Sanzica,
Chief Engineer

Eugene R. Snowden, Jr.,
Engineer

Lynn Sonkiss,
Chief of Fiscal Services

Shawn Phelps,
Fiscal Services

Jeremy Adams,
Fiscal Services

Joseph Colaianne,
Insurance Administrator

Chuck Lawhorn,
Civil Engineer

Elaine Van Dyke
Secretary

J. Bryan Williams, Bond Counsel
Dickinson Wright PLLC

John R. Axe,
Municipal Financial Consultants Incorporated

Howard Aube
City of Novi

Jon Austin
City of Madison Heights

Gary Nigro
Engineer

The Chairperson presented the minutes of the meeting of this Board held on March 22, 2005. Upon motion by Moss, seconded by Bullard, and unanimously adopted, the minutes were approved as presented.

There were no public comments.

The Chairperson offered proofs of the publication and mailing of notice of the public hearing. It was moved by Moss, seconded by Bullard and unanimously adopted that the proofs of publication and mailing be received and filed in the office of the Chairperson of the Drainage Board.

The Chairperson then opened the hearing and asked if there were any written objections. Ms. Van Dyke reported that there were no written objections on file. Mr. McCulloch noted for the record the receipt of a favorable letter from MDOT.

The Chairperson then asked if there were any comments or objections from those present at the hearing. Mr. Austin commented formally on the unanimous recommendation of the Advisory Committee with respect to the proposed final apportionments of cost with respect to administration, operations and maintenance of the George W. Kuhn Drain. On behalf of the members of the Advisory Committee, Mr. Austin thanked Mr. McCulloch and the staff of the Oakland County Drain Commissioner for their hard work in resolving serious issues and concerns related to such apportionment. Thereafter, the Chairperson declared the hearing closed.

After the hearing, the following resolution was offered by Moss and seconded by Bullard:

WHEREAS, the Drainage Board for the George W. Kuhn Drain, on the 28th day of February, 2005, tentatively established apportionments of the cost of the George W. Kuhn Drain, to be borne by the several public corporations, as follows:

The combined total volume of storm water and sewage disposal effluent flowing from the George W. Kuhn Drain into the City of Detroit treatment facilities is and will continue to be calculated through master meter charges ("Master Meter Charges") by the City of Detroit to the George W. Kuhn Drainage District.

In order to allocate the total costs of combined storm water and sewerage disposal and treatment by the City of Detroit, it is necessary to establish which portion of the flow from the George W. Kuhn Drain to the City of Detroit is sewage disposal and which portion is storm water runoff. This allocation will be made by assuming that all water purchased from the City of Detroit Water and Sewerage Department (DWSD) by the cities of Berkley, Birmingham, Clawson, Ferndale, Hazel Park, Huntington Woods, Madison Heights, Oak Park, Pleasant Ridge, Royal Oak, Southfield and Troy, the Township of Royal Oak and Village of Beverly Hills (the "Local Public Corporations") located within the George W. Kuhn Drainage District is returned as sanitary flow. Therefore, the difference between such purchased and metered water sales to the Local Public Corporations located within the George W. Kuhn Drainage District and the Master Meter Charges is, by definition, storm water flow.

A sewage disposal rate will be used to charge the Local Public Corporations for their respective sanitary sewage disposal flow into the George W. Kuhn Drain. Such a charge will be composed of the administrative costs of the costs of the sewage disposal portion of the George W. Kuhn Drain, together with the appropriate total sewage disposal rate per 1,000 cubic feet (MCF) of sewage flow for each Local Public Corporation.

The total storm water operation and maintenance component consists of two (2) categories. The first component is the DWSD's charges to the George W. Kuhn Drain to treat the total storm water flow. The second cost component is the administrative cost of operating and maintaining the balance of the George W. Kuhn Drain System not included in the sanitary sewage portion of the charges. An engineering study, utilizing area and land use, has been used to determine each Local Public Corporation's percentage of storm water contribution into the George W. Kuhn Drain System. These percentages will be utilized to apportion the storm water charges to the George W. Kuhn Drain communities. The percentages are finally apportioned as follows:

The costs of administration, operations and maintenance for that portion of the George W. Kuhn Drain, excluding the separate storm drains constructed as a part of Contracts 1 and 4, to be located in the County of Oakland and to serve land located in the following public corporations, are finally apportioned as follows, to wit:

Public Corporation (Community)	Tentative Percentage of Cost
City of Berkley	6.4895%

City of Birmingham	4.8837%
City of Clawson	5.9262%
City of Ferndale	10.2885%
City of Hazel Park	2.2554%
City of Huntington Woods	2.9061%
City of Madison Heights	6.5410%
City of Oak Park	13.6383%
City of Pleasant Ridge	1.3390%
City of Royal Oak	29.7915%
City of Southfield	7.7156%
City of Troy	2.4799%
Township of Royal Oak	1.2775%
Village of Beverly Hills	0.8369%
County of Oakland, on account of Drainage of county highways	1.5274%
State of Michigan, on account of Drainage of state highways	2.1035%
	100.0000%

The costs of administration, operations and maintenance for that portion of the George W. Kuhn Drain, inclusive of the separate storm drains constructed as a part of Contracts 1 and 4, to be located in the County of Oakland and to serve land located in the following public corporations, are finally apportioned as follows, to wit:

Public Corporation	Tentative Percentage of Cost
City of Madison Heights	94.4820%
County of Oakland, on account of Drainage of county highways	1.3065%
State of Michigan, on account of Drainage of state highways	4.2115%
	100.0000%

WHEREAS, after due notice the Drainage Board met on the 19th day of April, 2005, to hear any objections to the apportionments; and

WHEREAS, the apportionments of cost have been made by taking into consideration the benefits to accrue to each of the public corporations to be assessed and by taking into consideration the extent to which each public corporation contributes to the conditions which made the George W. Kuhn Drain necessary, limiting such

factors in the case of the County of Oakland and the State of Michigan solely to the drainage of county and state highways; and

WHEREAS, this Drainage Board has given due and full consideration to all objections offered thereto; and

WHEREAS, the George W. Kuhn Drain is necessary for the public health.

NOW, THEREFORE, BE IT RESOLVED by the Drainage Board for the George W. Kuhn Drain:

1. The apportionments of cost as above set forth be and the same are fixed and confirmed.

2. The Chairperson of this Drainage Board is authorized and directed to issue on behalf of the Board its Final Order of Apportionment setting forth the several apportionments as herein fixed and confirmed.

3. All former resolutions and orders of this Board, insofar as the same may be in conflict with the terms of this resolution, are rescinded.

ADOPTED: Yeas: 3
Nays: 0

The Chairperson proceeded to sign the Final Order of Apportionment for the George W. Kuhn Drain as directed in the foregoing resolution. The order was dated April 19, 2005, and, upon motion by Moss, supported by Bullard and unanimously adopted, was filed with the Chairperson.

Invoices in the amount of $108,305.17 (as attached) were presented for consideration. It was moved by Moss, supported by Bullard, that the invoices be approved for payment in the amount of $108,305.17.

ADOPTED: Yeas - 3
Nays - 0

Construction Estimate No. 41 (Contract No. 4) in the amount of $750,883.85 was presented for approval. Following discussion, it was moved by Moss, supported by Bullard, that Construction Estimate No. 41(Contract No. 4) in the amount of $750,883.85 be approved for payment to Walbridge Aldinger Company, Contractor.

ADOPTED: Yeas - 3
Nays – 0

Mr. Colaianne updated the Board with respect to issues involving the revocation and reissuance of the NPDES permit previously discussed at the February 28, 2005 meeting of the Drain Board. He reported that he had met with the attorneys for the various local communities in March, 2005 concerning the continuation of the practice of naming the individual communities as co-permitees. Mr. Colaianne indicated that the

Advisory Committee was prepared to take up the issue of the communities being named as co-permitees at its next meeting.

It was moved by McCulloch and supported by Moss, to certify attendance and authorize pro rata share payment of $25 per day to both Mr. Moss and Mr. Bullard.

ADOPTED: Yeas - 3
Nays - 0

There being no further business to come before the meeting, the meeting was adjourned.

Chairperson

Date: April 19, 2005

STATE OF MICHIGAN)
)SS.
COUNTY OF OAKLAND)

I, the undersigned, do hereby certify that the foregoing is a true and complete copy of the minutes of the George W. Kuhn Drain, Oakland County, Michigan, held on the 19th day of April, 2005 and that the said minutes are on file in the office of the Oakland County Drain Commissioner and are available to the public.

I further certify that notice of the meeting was posted at least 18 hours in advance of the meeting at the office of the Oakland County Drain Commissioner which is the principal office of the George W. Kuhn Drainage District.

John P. McCulloch, Chairperson

Dated: May 9, 2005

BLOOMFIELD 9007-326 669878v1 5/2/2005

EXHIBIT E

FY 2012-13 George W Kuhn Drainage Dist Sewer Rate Calculation

Part 1- Units of Service

Line		Unit	Amount	Reference	Comment
1	Metered Flow	Mcf	2,800,000		
2	Sanitary	Mcf	1,739,407	(1)-(3)-(5)	Metered less Local Community Infiltration/Inflow (Lns 3&5)
3	Local Dry Weather Infiltration	Mcf	142,160	GDRSS Data	Local Community only
4	Common Sewers Dry Weather Infiltration	Mcf	61,025	GDRSS Data	Represents share of common sewers "downstream" of connection
5	Wet Weather Inflow	Mcf	918,432	GDRSS Data	
6	Overflow Credit		15.0%		Universal for all customers
7	Net Wet Weather Inflow	Mcf	780,667	(5) x [1- (6)]	
8	Total Allocation Volume	Mcf	2,723,261	(2)+(3)+(4)+(7)	
9	System Volume	Mcf	28,160,902		
10	George W Kuhn Drainage Dist Share		9.67%	(8)/(9)	**Represents Customer's share of "common" flow costs**
11	BOD	lbs	16,720,902	98 mg/l	Based on 130 mg/l Sanitary, 43 mg/l DWII, and 43 mg/l wet weather
12	TSS	lbs	26,075,392	153 mg/l	Based on 202 mg/l Sanitary, 67 mg/l DWII, and 67 mg/l wet weather
13	PHOS	lbs	431,246	2.5 mg/l	Based on 3.3 mg/l Sanitary, 1.1 mg/l DWII, and 1.1 mg/l wet weather
14	FOG	lbs	2,784,008	16.4 mg/l	Based on 21.6 mg/l Sanitary, 7.1 mg/l DWII, and 7.1 mg/l wet weather
15	Wet Weather		2.26%	1999 RSA	**Represents Customer's share of DWSD New CSO Facilities cost**

Part 2 - Cost Allocation

Line		(1) Units	(2) Unit Cost (a)	(3) Allocated Rev Req't (1)*(2)	Comment
1	City Only	0	3.342	0	Collection System Costs
2	Wholesale Only	2,723,261	0.423	1,151,271	Collection System Costs
3	Oakland Only	0	0.000	0	Collection System Costs
4	Macomb Only	0	1.283	0	Collection System Costs
5	Common	2,723,261	5.236	14,259,129	Common Collection & WWTP Costs
6	BOD	16,720,902	0.438	7,329,412	WWTP Costs
7	TSS	26,075,392	0.445	11,599,761	WWTP Costs
8	PHOS	431,246	6.564	2,830,839	WWTP Costs
9	FOG	2,784,008	0.422	1,176,119	WWTP Costs
10	New WW Facilities	2.26%	43,047,400	971,135	
11	Total			39,317,667	Represents Unadjusted Annual Revenue Requirement Allocated to Customer

(a) Unit Costs are uniform for every customer

FY 2012-13 George W Kuhn Drainage Dist Sewer Rate Calculation

Part 3 - Adjustments and Rate Calculation

Line		Amount	Reference	Comment
1	Rev Req't Allocation	39,317,667		From Part 2
2	Adjustment A	864,850	1978 RSA	Indirect Benefits - allocates rev req'ts from Detroit to Suburbs
3	Adjustment B4	0	1980 RSA	15 Mile & Hayes Repairs - reallocates common costs to Macomb Co. only
4	Adjusted Rev Req't	**40,182,517**		**Represents Annual Revenue Requirement from Customer**

Part 4 - Rate Calculation

		Total	Fixed	Commodity	Existing Charge	Comment / Percent Change	
5	Direct	0	0			Direct allocations and adjustments	
6	New WW Facilities	971,135	971,135			From Part 2	
7	Wholesale Only Costs	1,151,271	1,151,271				
8	Other	38,060,111					
9	Allocated to Sanitary	24,309,845		24,309,845		Other allocated based on Part 1: (Line 8) * [(Part 1,Line 2)/(Part 1,Line 8)]	
10	Allocated to Infiltration	2,839,708	2,839,708			Other allocated based on Part 1: (Line 8) * [(Part 1,Lns 3&4)/(Part 1,Line 8)]	
11	Allocated to Inflow	10,910,558	10,910,558			Other allocated based on Part 1: (Line 8) * [(Part 1,Line 7)/(Part 1,Line 8)]	
12	Total	40,182,517	15,872,672	24,309,845		Total Lines 10 thru 16	
13	Units		12	2,800,000		Months / Mcf	
14	**Fixed Charge**		**$1,322,723**		$1,187,514	(Line 16)/(Line 17)	11.4%
15	**Commodity Charge**			**$8.68**	$8.77	(Line 16)/(Line 17)	-1.0%
16	***"All Commodity" Unit Cost***			***$14.35***	$13.86	Total (Line 16)/(Line 17)	3.5%

FY 2011-12 S.E. Oakland County Sewer Rate Calculation

Part 1- Units of Service

Line		Unit	Amount	Reference	Comment
1	Metered Flow	Mcf	3,000,000		
2	Sanitary	Mcf	2,012,360	(1)-(3)-(5)	Metered less Local Community Infiltration/Inflow (Lns 3&5)
3	Local Dry Weather Infiltration	Mcf	155,695	GDRSS Data	Local Community only
4	Common Sewers Dry Weather Infiltration	Mcf	57,283	GDRSS Data	Represents share of common sewers "downstream" of connection
5	Wet Weather Inflow	Mcf	831,946	GDRSS Data	
6	Overflow Credit		15.0%		Universal for all customers
7	Net Wet Weather Inflow	Mcf	707,154	(5) x [1- (6)]	
8	Total Allocation Volume	Mcf	2,932,491	(2)+(3)+(4)+(7)	
9	System Volume	Mcf	28,172,527		
10	S.E. Oakland County Share		10.41%	(8)/(9)	**Represents Customer's share of "common" flow costs**
11	BOD	lbs	26,629,842	146 mg/l	Based on 176 mg/l Sanitary, 79 mg/l DWII, and 79 mg/l wet weather
12	TSS	lbs	34,449,573	188 mg/l	Based on 228 mg/l Sanitary, 102 mg/l DWII, and 102 mg/l wet weather
13	PHOS	lbs	758,070	4.1 mg/l	Based on 5.0 mg/l Sanitary, 2.3 mg/l DWII, and 2.3 mg/l wet weather
14	FOG	lbs	4,371,608	23.9 mg/l	Based on 28.9 mg/l Sanitary, 13.0 mg/l DWII, and 13.0 mg/l wet weather
15	Wet Weather		2.26%	1999 RSA	**Represents Customer's share of DWSD New CSO Facilities cost**

Part 2 - Cost Allocation

Line		(1) Units	(2) Unit Cost (a)	(3) Allocated Rev Req't (1)*(2)	Comment
1	City Only	0	3.063	0	Collection System Costs
2	Wholesale Only	2,932,491	0.424	1,244,205	Collection System Costs
3	Oakland Only	0	0.964	0	Collection System Costs
4	Macomb Only	0	1.440	0	Collection System Costs
5	Common	2,932,491	5.027	14,741,831	Common Collection & WWTP Costs
6	BOD	26,629,842	0.269	7,151,224	WWTP Costs
7	TSS	34,449,573	0.337	11,624,879	WWTP Costs
8	PHOS	758,070	3.716	2,816,912	WWTP Costs
9	FOG	4,371,608	0.257	1,125,528	WWTP Costs
10	New WW Facilities	2.26%	43,309,045	977,038	
11	Total			**39,681,617**	Represents Unadjusted Annual Revenue Requirement Allocated to Customer

(a) Unit Costs are uniform for every customer

FY 2011-12 S.E. Oakland County Sewer Rate Calculation

Part 3 - Adjustments and Rate Calculation

Line		Amount	Reference	Comment
1	Rev Req't Allocation	39,681,617		From Part 2
2	Adjustment A	871,843	1978 RSA	Indirect Benefits - allocates rev req'ts from Detroit to Suburbs
3	Adjustment B4	(12,423)	1980 RSA	15 Mile & Hayes Repairs - reallocates common costs to Macomb Co. only
4	Adjusted Rev Req't	**40,541,038**		**Represents Annual Revenue Requirement from Customer**

Part 4 - Rate Calculation

		Total	Fixed	Commodity	Existing Charge	Comment / Percent Change	
5	Direct	0	0			Direct allocations and adjustments	
6	New WW Facilities	977,038	977,038			From Part 2	
7	Wholesale Only Costs	1,244,205	1,244,205				
8	Other	38,319,795					
9	Allocated to Sanitary	26,296,147		26,296,147		Other allocated based on Part 1: (Line 12) * [(Part 1,Line 2)/(Part 1,Line 8)]	
10	Allocated to Infiltration	2,783,043	2,783,043			Other allocated based on Part 1: (Line 12) * [(Part 1,Lns 3&4)/(Part 1,Line 8)]	
11	Allocated to Inflow	9,240,605	9,240,605			Other allocated based on Part 1: (Line 12) * [(Part 1,Line 7)/(Part 1,Line 8)]	
12	Total	40,541,038	14,244,890	26,296,147		Total Lines 10 thru 16	
13	Units		12	3,000,000		Months / Mcf	
14	**Fixed Charge**		**$1,187,074**		$759,417	(Line 16)/(Line 17)	56.3%
15	**Commodity Charge**			**$8.77**	$8.98	(Line 16)/(Line 17)	-2.3%
16	***"All Commodity" Unit Cost***			***$13.51***	$12.02	Total (Line 16)/(Line 17)	12.4%

S.E. Oakland County Sewer Rate Calculation
FY 2010-11 Rate Year

Part 1- Units of Service

Line		Unit	Amount	Reference	Comment
1	Metered Flow	Mcf	3,025,000		
2	Sanitary	Mcf	1,993,218	(1)-(3)-(5)	Metered less Local Community Infiltration/Inflow (Lns 3&5)
3	Local Dry Weather Infiltration	Mcf	178,306	GDRSS Data	Local Community only
4	Common Sewers Dry Weather Infiltration	Mcf	54,909	GDRSS Data	Represents share of common sewers "downstream" of connection
5	Wet Weather Inflow	Mcf	853,475	GDRSS Data	
6	Overflow Credit		30.8%		Universal for all customers
7	Net Wet Weather Inflow	Mcf	590,605	(5) x [1- (6)]	
8	Total Allocation Volume	Mcf	2,817,039	(2)+(3)+(4)+(7)	
9	System Volume	Mcf	27,588,045		
10	S.E. Oakland County Share		10.21%	(8)/(9)	**Represents Customer's share of "common" flow costs**
11	BOD	lbs	20,395,042	116 mg/l	Lower than volume share due to higher strengths of monitored industries
12	TSS	lbs	27,084,910	154 mg/l	Lower than volume share due to higher strengths of monitored industries
13	PHOS	lbs	589,303	3.4 mg/l	Lower than volume share due to higher strengths of monitored industries
14	FOG	lbs	3,373,601	19.2 mg/l	Lower than volume share due to higher strengths of monitored industries
15	Wet Weather		2.26%	1999 RSA	**Represents Customer's share of DWSD New CSO Facilities cost**

Part 2 - Cost Allocation

Line		(1) Units	(2) Unit Cost (a)	(3) Allocated Rev Req't (1)*(2)	Comment
1	City Only	0	2.190	0	Collection System Costs
2	Wholesale Only	2,817,039	0.390	1,099,206	Collection System Costs
3	Oakland Only	0	1.021	0	Collection System Costs
4	Macomb Only	0	1.246	0	Collection System Costs
5	Common	2,817,039	4.955	13,959,186	Common Collection & WWTP Costs
6	BOD	20,395,042	0.302	6,158,281	WWTP Costs
7	TSS	27,084,910	0.378	10,241,038	WWTP Costs
8	PHOS	589,303	4.140	2,439,982	WWTP Costs
9	FOG	3,373,601	0.233	786,098	WWTP Costs
10	New WW Facilities	2.26%	35,641,176	804,053	
11	Total			35,487,845	Represents Unadjusted Annual Revenue Requirement Allocated to Customer

(a) Unit Costs are uniform for every customer

S.E. Oakland County Sewer Rate Calculation
FY 2010-11 Rate Year

Part 3 - Adjustments and Rate Calculation

Line		Amount	Reference	Comment
1	Rev Req't Allocation	35,487,845		From Part 2
2	Adjustment A	808,708	1978 RSA	Indirect Benefits - allocates rev req'ts from Detroit to Suburbs
3	Adjustment B4	(12,252)	1980 RSA	15 Mile & Hayes Repairs - reallocates common costs to Macomb Co. only
4	Wayne Co. Adj	7,670	1982 RSA	15 Mile & Corridor Collapse - reallocates costs from Wayne Co. to all others
5	Adjusted Rev Req't	**36,291,971**		**Represents Annual Revenue Requirement from Customer**

Part 4 - Rate Calculation

		Total	Fixed	Commodity	Existing Charge	Comment / Percent Change	
6	Direct	0	0			Direct allocations and adjustments	
7	New WW Facilities	804,053	804,053			From Part 2	
8	Wholesale Only Costs	1,099,206	1,099,206				
9	Other	34,388,712					
10	Allocated to Sanitary	24,332,007		24,332,007		Other allocated based on Part 1: (Line 12) * [(Part 1,Line 2)/(Part 1,Line 8)]	
11	Allocated to Infiltration	2,846,958		2,846,958		Other allocated based on Part 1: (Line 12) * [(Part 1,Lns 3&4)/(Part 1,Line 8	
12	Allocated to Inflow	7,209,747	7,209,747			Other allocated based on Part 1: (Line 12) * [(Part 1,Line 7)/(Part 1,Line 8)]	
13	Total	36,291,971	9,113,006	27,178,965		Total Lines 10 thru 16	
14	Units		12	3,025,000		Months / Mcf	
15	**Fixed Charge**		**$759,417**		$545,256	(Line 16)/(Line 17)	39.3%
16	**Commodity Charge**			**$8.98**	$8.85	(Line 16)/(Line 17)	1.5%
17	***"All Commodity" Unit Charge***			***$12.00***	$11.06	Total (Line 16)/(Line 17)	8.4%

S.E. Oakland County Sewer Rate Calculation
FY 2009-10 Rate Year

Part 1- Units of Service

Line		Unit	Amount	Reference	Comment
1	Metered Flow	Mcf	2,950,000		
2	Sanitary	Mcf	2,053,341	(1)-(3)-(5)	Metered less Local Community Infiltration/Inflow (Lns 3&5)
3	Local Dry Weather Infiltration	Mcf	175,373	GDRSS Data	Local Community only
4	Common Sewers Dry Weather Infiltration	Mcf	54,115	GDRSS Data	Represents share of common sewers "downstream" of connection
5	Wet Weather Inflow	Mcf	721,286	GDRSS Data	
6	Overflow Credit		30.8%		Universal for all customers
7	Net Wet Weather Inflow	Mcf	499,130	(5) x [1- (6)]	
8	Total Allocation Volume	Mcf	2,781,959	(2)+(3)+(4)+(7)	
9	System Volume	Mcf	27,576,403		
10	S.E. Oakland County Share		10.09%	(8)/(9)	**Represents Customer's share of "common" flow costs**
11	BOD	lbs	20,350,529	116 mg/l	Lower than volume share due to higher strengths of monitored industries
12	TSS	lbs	26,786,546	154 mg/l	Lower than volume share due to higher strengths of monitored industries
13	PHOS	lbs	584,441	3.4 mg/l	Lower than volume share due to higher strengths of monitored industries
14	FOG	lbs	3,377,689	19.2 mg/l	Lower than volume share due to higher strengths of monitored industries
15	Wet Weather		2.26%	1999 RSA	**Represents Customer's share of DWSD New CSO Facilities cost**

Part 2 - Cost Allocation

Line		(1) Units	(2) Unit Cost (a)	(3) Allocated Rev Req't (1)*(2)	Comment
1	City Only	0	2.390	0	Collection System Costs
2	Wholesale Only	2,781,959	0.492	1,369,049	Collection System Costs
3	Oakland Only	0	0.512	0	Collection System Costs
4	Macomb Only	0	1.153	0	Collection System Costs
5	Common X C/O Mac	2,781,959	0.036	100,478	Collection System Costs
6	Common X Mac	2,781,959	0.238	662,936	Collection System Costs
7	Common	2,781,959	4.274	11,890,768	Common Collection & WWTP Costs
8	BOD	20,350,529	0.285	5,809,445	WWTP Costs
9	TSS	26,786,546	0.341	9,127,408	WWTP Costs
10	PHOS	584,441	3.862	2,256,976	WWTP Costs
11	FOG	3,377,689	0.255	860,159	WWTP Costs
12	New WW Facilities	2.26%	37,124,703	837,521	
13	Total			**32,914,741**	**Represents Unadjusted Annual Revenue Requirement Allocated to Customer**

(a) Unit Costs are uniform for every customer

S.E. Oakland County Sewer Rate Calculation
FY 2009-10 Rate Year

Part 3 - Adjustments and Rate Calculation

Line		Amount	Reference	Comment
1	Rev Req't Allocation	32,914,741		From Part 2
2	Adjustment A	773,041	1978 RSA	Indirect Benefits - allocates rev req'ts from Detroit to Suburbs
3	Adjustment B1	7,033	1980 RSA	15 Mile & Hayes Repairs - reallocates common costs away from all customers
4	Adjustment B2	(108,932)	1980 RSA	15 Mile & Hayes Repairs - reallocates common costs to Macomb Co. only
5	Adjustment B4	(957,820)	1980 RSA	15 Mile & Hayes/Garfield Interceptor- reallocates common costs to Macomb Co.
6	Wayne Co. Adj	9,975	1982 RSA	15 Mile & Corridor Collapse - reallocates costs from Wayne Co. to all others
7	Adjustment D	0	1999 RSA	Allocates revenue req'ts from Suburbs to Detroit (reverses prior implementation adj)
8	Adjusted Rev Req't	**32,638,038**		**Represents Annual Revenue Requirement from Customer**

Part 4 - Rate Calculation

		Total	Fixed	Commodity	Existing Charge	Comment / Percent Change	
9	Direct	0	0			Direct allocations and adjustments	
10	New WW Facilities	837,521	837,521			From Part 2	
11	Other	31,800,517					
12	Allocated to Sanitary	23,471,698		23,471,698		Other allocated based on Part 1: (Line 12) * [(Part 1,Line 2)/(Part 1,Line 8)]	
13	Allocated to Infiltration	2,623,273		2,623,273		Other allocated based on Part 1: (Line 12) * [(Part 1,Lns 3&4)/(Part 1,Line 8)]	
14	Allocated to Inflow	5,705,547	5,705,547			Other allocated based on Part 1: (Line 12) * [(Part 1,Line 7)/(Part 1,Line 8)]	
15	Total	32,638,038	6,543,067	26,094,971		Total Lines 10 thru 16	
16	Units		12	2,950,000		Months / Mcf	
17	**Fixed Charge**		**$545,256**		$530,572	(Line 16)/(Line 17)	2.77%
18	**Commodity Charge**			**$8.85**	$8.75	(Line 16)/(Line 17)	1.14%
19	**"All Commodity" Unit Charge**			**$11.06**	$10.88	Total (Line 16)/(Line 17)	1.73%

S.E. Oakland County Sewer Rate Calculation
FY 2008-09 Rate Year

Part 1- Units of Service

Line		Unit	Amount	Reference	Comment
1	Metered Flow	Mcf	3,000,000		
2	Sanitary	Mcf	2,052,561	(1)-(3)-(5)	Metered less Local Community Infiltration/Inflow (Lns 3&5)
3	Local Dry Weather Infiltration	Mcf	226,153	GDRSS Data	Local Community only
4	Common Sewers Dry Weather Infiltration	Mcf	49,518	GDRSS Data	Represents share of common sewers "downstream" of connection
5	Wet Weather Inflow	Mcf	721,286	GDRSS Data	
6	Overflow Credit		30.8%		Universal for all customers
7	Net Wet Weather Inflow	Mcf	499,130	(5) x [1- (6)]	
8	Total Allocation Volume	Mcf	2,827,362	(2)+(3)+(4)+(7)	
9	System Volume	Mcf	28,919,283		
10	S.E. Oakland County Share		10.09%	(8)/(9)	**Represents Customer's share of "common" flow costs**
11	BOD	lbs	20,682,655	118 mg/l	Lower than volume share due to higher strengths of monitored industries
12	TSS	lbs	27,223,722	154 mg/l	Lower than volume share due to higher strengths of monitored industries
13	PHOS	lbs	593,983	3.4 mg/l	Lower than volume share due to higher strengths of monitored industries
14	FOG	lbs	3,432,811	19.2 mg/l	Lower than volume share due to higher strengths of monitored industries
15	Wet Weather		2.26%	1999 RSS	**Represents Customer's share of DWSD New CSO Facilities cost**

Part 2 - Cost Allocation

Line		(1) Units	(2) Unit Cost (a)	(3) Allocated Rev Req't (1)*(2)	Comment
1	City Only	0	2.084	0	Collection System Costs
2	Wholesale Only	2,827,362	0.298	843,904	Collection System Costs
3	Oakland Only	0	0.408	0	Collection System Costs
4	Macomb Only	0	0.919	0	Collection System Costs
5	Common X C/O Mac	2,827,362	0.031	86,746	Collection System Costs
6	Common X Mac	2,827,362	0.203	573,186	Collection System Costs
7	Common	2,827,362	5.018	14,188,042	Common Collection & WWTP Costs
8	BOD	20,682,655	0.254	5,249,913	WWTP Costs
9	TSS	27,223,722	0.324	8,833,791	WWTP Costs
10	PHOS	593,983	3.729	2,215,098	WWTP Costs
11	FOG	3,432,811	0.221	757,243	WWTP Costs
12	New WW Facilities	2.26%	32,692,037	737,521	
13	Total			33,485,446	**Represents Unadjusted Annual Revenue Requirement Allocated to Customer**

(a) Unit Costs are uniform for every customer

S.E. Oakland County Sewer Rate Calculation
FY 2008-09 Rate Year

Part 3 - Adjustments and Rate Calculation

Line		Amount	Reference	Comment
1	Rev Req't Allocation	33,485,446		From Part 2
2	Adjustment A	755,940	1978 RSA	Indirect Benefits - allocates rev req'ts from Detroit to Suburbs
3	Adjustment B1	6,556	1980 RSA	15 Mile & Hayes Repairs - reallocates common costs away from all customers
4	Adjustment B2	(108,453)	1980 RSA	15 Mile & Hayes Repairs - reallocates common costs to Macomb Co. only
5	Adjustment B4	(953,609)	1980 RSA	15 Mile & Hayes/Garfield Interceptor- reallocates common costs to Macomb Co.
6	Wayne Co. Adj	9,663	1982 RSA	15 Mile & Corridor Collapse - reallocates costs from Wayne Co. to all others
7	Adjustment D	(570,181)	1999 RSA	Allocates revenue req'ts from Suburbs to Detroit (reverses prior implementation adj)
8	Adjusted Rev Req't	32,625,363		**Represents Annual Revenue Requirement from Customer**

Part 4 - Rate Calculation

		Total	Fixed	Commodity	Existing Charge	Comment / Percent Change	
9	Direct	0	0			Direct allocations and adjustments	
10	New WW Facilities	737,521	737,521			From Part 2	
11	Other	31,887,841					
12	Allocated to Sanitary	23,149,400		23,149,400		Other allocated based on Part 1: (Line 12) * [(Part 1,Line 2)/(Part 1,Line 8)]	
13	Allocated to Infiltration	3,109,101		3,109,101		Other allocated based on Part 1: (Line 12) * [(Part 1,Lns 3&4)/(Part 1,Line 8)]	
14	Allocated to Inflow	5,629,340	5,629,340			Other allocated based on Part 1: (Line 12) * [(Part 1,Line 7)/(Part 1,Line 8)]	
15	Total	32,625,363	6,366,862	26,258,501		Total Lines 10 thru 16	
16	Units		12	3,000,000		Months / Mcf	
17	**Fixed Charge**		**$530,572**		$496,361	(Line 15)/(Line 17)	6.89%
18	**Commodity Charge**			**$8.75**	$8.31	(Line 16)/(Line 17)	5.29%
19	**"All Commodity" Unit Charge**			**$10.88**	$10.28	Total (Line 16)/(Line 15)	5.84%

PRELIMINARY

EXHIBIT F

Oakland County Water Resource's Commissioner's Office
Fixed Charge - Three Year Rolling Average

March 20, 2014

Flat Rate Sewage Charge (Budget)

	2013	2014	2015
DWSD Purchased Expense	$ 19,544,502	$ 20,926,794	$ 21,378,450
OCWRC Operating Expense	1,653,169	1,616,614	1,670,306
Less: Interest Income	(298,820)	(280,163)	(253,357)
Total	$ 20,898,851	$ 22,263,245	$ 22,795,399

Municipality	Three Year Rolling Average 08/09-10/11	09/10-11/12	10/11-12/13	2013 Annual Charge	2014 Annual Charge	2015 Annual Charge
City of Berkley	4.0526%	4.0636%	3.9186%	$ 846,951	$ 904,681	$ 893,253
Village of Beverly Hills	0.2937%	0.2950%	0.2983%	61,381	65,667	68,002
City of Birmingham	2.8833%	2.9525%	3.0061%	602,574	657,314	685,250
City of Clawson	2.9303%	2.9142%	2.8846%	612,390	648,806	657,557
City of Ferndale	5.3108%	5.3948%	5.1630%	1,109,905	1,201,065	1,176,929
City of Hazel Park	4.0265%	3.7899%	3.5346%	841,483	843,759	805,735
City of Huntington Woods	1.8983%	1.9039%	1.8996%	396,731	423,874	433,033
City of Pleasant Ridge	0.8759%	0.8751%	0.8827%	183,059	194,834	201,215
City of Madison Heights	11.6310%	11.2628%	11.2842%	2,430,755	2,511,921	2,572,275
City of Oak Park	8.4081%	8.2825%	8.2634%	1,757,187	1,843,950	1,883,679
City of Royal Oak	19.3610%	19.2214%	19.0980%	4,046,230	4,279,308	4,353,457
Royal Oak Twp	0.9601%	0.9098%	0.9087%	200,641	202,561	207,149
City of Southfield	6.9956%	6.9636%	6.8818%	1,462,034	1,550,331	1,568,728
City of Troy	28.7953%	29.6232%	30.5265%	6,017,882	6,595,094	6,958,637
Detroit Zoological Park	1.3441%	1.2961%	1.1886%	280,907	288,564	270,957
OC Evergreen-Farmington	0.1231%	0.1226%	0.1211%	25,730	27,284	27,607
Rackham Golf Course	0.1101%	0.1083%	0.1396%	23,010	24,115	31,818
Red Run golf Course	0.0000%	0.0005%	0.0005%	-	117	119
State Of Michigan	0.0000%	0.0000%	0.0000%	-	-	-
Total	100.00%	100.00%	100.00%	$ 20,898,851	$ 22,263,245	$ 22,795,399

Flat Rate Storm Charge (Budget)

	2013	2014	2015
DWSD Purchased Expense	$ 21,847,374	$ 20,911,801	$ 21,378,450
OCWRC Operating Expense	3,317,617	3,635,673	3,705,465
Less: Interest Income	(203,450)	(254,200)	(63,772)
Total	24,961,541	24,293,274	25,020,144

Municipality	Allocation Percent	Same	Same	2013 Annual Charge	2014 Annual Charge	2015 Annual Charge
City of Berkley	6.4895%	6.4895%	6.4895%	$ 1,619,879	$ 1,576,512	$ 1,623,682
Village of Beverly Hills	0.8369%	0.8369%	0.8369%	208,903	203,310	209,394
City of Birmingham	4.8837%	4.8837%	4.8837%	1,219,047	1,186,411	1,221,909
City of Clawson	5.9262%	5.9262%	5.9262%	1,479,271	1,439,668	1,482,744
City of Ferndale	10.2885%	10.2885%	10.2885%	2,568,168	2,499,413	2,574,197
City of Hazel Park	2.2554%	2.2554%	2.2554%	562,983	547,910	564,304
City of Huntington Woods	2.4671%	2.4671%	2.4671%	615,826	599,339	617,272
City of Pleasant Ridge	1.3390%	1.3390%	1.3390%	334,235	325,287	335,020
City of Madison Heights	6.5410%	6.5410%	6.5410%	1,632,734	1,589,023	1,636,568
City of Oak Park	13.6383%	13.6383%	13.6383%	3,404,330	3,313,190	3,412,322
City of Royal Oak	29.7028%	29.7028%	29.7028%	7,414,277	7,215,783	7,431,683
Royal Oak Twp	1.2775%	1.2775%	1.2775%	318,884	310,347	319,632
City of Southfield	7.7156%	7.7156%	7.7156%	1,925,933	1,874,372	1,930,454
City of Troy	2.4799%	2.4799%	2.4799%	619,021	602,449	620,475
Detroit Zoo	0.3364%	0.3364%	0.3364%	83,971	81,723	84,168
OC Evergreen-Farmington	1.5274%	1.5274%	1.5274%	381,263	371,055	382,158
Rackham Golf Course	0.1913%	0.1913%	0.1913%	47,751	46,473	47,864
Red Run Golf Course	0.0000%	0.0000%	0.0000%	-	-	-
State of Michigan	2.1035%	2.1035%	2.1035%	525,066	511,009	526,299
Total	100.00%	100.00%	100.00%	$ 24,961,541	$ 24,293,274	$ 25,020,144

Combined Storm and Sewer Charge (Budget)

	2013	2014	2015
DWSD Purchased Expense	$ 41,391,876	$ 41,838,595	$ 42,756,900
OCWRC Operating Expense	4,970,786	5,252,287	5,375,771
Less: Interest Income	(502,270)	(534,363)	(317,128)
Total	45,860,392	46,556,519	47,815,543

Municipality	2013 Monthly Charge	2014 Monthly Charge	2015 Monthly Charge	2013 Annual Charge	2014 Annual Charge	2015 Annual Charge
City of Berkley	$ 205,569	$ 206,766	$ 209,745	$ 2,466,830	$ 2,481,193	$ 2,516,935
Village of Beverly Hills	22,524	22,415	23,116	270,285	268,978	277,396
City of Birmingham	151,802	153,644	158,930	1,821,621	1,843,725	1,907,159
City of Clawson	174,305	174,039	178,358	2,091,661	2,088,474	2,140,301
City of Ferndale	306,506	308,373	312,594	3,678,073	3,700,479	3,751,126
City of Hazel Park	117,039	115,972	114,170	1,404,466	1,391,670	1,370,039
City of Huntington Woods	84,380	85,268	87,525	1,012,557	1,023,214	1,050,305
City of Pleasant Ridge	151,316	148,855	153,149	1,815,793	1,783,857	1,837,782
City of Madison Heights	486,257	485,426	498,716	5,835,085	5,825,111	5,984,597
City of Oak Park	174,285	180,770	184,892	2,091,422	2,169,237	2,218,699
City of Royal Oak	955,042	957,924	982,095	11,460,506	11,495,091	11,785,140
Royal Oak Twp	43,294	42,742	43,898	519,525	512,907	526,781
City of Southfield	282,331	285,392	291,598	3,387,967	3,424,703	3,499,182
City of Troy	553,075	599,795	631,593	6,636,904	7,197,543	7,579,112
Detroit Zoo	30,406	30,857	29,594	364,877	370,287	355,125
OC Evergreen-Farmington	6,123	6,146	6,289	73,481	73,757	75,471
Rackham Golf Course	1,918	2,010	2,651	23,010	24,115	31,816
Red Run Golf Course	31,772	30,931	31,856	381,263	371,172	382,277
State of Michigan	43,756	42,584	43,858	525,066	511,009	526,299
Total	$ 3,821,699	$ 3,879,710	$ 3,984,629	$ 45,860,392	$ 46,556,519	$ 47,815,543

Exhibit 10

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

KICKHAM HANLEY, PLLC,

Plaintiff, Case No. 2017-159351-CZ

vs

OAKLAND COUNTY MICHIGAN and
GEORGE W. KUHN DRAINAGE DISTRICT,

Defendants.

_____/

MOTION

BEFORE THE HONORABLE DANIEL PATRICK O'BRIEN

Pontiac, Michigan - Wednesday, October 25, 2017

APPEARANCES:

For the Plaintiff: EDWARD F. KICKHAM, III (P70332)
Kickham Hanley, PLLC
32121 Woodward Avenue
Suite 300
Royal Oak, Michigan 48073
(248) 544-1500

For the Defendants: PETER H. WEBSTER (P48783)
Dickinson Wright, PLLC
2600 West Big Beaver Road
Suite 300
Troy, Michigan 48084
(248) 433-7200

Videotape Transcription Provided By:
Deanna L. Harrison, CER 7464
About Town Court Reporting, Inc.
248-634-3369

TABLE OF CONTENTS

Pontiac, Michigan

Wednesday, October 25, 2017

- - -

(At 8:48 a.m., proceedings begin)

THE CLERK: The Court calls Kickham versus Oakland County, case number 2017-159351-CZ.

MR. KICKHAM: Edward Kickham for the Plaintiff.

MR. WEBSTER: May it please the Court, Peter Webster on behalf of the Defendants.

THE CLERK: All rise. Circuit Court for Oakland County is now in session; the Honorable Daniel Patrick O'Brien presiding.

THE COURT: Good morning everyone. Be seated, please.

THE CLERK: We called docket number 24, and the attorneys' appearances are already on the record.

THE COURT: Okay. Gentlemen, is that you guys; Kickham?

MR. KICKHAM: Yes, Your Honor.

THE COURT: Hi.

MR. WEBSTER: Yes, Your Honor. Good morning, Your Honor.

THE COURT: Gentlemen, go ahead.

MR. WEBSTER: All right. Thank you, Your Honor.

There are actually -- I think we have three

matters up before the Court this morning; that is the Defendant's motion for summary disposition pursuant to (C)(8), there is a motion to amend to allow first amended complaint, and then there is a carryover per the Court's direction --

THE COURT: Yeah.

MR. WEBSTER: -- motion to enlarge time --

THE COURT: The motion to amend is to add unjust enrichment, correct?

MR. WEBSTER: Correct. There are actually technically two counts --

THE COURT: Is there two?

MR. WEBSTER: -- but unjust enrichment is probably perhaps the one large aspect of that.

THE COURT: Okay. All right. Go ahead.

MR. WEBSTER: And so with respect to the (C)(8) motion that we have filed in this case, the -- the Court is aware that this complaint is brought by the Plaintiff standing in the shoes of the City of Royal Oak. That arises out of this 2014 class action in which the Plaintiffs in this case were Plaintiff's counsel in the prior action representing a class suing the City of Royal Oak over two aspects. One is the retention facility charge charged by the City of Royal Oak as to its users, and the other is storm water charge charged by the City of

Royal Oak as to its users.

In that case, after motion for summary disposition was granted in favor of Royal Oak against the class, then there was a settlement, and the settlement provided for payment by Royal Oak as to the facility debt charge, but there was no payment by Royal Oak for the storm water charge, and indeed the City of Royal Oak then assigned any claims that it may or may not have against my clients, George W. Kuhn Drainage District, the water resource commissioner, and also obtained a release from the class forever of any claim for any damages arising out of that class. And so that Royal Oak then after the assignment is here before the Court in the form of the Kickham Hanley firm pursuant to that settlement agreement.

The complaint states two counts, breach of contract, and a count for assumpsit/money add money received, that with respect to the breach of contract claim we state in our motion for summary disposition that there is no contract here, and as a matter of law there can't be a contract. There is no -- obviously, there is no contract as one would normally envision it, it wasn't attached to the complaint, there was no contractual document signed by the George W. Kuhn Drainage District and the City of Royal Oak. As happens oftentimes with drainage districts, they actually enter into service

contracts with various communities. That was never done here.

What was done is that the George W. Kuhn was formed as a Chapter 20 drainage district under the Drain Code, and that Royal Oak is part of the apportioned communities pursuant to state law and to the formation of the GWK under Chapter 20. That was done by virtue of a resolution approving final apportionment, and that the -- the GWK was established as a separate legal entity.

Recognizing that there's not a contract between the George W. Kuhn and City of Royal Oak, the theory here is that somehow the resolution adopting the existence of the GWK and the final order of apportionment acts as the contract.

We provide the Court in our briefing significant authority that says such a resolution is not a contract, that it doesn't contain any indicia of any contract, there's no offer made by the George W. Kuhn, there's no acceptance by the City of Royal Oak, there's no separate contract document, and indeed there's no consideration or promises made. So where there is no contract, there can be no breach of contract.

And in addition to a cause of action for a breach of contract, I'm going to point out here, as I'll discuss again, even if there were a breach of contract,

there is no damage here.

Recognizing that there's no breach of contract, and pleading in the alternative, which is implicit recognition that there is no contract to be breached, there is this claim for assumpsit. Here with respect to assumpsit, we identify to the Court that there is no damage.

Recall that they're standing in the shoes now -- we now know they're standing directly and squarely -- they admit that -- in the shoes of City of Royal Oak, and in the response, they admit that there's no damage to the City of Royal Oak, right? So where there's no damage, then they don't have standing and there's no claim to be made for assumpsit.

In addition, to the extent that they're arguing that this claimed overcharge was the result of some negligence or error, whether through calculation or otherwise, by the operation of the GWK in improperly charging a fee, that that negligence claim is barred by governmental immunity as a matter of law.

As we know Royal Oak passed through all the charges from the George W. Kuhn to its -- to the constituents of the folks that utilize those services. Royal Oak paid nothing to settle the class. Royal Oak is now released and forever of any damages arising out of

that. Royal Oak has not been damaged and can never be with respect to the storm water charge. And interestingly, the settlement also allows Royal Oak to continue charging that charge.

I wanted to identify that also with respect to no damage, in response the Plaintiffs here assert the legal theory -- and we identify this in our reply -- this legal theory from antitrust law of Hanover and Illinois Brick, right, and so on the outset, the whole concept of applying antitrust law to this situation, there's no authority for that. That, is the case law developed under antitrust, in which Hanover is actually a horizontal conspiracy, a price fixing, is not -- inapplicable here. But even if the Court were to actually look at this, the State of Michigan passed 30 years ago a repealer law judicially overruling Hanover and its companion case Illinois Brick, and so it's oftentimes called an Illinois Brick repealer statute, not only in Michigan but throughout the country, which legislatively undermined this -- this defense, if you will, or allowance of a claim that's being brought here.

Let me just explain. Hanover was brought forth and it said -- and it said that our defense here in this case, which is they don't have any damages because they passed it through, Hanover says you can't do that because

under antitrust law we want is under -- for a number of reasons, mostly judicial efficiency and evidentiary issues, we want to consolidate all the damages into a person or entity that's akin to the City of Royal Oak in this case, right; instead of having all of the class members make these claims, we just want it in an antitrust context to be only Royal Oak. The State of Michigan said no, and specifically allowed the -- the class members by analogy to make the claim, and specifically said that the defense to the claim, exactly what's being made here by Royal Oak, can be made where Royal Oak didn't suffer any damages because they passed it on. That's the law in the state of Michigan, and that's -- you know, was not even mentioned in the response here as part of the discussion, and so we called that out as part of our reply.

And indeed we cite to the Zimmerman case that says with respect to this claim that they can make this allegation of damages, not because they suffered any damages, but because someone else has, the Zimmerman case that we cite to out of the First Circuit says that argument is unpersuasive, and this is the antitrust context; that it's unprecedented and rather a startling premise, and that to institute an independent lawsuit against different parties and never provide those parties with an opportunity to challenge the propriety of the

class action mechanism, and to expose these new defendants to a risk of a massive class action based damage award is impermissible. The potential of use of the class action tool of Plaintiff's theory, were it to be approved, is prodigious. This simply cannot be permitted. That's the thinking of the First Circuit. And also that's the policy thinking behind the Michigan legislature when they adopted the repealer statutes.

So as a consequence, the key element of the assumpsit claim is that somehow they've been damaged. The City of Royal Oak has not been damaged, nor can it be relative to this case. Consequently, they failed to state a claim.

That's the overview and the upshot. I'm happy to answer any questions that the Court has.

THE COURT: Not right now. And let me invite you to have a seat for a moment. I'll hear your response and your -- your motion for leave to amend, recognizing you still have the discovery motion. If the Court makes a ruling, which -- which it expects it will, it might invite you both to go get a cup of coffee and come on back in an hour or something like that. But let me take them in that -- in that particular sequence, okay?

MR. WEBSTER: Okay. It -- and if I may, if the Court --

THE COURT: Yes.

MR. WEBSTER: I apologize. There was an element as part of our briefing, and that relates to the Drain Code here. We do brief that under Chapter 20, the procedure for asserting that there's something illegal going on here with respect to the order of apportionment, is that the complaining entity, who was part of the apportionment -- has to appeal that within 20 days --

THE COURT: Mm-hmm.

MR. WEBSTER: -- right? Of course that was not done, and it's not -- it's not pled --

THE COURT: You've -- you've read his response that they're not complaining, in fact, they -- you read his response?

MR. WEBSTER: Certainly. Right. And so --

THE COURT: He's taking no issue with the concept of the method, but just that it's -- that's --

MR. WEBSTER: Yeah, and --

THE COURT: Go -- go ahead and speak to it, if you want --

MR. WEBSTER: And so I was only going to say -- so -- so one, complaining about that is, you know, one, is time barred. And then the assertion is somehow oh well, we're not complaining about it, we're -- we're somehow seeking to enforce it --

THE COURT: You called it semantics, I know --

MR. WEBSTER: It -- and it is semantics, and indeed, they allege in the complaint a -- somehow a breach of the resolution. But they say words that aren't in the resolution. They just make them up with respect to it --

THE COURT: Sure.

MR. WEBSTER: -- and so it is indeed a -- you know, a challenge to what that resolution is.

THE COURT: Okay. All right, thank you.

MR. WEBSTER: Thank you.

THE COURT: Counsel.

MR. KICKHAM: Your Honor, we've got a -- there are a lot moving parts on this hearing, and I'm not really sure where to begin. I think our --

THE COURT: Start with your -- anything you have to say in response to their reply about MCL 445, whatever it is.

MR. KICKHAM: Right. Well, that's -- that Illinois Brick repealer statute actually broadens the conditions under which -- or it -- it broadens the parties who can bring a claim. I mean, first of all, it is an antitrust statute, and under -- un -- unlike the cases we've cited which, were decided in the antitrust context --

THE COURT: Give -- I'm sorry; make it simple

for me.

MR. KICKHAM: Well --

THE COURT: If -- no, here, put it this way. If I was to look up on Shepard's, Hanover, would I see a stop sign that says MCL 445?

MR. KICKHAM: I don't think so.

THE COURT: Okay. And would you say that I would, Mr. Webster? Is it that stark? Because admittedly, I didn't break any books open and look at it; I just read your response that would cause me to think that Shepard's would should Hanover has been overruled, if you will, by MCL 445.

MR. WEBSTER: I don't -- I don't know about Shepard's, but we provided you the case that -- that's says that --

THE COURT: And -- and that -- that is -- you're not -- you're not diluting your argument. You're saying pointblank that's effectively what --

MR. WEBSTER: Yeah.

THE COURT: -- Hanover --

MR. WEBSTER: Yeah.

THE COURT: -- is reversed?

MR. WEBSTER: And the case that says that says that if you're making a claim -- the statute specifically says if you're making a claim, you are entitled to actual

damages, and the case law says the statute brings back to life the common law rule that you have to prove actual damages to state your claim.

THE COURT: Well, in the pre -- in the preamble to 445 would it say this is an act to set aside the holding in Hanover or something like that --

MR. WEBSTER: I -- I don't think so, but it is -- it is -- and we presented to the Court significant authority that says the -- the repealer of Illinois Brick Hanover by the State of Michigan is also -- was part of a national --

THE COURT: I -- I gotcha.

MR. WEBSTER: -- and so there is no doubt that --

THE COURT: I've -- I've never heard the word -- I don't remember hearing the word repealer, so it's -- it's identified as a repealer act or -- or in some case, it calls it a repealer act?

MR. WEBSTER: In -- not only in -- in a case, but it in literature discussing the concept --

THE COURT: Okay.

MR. WEBSTER: -- that is exactly how it is characterized.

THE COURT: Okay.

MR. KICKHAM: Your Honor, here's what the

statute actually says. It says any other person injured directly or indirectly. So what it does is in -- in the antitrust context, it allows the people to whom the charge has been passed on to bring a case or a class action, but it does not foreclose the right of the person who initially paid the charge. In -- in our case, Royal Oak would be the analogy. It's -- it specifically says the person injured directly may bring an action for actual damages sustained. And --

THE COURT: What damages? Because you're -- the premise of your theory is that there were no damages; that they were just passed right through, right?

MR. KICKHAM: Right. But not passed through, but that we -- that Royal Oak charged --

THE COURT: If they weren't -- okay, so -- all right, all right. So your theory is that -- and -- and we're going to get into this shortly, but -- but your theory is that Kuhn gouged Royal Oak and Royal Oak ate it and didn't in turn gouge your client, and -- and if of course you maintain that, then there was no cause of action -- there was no viable cause of action that you had against Royal Oak?

MR. KICKHAM: No. We -- our position is Royal Oak passed it on it the class members.

THE COURT: Okay. We're -- we're going to get

into bean counting in -- in a little bit, but --

MR. KICKHAM: Okay.

THE COURT: -- go ahead with your -- go ahead with your argument.

MR. KICKHAM: The -- this statute the Defendant cites was enacted in 1984. The case I cite, the County of Oakland versus Detroit, and this is a Sixth Circuit case cited in 1989, held that where the municipalities who were overcharged passed that overcharge on to the ultimate consumers, the counties are indeed the proper parties to bring suit in light of Hanover Shoe and the subsequent case of Illinois Brick. So obviously, the Sixth Circuit as of 1989 didn't believe that this statute that Mr. Webster cites abrogated Hanover Brick and Illinois Shoe -- or Hanover Shoe and Illinois Brick --

THE COURT: Sure. Okay.

MR. KICKHAM: And, you know, we think that case is the most relevant law here; that -- and it -- and it held that the counties, in our view, must be treated as direct purchasers in their own right. And so Royal Oak, analogous to the counties in the County of Oakland, was the direct purchaser. And it -- it -- my analogy on the last page of my brief about the widgets --

THE COURT: I -- I read that. I --

MR. KICKHAM: -- this explains our position

about why we can still sue. Even if some of that cost or maybe all of the cost got baked into the cost of the ultimate product --

THE COURT: Mm-hmm.

MR. KICKHAM: -- the purchaser who has been overcharged can still sue.

THE COURT: Okay. All right.

MR. KICKHAM: And I guess to try to address some of the points Mr. Webster has raised, the cases we've cited in our brief show that -- well, they -- they hold that resolutions of a municipality or of a governmental body should be construed like statutes. And the remedy there seems to be the same remedy as for a breach of contract; that they are enforceable by the parties who are beneficiaries to the resolutions. That these cases say over and over again that the beneficiaries can enforce the resolution.

Resolution is not just an empty promise and it -- that is performable at the whim of the governmental body. The beneficiaries have a right to enforce it. And even if that right -- you know, and we don't -- we're not abandoning our breach of contract claim --

THE COURT: Mm-hmm.

MR. KICKHAM: -- but let's say even if that right doesn't sound in contract, it does sound in

assumpsit, and they've admitted as much in their reply brief. They say the assumpsit claims are not barred by governmental immunity, and nowhere have we said that we're planning on having a negligence claim. This is a total non sequitur and diversion from what we're trying to talk about. If we don't have a breach of contract claim or even if we do have a breach of contract claim, we also have a claim in assumpsit, and under our amended complaint, we'd also like to have a claim of unjust enrichment.

As far as the -- the class action aspect of this, and it -- it all kind of ties in together. This is not an unfair back door class action, because when the Kuhn Drainage District levied its charge, it didn't levy it on a class of 10,000; it levied it one entity, Royal Oak. Royal Oak then assigned that claim to a class of people, but that's totally irrelevant as for -- to whether that claim exists. I'm standing in the shoes of Royal Oak. We -- we admit that. Mr. Webster seems to think it's a damaging admission, but that's our posture in this case.

As far as the Drain Code, I think Your Honor has hit on the really relevant aspect of that, which is we're not challenging how this resolution was enacted, we're just trying to say do what you promised to do. And in my

brief, I show just based on one year how much they're overcharging -- how much they're supposed to be charging and how much they're actually charging, and it's not in conformance with the resolution. There -- there's at a minimum a question of fact regarding whether they've overcharged beyond what they're allowed to charge under the resolution.

THE COURT: As opposed to a question of law? If it's just a mathematical equation, if it is simply that -- I -- I didn't look at the resolution and I didn't try to mathematically formulate it, but I suppose it's just a -- it's a formula error that you're saying, or a formula overlooking that you're alleging.

MR. KICKHAM: Right. We think it is --

THE COURT: And that sounds like the law. It doesn't sound like fact. I don't know what facts would be in dispute.

MR. KICKHAM: Well, I don't know either. And we probably at some point will bring a motion for summary saying this is what you were allowed to charge, this is what you actually charged.

THE COURT: Sure.

MR. KICKHAM: What I'm saying is there's -- for the purpose of this motion --

THE COURT: I gotcha.

MR. KICKHAM: -- we have stated a claim and we've explained why the overcharge is an overcharge.

THE COURT: Sure. Okay.

MR. KICKHAM: As far as the motion to amend the complaint, we're not entirely moving to amend a complaint to try to cure defects in this motion. We are -- we've identified some things that, you know, we're trying to stay one step ahead of --

THE COURT: Mm-hmm.

MR. KICKHAM: -- where we can say okay, well the Court found that our claims failed because we did not plead this allegation --

THE COURT: You need not worry about perceptions the Court has by virtue of this motion that exists at the same time of their (C)(8). Don't worry about that. I -- let me just talk barebones. You're seeking to add one count, and that's unjust enrichment --

MR. KICKHAM: We're seeking --

THE COURT: -- or is there two?

MR. KICKHAM: We're adding two counts.

THE COURT: Okay. And what's the other one?

MR. KICKHAM: The other count is assumpsit for -- well, really we're bifurcating our assumpsit claim. What we have right now is just one assumpsit claim, and it applies to both rate overcharges and an unlawful exaction

-- or really -- un -- un -- unreasonable rates and an unlawful exaction. What we're trying to do is split that assumpsit claim into two --

THE COURT: Okay.

MR. KICKHAM: -- so that we have one focused on unreasonable fees, one focused on unlawful exaction under --

THE COURT: What is -- they're both unlawful, aren't they?

MR. KICKHAM: They are.

THE COURT: So one's unlawful and unreasonable and the other one's unlawful but it is reasonable?

MR. KICKHAM: Well, the other --

THE COURT: I -- I -- I'm not following.

MR. KICKHAM: Let me -- let me pull out our amended complaint and see if I can clarify this.

Well, the one -- our -- our unlawful exactions claim -- the proposed unlawful exaction claim arises from the Kuhn District violation of the resolution and order of apportionment. The unreasonable water and sewer rates claim arises from the fact that the charges are arbitrary, capricious, and reasonable. And we -- it's possible that these could be combined in one claim. Our position frankly is they were already both combined in our existing assumpsit claim --

THE COURT: Got it. Okay.

MR. KICKHAM: -- but for the purpose of our proposed amended complaint, we break them down.

THE COURT: Okay. I got it.

MR. KICKHAM: The other thing we seek to add in the amended complaint is a claim for unjust enrichment based on this new case that we discussed --

THE COURT: Sure.

MR. KICKHAM: -- last time we were here.

THE COURT: Right. Okay, thank you.

He says that there's a 1989 case that seems to acknowledge the viability of Hanover Shoe.

MR. WEBSTER: Sure.

THE COURT: Is that something that you could -- some simple thing you could point to?

MR. WEBSTER: Sure.

THE COURT: I -- and I'll -- and I'll confess, when I read your reply brief, the -- the thing the Court said to itself was presumably out there is some explicit statement by the legislature that I guess authoritatively reverses a United States Supreme Court case.

I'm scratching my head about the procedure and civics and so forth, but I didn't do any research.

MR. WEBSTER: Sure.

THE COURT: So --

MR. WEBSTER: So the -- the case that counsel has identified, County of Oakland versus Detroit, the -- the key fact for the Court is that in the opinion -- the opinion specifically identifies the County of Oakland is a consumer, right, is a direct purchaser of the services. It reflects that all county buildings are connected to the sewer systems and where the communities are located, and that Oakland County receives and pays regular sewer bills like any other end user of those communities. And so that is a key distinguishing feature.

I should also point that -- and so the facts are completely different. I should also -- and so in essence, the important part here is that the County of Oakland had actual damages, right? In that same case, they also talk about and identify a case called County of Oakland versus City of Berkley, which acknowledged the opposite, and that is where the county was simply a pass-through, right, it could not raise that -- raise the claim because it didn't have any damages.

Counsel stood here and read to the Court the statutory language of -- the Illinois Brick repealer of -- of the statute that was adopted, and it said that for them to bring a claim, they have to have actual damages, and they admit that they don't have any. That's the problem here.

THE COURT: Where did you get the title Illinois Brick repealer? Where -- where did that phrase come from?

MR. WEBSTER: So -- so in the literature -- if you Google --

THE COURT: What literature?

MR. WEBSTER: Law review articles --

THE COURT: Like Williston's on Contracts or --

MR. WEBSTER: -- law --

THE COURT: -- or Jones on Antitrust?

MR. WEBSTER: Yeah. So in law review articles -- if you -- literally if you Google Illinois repealer -- Illinois Brick repealer, you're going to get hits. That's just -- right?

THE COURT: So it's not a -- it's not phrase that has been ordained by any governmental body --

MR. WEBSTER: No.

THE COURT: -- it's just the scholars are out there --

MR. WEBSTER: It is the vernacular --

THE COURT: Okay.

MR. WEBSTER: -- using the phrase, correct.

THE COURT: Okay.

MR. WEBSTER: And so -- and is to recognize that in this instance -- even assuming that the antitrust law is applicable, in this instance, Michigan law specifically

allows me to say as a defense to a claim exactly like in this case, you don't have a claim, whether it's in a breach of contract -- I have all these other reasons, but an element of that is no damages, and then the assumpsit claim is you don't have any damages here. And that's -- that has been admitted, right? And so as a consequence, they failed to state a claim.

The -- the case law and the statutes are relatively clear on that as we have presented to the Court. The citation to the County of Oakland case is -- you know, is -- is distinguishable indeed because of the fact that there is an acknowledgement that Oakland County in that particular case had specific actual damages.

I would also then point out that with respect to the issue of adding an unjust enrichment claim, in the citation of the Genesee County case, we point out that just as Genesee County is a relatively new case, there's actually another case, the Shears/Bingaman case, which says -- and actually echoes what counsel just stated; the resolution here is to be construed like a statute, and then Shears also then talks about law that says it should be construed as a statute or an ordinance, and that you can't make a claim for unjust enrichment based upon those concepts, as a matter of law. And so we present that authority to the Court as well.

And so as a consequence, this unjust enrichment claim here can't be made as a matter of law where it's base -- not based on some contract, but rather based on a governmental act, the George W. Kuhn Drainage District.

THE COURT: Thank you.

MR. WEBSTER: Thank you, Your Honor.

MR. KICKHAM: Your Honor, if I may --

THE COURT: Go ahead. Go ahead.

MR. KICKHAM: -- just a brief rebuttal?

THE COURT: Yes.

MR. KICKHAM: First of all, their unjust enrichment case is unpublished. Ours is published --

THE COURT: Okay.

MR. KICKHAM: -- and it's binding on the Court.

As far as whether -- if the issue comes down to whether Royal Oak itself was a purchaser from the Kuhn Drainage District, I believe it was, and I -- I don't have proof with me today, I can submit that to the Court, but I'm 99.9 percent sure that Royal Oak itself pays a water and sewer bill to itself for its municipal buildings.

And in our complaint, we allege that the City passed on the storm water management overcharge to its water and sewer customers, and that the City's water and sewer customers then paid the city for storm water -- for the storm water management overcharge.

So we've pleaded the facts sufficient to make the case that Royal Oak was itself a direct payer of the overcharge.

THE COURT: Okay.

MR. WEBSTER: And I would just say counsel just makes my point. If the claim is how much the City of Royal Oak for itself, that's a whole different kettle of fish than trying to pass on class damages here.

THE COURT: If you were to quantify the damages that were occasioned by the class on the one end of the teeter-totter and the separate independent damages by the City of Royal Oak, would they equate incidentally, or are those two different pots of money, in fairness to what he just said to your response? You're -- you're -- you're contending well, we have standing because we -- Royal Oak does have standing because Royal Oak does have damages, but that's precisely what he just said, it's a separate bag of money, correct? And which bag of money are -- is -- are you targeting?

MR. KICKHAM: Well, we're targeting the entire overcharge. And all I'm saying with my rebuttal was if --

THE COURT: Okay.

MR. KICKHAM: -- if the necessary element is that Royal Oak have paid one dollar in order to have standing to sue --

THE COURT: They they've got the dollar, okay.

MR. KICKHAM: -- then we've paid dollar.

THE COURT: All right. Do you have another case up here today?

MR. KICKHAM: I do.

THE COURT: Okay. Why don't you both come on up here real quick for a second on -- on scheduling?

(At 9:20 a.m., bench conference)

(At 9:21 a.m., bench conference concluded; proceedings passed)

(At 2:32 p.m., proceedings resumed)

THE CLERK: Court calls Kickham versus Oakland County, 2017-159351-CZ.

MR. KICKHAM: Edward Kickham on behalf of the Plaintiff.

MR. WEBSTER: May it please the Court, Peter Webster on behalf of the Defendants.

THE COURT: Thank you. You may be seated, gentlemen.

The -- the Court's not so sure that its writings here are an invitation to further argument, or exclusively a court ruling. Admittedly, this Court hasn't rewritten it, and it was preparing this at the airport for four hours and in the air for four hours, and so it evolved over time. I'm just going to start reading, and I may

invite counsel to chime in, or if something is confusing to counsel, feel free to interrupt and I'll see if I can clarify for you, because it is a work in progress, okay? All right?

MR. WEBSTER: Yes, Your Honor.

MR. KICKHAM: I guess I'm unsure, Your Honor, is this the ruling of the Court or is this --

THE COURT: It might ult -- it ultimately is going to be a ruling of the Court, but presently it's just some observations --

MR. KICKHAM: Okay.

THE COURT: -- and thoughts that might be an invitation to comment.

MR. KICKHAM: Okay. Fair enough.

THE COURT: Okay. And forgive the choice of words here. When the Court refers to Kuhn, it's referring to Defendant -- the Defendant.

If Kuhn gouged Royal Oak, meaning charged an -- an illegal amount, and Royal Oak in turn gouged the Plaintiff class -- mind you, we're referring to the other lawsuit -- query, did there occur two transgressions with two victims, or one with two victims? And I trust counsel knows what the Court means when it says transgression, or do you need clarification?

MR. KICKHAM: No, Your Honor, I think I can

answer that. There was one transgression --

THE COURT: Before you do, hold the thought.

MR. KICKHAM: Okay. Sure.

THE COURT: If one transgression with one victim, then who was the victim, Royal Oak or the Plaintiff class? If one transgression and the Plaintiff class was the victim, then Royal Oak, not being a victim, had no claim to assign to the Plaintiff class.

If one transgression -- if one transgression and Royal Oak was the victim, then is Royal Oak's purported assignment to Plaintiff class valid? What is its consideration for assigning its chosen action Kuhn?

Don't answer that by saying it was relieved of liability to the Plaintiff class, because we are in the option where there is but one transgression, Kuhn's, and only one victim, being Royal Oak. In other words, Royal Oak not being a transgressor has no liability to Plaintiff class from which Royal Oak could enjoy relief in the form of a release from liability as consideration for the assignment. Ah, but Royal Oak could enjoy relief in the form of release from the headache of defending a frivolous lawsuit. The Court guesses that that would not be called a release from -- a release from liability, but a release from frivolity. Both are annoying and costly and valuable to be free of.

You were going to chime in, Mr. Kickham, as to the Court's -- I was characterizing it as a rhetorical question, but I'll take an answer. Did there occur two transgressions, if Kuhn gouged Royal Oak and Royal Oak in turn gouged the Plaintiff class? If -- and if you want to --

MR. KICKHAM: No, Your Honor. There was one transgression. There was one direct victim, which was Royal Oak. There was one indirect victim, which was the Plaintiff class. Because Royal Oak is allowed to charge the Plaintiff class in -- just talking about the underlying Royal Oak litigation, they're allowed -- Royal Oak is allowed to charge its rate payers based on what Royal Oak itself pays.

THE COURT: Is there no claim cognizable in Michigan if for example Kuhn, that body, that entity, read its resolution, and the resolution said $1.00 per gallon, and chose to charge $50.00 per gallon. So charges Royal Oak $50.00 per gallon, Royal Oak charges $50.00 per gallon, Royal Oak has committed no transgression is what you're saying?

MR. KICKHAM: That's correct.

THE COURT: Then what was the lawsuit that your class -- that the class had against Royal Oak that was bargained for by dismissal?

MR. KICKHAM: We argued that there were unlawful components in the City's rates, other than this charge by the County --

THE COURT: Okay.

MR. KICKHAM: -- and we argued that the City was improperly charging for storm water disposal based on how much water comes out of someone's tap.

THE COURT: Okay.

MR. KICKHAM: And --

THE COURT: So we'll get to that option in a moment then. So let me keep on thinking here for a second.

Unless you wanted to chime in more?

MR. KICKHAM: Well, I -- one of the later things you said -- but it -- it escapes me now, so maybe I'll come back --

THE COURT: Okay. All right. If on the other hand, there were two transgression, Kuhn gouged Royal Oak, transgression number one, and Royal Oak gouged Plaintiff class, transgression number two, then the Court supposes, without ruling, that those two parties, Royal Oak, both a transgressor and a victim, and class -- Plaintiff class, a victim only, may engage in commerce and buy and sell choses in action.

But, question; well, first how -- how could it

be two transgressions, for a transgression or illegal parlance, any wrong is by definition occasioned by a breach and its own damages; for if there is one damage which is fungible and passed from one to another, then there is only one legal wrong occasioned by the one who was left holding the bag. The only one ultimately holding the bag, and Plaintiff being that bag man, well that means Royal Oak is no claimant with no claim to assign.

And this is not a ruling. These are just musings.

Well, what if Kuhn gouged Royal Oak to the tune of $2.50, and Royal Oak gouged Plaintiff to the tune of $3.50? Well, if Plaintiff sued Royal Oak for only Royal Oak's $1.00 gouge, believing its additional $2.50 gouge was not from the hand of Royal Oak, but Kuhn's, then the Plaintiff class could contend that it could barter with Royal Oak, I'll give up my $1.00 claim against you, and you give me your $2.50 claim against Kuhn. But alas, if Plaintiff class so contends it is mistaken that Royal Oak is the $2.50 claimant, Plaintiff was -- class was the $2.50 claimant, for Plaintiff is the bag man, the last guy holding the bag. And that's why Plaintiff class sued Royal Oak for only $1.00.

Such a theory includes the contention that Kuhn is Plaintiff class's transgressor, not Royal Oak, and

therefore again, Royal Oak had no claim to assign the Plaintiff class. Plaintiff class was the claimant all along.

Again, not a ruling, just thoughts.

MR. KICKHAM: Well, and I think I can address that, if you'd like.

THE COURT: Chime in. Sure.

MR. KICKHAM: Your Honor, this goes to some of the case --

THE COURT: By the way, save the thought, because I'm -- I'm not going to read anything -- as the Court was thinking over what I just read, which was -- I call it number four, 2.50 from Kuhn, 3.50 -- yeah, 2.50 from Kuhn to Royal Oak, 3.50 from Royal Oak to the class, I thought -- the Court thought to itself that can't be the theory here, because that $1.00 gouged from Royal Oak to Plaintiff's class was a forsaken claim by virtue of your dismissal and the release.

So that hypothetical can't be the situation here, because you would have forsaken it by the release.

Now I'll give you the floor, and go ahead.

MR. KICKHAM: Right. And that -- that's what we're saying here. It -- we're not saying that Royal Oak charged the Plaintiff class too much for the charges at issue here. We're saying they -- in -- in our underlying

case, we said they charged them too much for other reasons, and in consideration for a release -- we -- you know, we also got $2 million for the class, which is not a nuisance value, I would submit -- but in exchange for -- in addition to that, a release of claims by the class, Royal Oak, assigned to the class in consideration of that, Royal Oak's claim against Oakland County.

And I think if we -- what -- I feel like this morning we got very sidetracked on this antitrust stuff, and --

THE COURT: Don't worry about it. We'll come to that later on.

MR. KICKHAM: Okay.

THE COURT: I'm still -- I'm still in the very -- I'm -- I'm in the very core of --

MR. KICKHAM: Right.

THE COURT: -- of the -- the theory here. I'm not into all the antitrust defenses and all that other stuff yet.

MR. KICKHAM: Nor should we be. And that's -- I -- I think that --

THE COURT: Well, not yet.

MR. KICKHAM: -- I think that there's law in our brief that goes to the very core of this. We start out -- and maybe I take this out of order in the brief -- but

we're talking about a case called Brogno versus City of Ann Arbor --

THE COURT: I -- I don't want to prevent you from speaking. But counsel, I'm still trying -- I'm studying this piece of rock candy trying to figure out what all its facets are. I'm trying to understand your case. I would suggest hold off on giving me analogy to other cases until I first understand what this case is about.

MR. KICKHAM: Okay.

THE COURT: And as you can tell here, I'm still trying to figure it out. Is it a scenario with one transgressor and two victims, two transgressors and two victims, or is it exclusively is and always was be purely a pass-through from Kuhn to Royal Oak to the -- to the Plaintiff class. I've -- I've got a whole bunch of other questions too.

MR. KICKHAM: Right. And I think the easiest way to answer that is there's one transgressor, and that's Kuhn, and really there -- there's one direct victim, which is Royal Oak, and there's one incidental victim.

THE COURT: Well, can you -- can you help me understand what is an incidental victim; is that someone who suffers no damages? And if that's true, then how -- how does the law observe a victim who has suffered no

damages?

MR. KICKHAM: Well --

THE COURT: You used the phrase incidental victim --

MR. KICKHAM: Right.

THE COURT: -- but I don't know if that's -- if that has a real meaning.

MR. KICKHAM: Well, maybe -- maybe then the answer is the -- the class was not a victim, because what I'm trying to say that any cost incurred by a business -- and let's just think of Royal Oak as a business in this sense -- is necessarily included in the price that business charges to its customers. If that cost to the business is inflated through illegality, then there are many cases, and I've cited them in our brief, holding that the business can recover that overcharge. Any other rule would allow the wrongdoer to retain the ill-gotten gains because the business's customers have no standing to sue.

THE COURT: Mm-hmm. Mm-hmm.

MR. KICKHAM: So it -- and that's -- that's the core of this issue. And unfortunately, it does get into the cases I've cited in my brief, and -- other than the antitrust cases, and we can into that, but that's --

THE COURT: Okay. Let -- let -- just -- just a minute, gentlemen, I'm still -- I'm still musing here.

What if Kuhn gouges Royal Oak for $2.50 and Royal Oak gouges Plaintiff's class for .50 of that 2.50 and eats $2.00 of Kuhn's $2.50 gouge? Well again, one transgression or two? Is Royal Oak a .50 transgressor and Kuhn only a $2.00 transgressor? Well, who is Kuhn's victim? Royal Oak of course. But is .50 of Kuhn's quote, day one $2.50 transgression purged on day two when Royal Oak sticks it to Royal Oak with a -- sticks it to Plaintiff's class with a bill? What about day three when Plaintiff pay -- Plaintiff class pays that .50 to Royal Oak satisfying one-fifth of Kuhn's $2.50 transgression against Royal Oak?

This devolves into absurdity when you espouse two transgressions. It was either one transgression, a commensurate pass-through, if a transgression at all, then go back to number one which the Court started out with, Plaintiff loses there. Or if it was two transgressions, meaning a pass-through plus some, seeing note four, that's the 2.50 plus 1.00 to $3.50, it would seem Plaintiff would lose there, or meaning a pass-through minus sum, see number five, which I'll -- which was -- which was what the Court's talking about, 2.50 minus .50, because in fact it cannot be two transgressions, but only one.

Go ahead, Mr. Kickham.

MR. KICKHAM: This -- this gets right into the

case law, and this is one of the cases I've cited in my brief, it's Southern Pacific versus Darnell-Taenzer Lumber Company, this is a U.S. Supreme Court Case, and what this case held was as the law does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss.

THE COURT: That --

MR. KICKHAM: And I know that --

THE COURT: That -- that --

MR. KICKHAM: -- the syntax is terrible, but the Court goes on to say the plaintiff suffered losses to the amount of the verdict when they paid, their claim accrued once in the theory of the law and it does not inquire into later events.

THE COURT: I totally understand that; that's where he starts chiming in about antitrust and everything else --

MR. KICKHAM: Right, but that's not an antitrust case.

THE COURT: That's not an antitrust --

MR. KICKHAM: No, it's not.

THE COURT: Okay. All right. Okay.

MR. KICKHAM: And the only thing that the Defendant has to say about that case in their reply brief is that the Court there was motivated by the endlessness

and futility of following every transaction to its ultimate result. And they say the ultimate result here is easy to see, so we shouldn't have to follow Southern Pacific, but that's nice dicta, but that's not the holding of the case. The holding of the case is the immediate bearer of the cost of the -- of the unlawful cost can sue to recover that cost.

And by contrast, we've also cited another case, Brogno versus City of Ann Arbor, where Ann Arbor had --

THE COURT: Then why -- why aren't you out for issue preclusion, because you could have named Kuhn in that earlier case? If what you're -- if I -- if I heard you correctly -- and I think I'm following the bouncing ball -- that you -- not you, the Plaintiff class, the bag -- what I'll call the bag man, could have sued by virtue of some case law Kuhn directly, you didn't, and coulda, woulda, shoulda --

MR. KICKHAM: No, we should -- we could not have sued Kuhn directly.

THE COURT: I thought you were just -- I thought -- maybe I misunderstood your argument --

MR. KICKHAM: No, I -- I'm sorry, I think -- maybe I'm not being clear. What -- what -- the -- let me back up and cite --

THE COURT: Okay.

MR. KICKHAM: -- more completely from this Southern Pacific case.

THE COURT: Okay.

MR. KICKHAM: This starts out saying the only question before us, the U.S. Supreme Court, is that at which we've hinted, whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance buy paying the unreasonable -- unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. And then it goes on and it says the answer is not difficult. The general tendency of the law in regards to damages at least is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued it once in the theory of law, and it does not inquire into later events. And then it goes on later, it says the carrier ought not to be allowed to retain his illegal profit and the only one who can take it from him is the one that alone was in a relation with him and from whom the carrier took this sum. And there's a -- a converse case, the Brogno, which I'm trying to get to, where the City of Ann Arbor imposes a charge on Comcast

for cable services, Comcast passes that charge on to its customers, the customers try to sue the City of Ann Arbor to get that charge back. And there, the Court said in the present case, plaintiffs are not the real parties in interest, because the franchise fee at issue is imposed on Comcast, and not on individual consumers. Thus, plaintiff suffered no actual injury, loss or damage. Further, no contractual relationship exists between plaintiffs and defendant. Although plaintiffs may pay other taxes to the City of Ann Arbor, they do not pay the alleged tax at issue in this case. It is critical that the taxpayer to whom standing is granted is one to whom the tax applies. And there they said the tax applies to Comcast and only Comcast, and not the ultimate payers of Comcast rates had the right to sue.

Now, the Defendant, in addition to relying on some dicta that talks about the reasons why Southern Pacific held the way it did, talks about a case called Bacchus Imports v Dias. That's another U.S. Supreme Court case. But that case actually supports the Plaintiff's position here. What happened there was the State of Hawaii imposed an excise tax on the sale of liquor, and the liquor wholesalers challenged the 20 percent state excise tax, the Court held there that the wholesalers had standing to sue, even though they passed that tax on to

retailers. And one reason the Court held that way was because the wholesalers have to pay that tax regardless of whether the retailers pay their bills to the wholesalers. And when the wholesalers buy the liquor, they owe the state the tax. They then sell the liquor on to retailers; maybe some of them don't pay. The wholesalers have already paid the tax. And that applies equally here, because when the Drainage District charges Royal Oak X amount of dollars for --

THE COURT: Let him go. Let him go. It's okay.

MR. KICKHAM: -- drainage, then Royal Oak splits that up into 20,000 individual bills, some of those get paid, some of them don't. Royal Oak is still on the hook for 100 percent of what it gets charged by Kuhn Drainage District.

THE COURT: What's your point in mentioning that case --

MR. KICKHAM: My point is --

THE COURT: -- for -- for -- those other cases are contained in your brief, I -- I -- I know about them, and maybe even Hawaii was as well, but what you're -- what I'm left with -- and maybe it's my fault -- that the bag man has standing. The bag man being the ultimate person left holding the bag, has standing to sue.

MR. KICKHAM: No, that's not --

THE COURT: Okay.

MR. KICKHAM: -- what the Hawaii case -- I only mentioned the Hawaii case because Mr. Webster, the Defendant --

THE COURT: I gotcha.

MR. KICKHAM: -- cited it in his brief and it's the --

THE COURT: And you said that it actually supports your position?

MR. KICKHAM: Yes. And it's the only authority he cites to contradict the Supreme Court Case, Southern Pacific versus Darnell-Taenzer Lumber.

THE COURT: Okay. Let's see. Perhaps a very inartful analogy. If there was a knife to Bill's throat, and a threat to slice Bill's throat if Bill doesn't slice Ted, and if Bill succumbs, Ted's blood is shed, not Bill's. If Bill is a hero, he is cut and it is his blood which is shed, not Ted's. If Bill succumbs and cuts Ted, can he sue for Ted's blood? If Hanover and Southern Pacific apply, then I guess so. Am I missing something?

MR. KICKHAM: I think that what you're missing, you -- with all due respect --

THE COURT: Yes, please.

MR. KICKHAM: -- is that there's no Ted in this analogy. Royal Oak was allowed to charge its water and

sewer rate payers based on what it -- Royal Oak itself paid.

Royal Oak can -- they basically -- they have to -- they have to charge with a reasonable administrative cost. They can, you know -- say they buy water -- you know, putting aside this -- if they buy water from the City of Detroit and they pay the Detroit Water and Sewer Department X cents per unit of water, Royal Oak then can charge its customers X cents per unit of water plus a reasonable administrative fee.

So here --

THE COURT: An X is the resolution that yields the -- the -- the value of X, correct?

MR. KICKHAM: Exactly. But here --

THE COURT: And you're con -- go -- go ahead.

MR. KICKHAM: We're contending that the Drainage District didn't charge X, which it was bound to do under the resolution is charge X --

THE COURT: I trust -- I understand your theory.

MR. KICKHAM: -- plus 1.

THE COURT: I gotcha.

MR. KICKHAM: Okay.

THE COURT: I gotcha.

MR. KICKHAM: Okay. So -- but even though it charged X plus 1, Royal Oak was still allowed to pass on X

plus 1 to its water and sewer customers. So there's no Ted bleeding on the floor. There are water and sewer customers who are -- they are suffering, but they're not suffering unlawfully. Royal Oak hasn't done anything in this narrow instance.

Now, we've alleged in the underlying case that Royal Oak did other unlawful things --

THE COURT: Mm-hmm.

MR. KICKHAM: -- and that's why they ended up settling with us and why they ended up assigning this claim to us in consideration for release.

THE COURT: Okay. All right. Okay. Let me -- let me think about that for just a second. You can have a seat for a second.

That a wrong by Kuhn to Royal Oak, which is passed along to Royal Oak's customers, is not a wrong to the customers?

MR. KICKHAM: Not -- it's not an actionable wrong by the customers against Royal Oak or against the Kuhn Drainage District. As long as Royal Oak is charging in accordance with the Headlee Amendment and its own ordinances and --

THE COURT: Well, let's -- let's -- okay, let's do it this way then. Let's do it this way --

MR. KICKHAM: But that's not the issue --

THE COURT: -- let's -- let's quantify the resolution, and that's -- that's -- that truly is the -- the -- you say the resolution yield -- the resolution requires -- simplify it for me, X per gallon.

MR. KICKHAM: Right.

THE COURT: And now we have to quantify X, and you say X quantified is a $1.00 per gallon, let's just say.

MR. KICKHAM: Okay.

THE COURT: Your issue is not with the resolution which says X, but it's with someone's formulation -- Kuhn's formulation that they're charging -- that they contend that X equals 6, not X equals 1, so they charged 6, contending that it's X, and you're saying the resolution which talks about X is actually 1, and that's the issue that you're -- all along, that's the -- that's the -- that's the heart of the onion; am I correct?

MR. KICKHAM: That is correct.

THE COURT: Okay. And you're saying that when Kuhn maliciously or ignorantly quantifies X as 6, charges Royal Oak 6, it does so in an actionable way that yields a claim by Royal Oak against Kuhn. But when Royal Oak passes the baton to the Plaintiff class charging X on the premise that X equals 6, when in fact, if your theory is correct, X equals 1, there is no cognizable claim that the

Plaintiff class has against Royal Oak.

MR. KICKHAM: That is correct. Royal Oak is --

THE COURT: They are -- they are excused of -- Royal Oak is excused of the error, malicious, or ignorant, or innocent, that Kuhn foisted upon them?

MR. KICKHAM: That's correct, because it's not Royal Oak's error. Royal Oak is allowed to charge in accordance with law --

THE COURT: Royal Oak is allowed to --

MR. KICKHAM: -- based on what it pays.

THE COURT: -- charge in accordance with the resolution, correct?

MR. KICKHAM: Well, no. Royal Oak is allowed to charge based on what it itself is charged.

THE COURT: Okay. Got -- okay.

MR. KICKHAM: Royal Oak -- Royal Oak --

THE COURT: They don't have -- Royal Oak doesn't have to think. In other words, Kuhn says X equals 6, Royal Oak is under no obligation -- and I'm not challenging you --

MR. KICKHAM: Oh, no.

THE COURT: -- I'm trying to learn.

MR. KICKHAM: No, that's -- that's exactly correct. And it was only through the --

MR. WEBSTER: With all due respect --

MR. KICKHAM: -- underlying lawsuit that Royal Oak ever --

MR. WEBSTER: -- that's just --

THE COURT: Okay. I'll hear from you.

MR. KICKHAM: -- discovered that X wasn't equal to 6; that X was equal to 1.

THE COURT: Say that again.

MR. KICKHAM: It was only through the underlying lawsuit, and our discovery, that Royal Oak -- we believe that Royal Oak ever discovered that X was not equal to 6, that X was equal to 1; that they were being overcharged by --

THE COURT: And your lawsuit recog -- your lawsuit before the -- the earlier lawsuit, recognizing that Royal Oak is excused from culpability, was not an ingredient in your -- you didn't sue Royal Oak at that time for that extra 5, because when you sued Royal Oak, you're contending then that -- like you're contending now, they're just a patsy. They don't have to think, they just have to take their bill and forward it to the customers?

MR. KICKHAM: That's correct. As to --

THE COURT: And that was not your theory at all. There was -- that wasn't a fac -- one of your theories?

MR. KICKHAM: No.

THE COURT: Okay. Okay. Let's see. Maybe

we're beating a dead horse, but let me just finish my thoughts here.

What if Kuhn gouges Royal Oak 2.50, Royal Oak eats -- eats that 2 -- well, maybe this -- maybe this is what you'll say your case was about. What if Kuhn gouges Royal Oak 2.50, Royal Oak eats that 2.50, but gouges Plaintiff class for a separate .75? I'll ad lib here that that can't be your contention today, because you released that .75 claim against Royal Oak. But nevertheless, let's say that that was the -- the contention here. Now we have two transgressions with two damages, two different damages, because two independent victims. Plaintiff sues Royal Oak for that .75, well now we've got a feasible assignment, but in order for Plaintiff, the last bag man to prove his formerly Royal Oak's case, Plaintiff, who is now Royal Oak, will have to show that the $2.50 was not passed through, because if it was, Plaintiff standing in Royal Oak's shoes, would not have suffered damages, and therefore would not be a victim. He would not have a -- would not have a claim assign. And if Plaintiff, standing in Royal Oak's shoes, could prove no quote Kuhn $2.50 gouge, close quote, pass-through to Plaintiff, ought Kuhn be able to join the class as a separate party, who is already a party, but standing in the shoes of Royal Oak, and offset its liability to Plaintiff, standing in Royal

Oak's shoes, to the amount of .75 for the class's failure to mitigate damages by releasing its claim against Royal Oak for .75 as consideration for the assignment of the 250 -- 250 -- $2.50 claim?

I have no idea if you can follow any of that, but --

MR. KICKHAM: I think I can.

THE COURT: Okay.

MR. KICKHAM: It -- what I would say to that is the .75 claim in your analogy stands on its own. That there are the -- improper components in water and sewer rate are actionable. So if this -- the rate payers, the class members, released that .75 claim in exchange for the assignment of the $2.50 claim, they got something that they never had before. They didn't have that $2.50 claim. They did have the .75 claim. And let's say they took .25 on the dollar, or .25 of every .75 and then they said, okay, we'll -- we'll get -- you can refund .25 of that, because we know that your fund balance is low and times are tough, but we'll also take your claim --

THE COURT: Mm-hmm.

MR. KICKHAM: -- against the Kuhn Drainage District on this totally separate issue.

THE COURT: Mm-hmm.

MR. KICKHAM: That's what happened here.

THE COURT: Well, what about -- what about the question about the right of Kuhn to be able to join that case as a separate party to con -- to challenge your failure to mitigate damages by releasing your claim against Royal Oak for .75, or to -- or some -- some approximation thereof? Are you --

MR. KICKHAM: No, I'm following you.

THE COURT: Okay.

MR. KICKHAM: I guess I'm thinking if they have such a defense -- I don't think they have a defense of failure to mitigate damages because I think they're two totally separate things --

THE COURT: Mm-hmm.

MR. KICKHAM: -- that they can raise that defense in this case. They didn't need to be a party to that case. You know, you -- I guess I go back to the analogy I used a couple sessions ago about the house painter and the paint supplier.

THE COURT: Mm-hmm.

MR. KICKHAM: You know, you've got a house painter who contracts with a homeowner to paint his house. The day of performance comes and the house painter doesn't show up. Why didn't he show up? Well, because his paint supplier didn't deliver the paint on time. The homeowner sues the painter and says I've been damaged -- I mean,

let's -- let's just imagine there are damages --

THE COURT: Sure.

MR. KICKHAM: -- says I've been damaged in X amount --

THE COURT: I'm having a party and now I can't have the party.

MR. KICKHAM: Yeah, exactly.

THE COURT: Okay.

MR. KICKHAM: My house is going to look terrible, I'm injured, my reputation. Painter says all right, I'll tell you what, I'll pay you $50,000.00 in damages -- you say you've been damaged $100,000.00 --

THE COURT: Mm-hmm.

MR. KICKHAM: -- I'll pay you 50 in damages, and I'll assign to you my claim against the paint supplier. The painter's claim against the paint supplier is whatever it is. It doesn't depend on -- although it may -- I guess, yeah, it may --

THE COURT: What is the claim?

MR. KICKHAM: Well --

THE COURT: It's -- it is part and parcel of it's not -- I -- I was -- in my seventh analogy -- was endeavoring to treat them as apples and oranges, and your .75 claim that Royal Oak was gouging was separate and distinct and -- such that you can have a lawsuit for the

75 -- maybe it's -- maybe it's an issue with the analogy, because your -- your analogy painter's claim against the paint supplier is derivative of the homeowner's claim against the painter.

MR. KICKHAM: No, it's not --

THE COURT: Okay. Help me.

MR. KICKHAM: -- because the painter has a claim for his lost profits, injury -- I -- I mean, let's just throw everything --

THE COURT: Sure. Of course.

MR. KICKHAM: -- every possible claim; injury to the painter's reputation. Meanwhile the homeowner has a claim against the painter for whatever the homeowner's damages are --

THE COURT: The -- but for the homeowner's damages, the painter would still have some claim against the -- the paint supplier?

MR. KICKHAM: That's correct. He would have the loss profits he would have made had he had the paint to --

THE COURT: No, no, no -- but if there -- if --

MR. KICKHAM: -- perform the contract.

THE COURT: -- if there -- if the painter performed under the contract --

MR. KICKHAM: Correct.

THE COURT: -- the homeowner would have no claim

against the painter.

MR. KICKHAM: That's right.

THE COURT: If the painter performed under the contract, what claim would the painter have against the supplier? It is only by virtue of the painter breaching the -- the contract with the homeowner that the painter can have a claim against the paint supplier.

MR. KICKHAM: Not necessarily. Let me use --

THE COURT: Well, help me out.

MR. KICKHAM: I will. I -- let me use a slightly different analogy.

THE COURT: Okay.

MR. KICKHAM: Imagine there's a painter who has a contract to paint the house and he has a contract to buy the paint. The contract to buy the paint is for $25,000.00. The day of the performance, the paint is --

THE COURT: Of what, the painting?

MR. KICKHAM: I'm sorry, of the painting.

THE COURT: Okay.

MR. KICKHAM: The day of the painting, the paint doesn't show up. So the painter goes to a different supplier and he buys different paint for $35,000.00. He now would have a claim for $10,000.00 against the original supplier for breach of contract.

THE COURT: Okay. I -- I think that's actually

--

MR. KICKHAM: And you know --

THE COURT: -- precisely your example in your motion; maybe the Ford car or something like that. But --

MR. KICKHAM: So --

THE COURT: -- let me -- let me keep thinking on that.

MR. KICKHAM: -- my -- my point is that the painter -- if the supplier doesn't deliver his supplies, what happens between the painter and the homeowner doesn't necessarily -- it's not necessarily dispositive of whether there's a claim by the painter against the supplier.

THE COURT: Mm-hmm. Okay. All right.

There's -- there's more to this, but let me -- I know Brother Counsel was chomping at the bit here. So you want to chime in so far? Go ahead.

MR. WEBSTER: If -- if I may, Your Honor.

I'm happy to address the -- the cases, but -- but let me just suggest this. The discussion and the theory that's twisted in a bunch of knots here that you'd need a marlinspike to unravel this thing, whereas the complaint and what's been alleged to the Court is pretty simple and straightforward. There was -- from the underlying case, in which there was a dispute over the storm water charge brought by the class against Royal Oak,

there was an assignment of then Royal Oak's commensurate allegations against the GWK to the class. That's what we're dealing with here.

And so it is admitted that the amount sought is the pass-through amount that was alleged by the class, right? So -- and I -- I don't know if I can recall all of the numbers that the Court was presenting, but that there is no plus or minus here. This is a pass-through of the same amount. And that the assignment serves as the basis of which counsel's standing here in court. The problem is and the root cause is that the complaint before you has a breach of contract and this assumpsit.

I've already stated position with respect to the contract. So dealing with the assumpsit portion. The main -- one of the main issues you have to grapple with is this no damage claim. There is no damage to the City of Royal Oak, so they can't present a claim. That's actually admitted by the Plaintiff in their response.

What they do say to save the claim is they say we don't need to have damages, we can state in this case the damages of the class. They don't have any case law in the context of storm water infrastructure in the Drain Code to support that, so what they do then is they bring in Hanover, Illinois Brick, and they argue by analogy.

So the first hurdle they have to overcome is

where is the case that says that case law is applicable to this situation? It doesn't exist. But even if it were analogous, we point out that in Michigan, right, Hanover/ Illinois Brick has been re -- repealed specifically by policy and by statute, in that we can absolutely use as a defense the fact that you didn't have any damages. Hanover said you can't raise that as a defense and Michigan says exactly that you can.

And importantly, the laws interpreting and discussing that statute provision, which says we can use that as a defense, it says that it is a statutory codification of the common law requirement that you have to have actual damages. They don't have that here. That's just the fundamental basis of our claim.

And so what they were involved in in the underlying case, they laid the table here, they're the ones who set the -- set the stage, they're the ones who brought the class claim, they're the ones who -- who litigated the case. In that case, the judge actually issued a motion for summary disposition as to Royal Oak granting that. Then it was reconsideration --

THE COURT: That -- that -- let's pooh-pooh that, because that's --

MR. WEBSTER: All right. I'll pooh-pooh that, absolutely.

THE COURT: -- empirical and meaningless --

MR. WEBSTER: So then I'm going to get to the next point, is then they draft the assignment --

THE COURT: Mm-hmm.

MR. WEBSTER: -- right? It's their assignment. It's their draft. The issue fact -- the -- the point of it is, is that Royal Oak doesn't have the damage, because they pass it on. I'm perfectly entitled to assert -- the law specifically says that they have to plead as part of a cause of action damages, and they've admitted that they don't have any.

That's the problem with this case.

MR. KICKHAM: Your Honor --

THE COURT: Go ahead.

MR. KICKHAM: The Brogno case is not a storm water case, but it is a Headlee Amendment taxation case, just like the underlying case was here, and it held that the cable customers were not the real parties in interest, that Comcast --

THE COURT: Right.

MR. KICKHAM: -- the pass-through entity was.

THE COURT: You -- you talked about that one.

MR. KICKHAM: Yeah.

THE COURT: Is that an Ann Arbor case?

MR. KICKHAM: Yeah, it's --

THE COURT: Yeah, I -- I'm familiar with that.

MR. KICKHAM: -- Brogno versus the City of Ann Arbor. It is unpublished --

THE COURT: Mm-hmm.

MR. KICKHAM: -- but I think it's persuasive.

THE COURT: Yeah. I gotcha.

Like I said, this is an evolving deliberations by the Court, which might and probably will ultimately yield into an opinion, so there is no -- there is no structure to it, and I -- I won't apologize for it, because I'm not drafting an opinion, but in no particular order I'll just now go through the various briefs that have been submitted.

I don't know if this is of any moment, but maybe it is. The Plaintiff in this case is Kickham Hanley, PLLC, as trustee for a certified class. That's -- that's -- for what it's worth, the Court is struggling with the -- with the -- with the -- what is the Plaintiff? Plaintiff here is a trustee to a creature of a particular lawsuit, specifically a class. That creature, the -- a class, is real in the eyes of the court that it lives in, the other lawsuit, and maybe that jury and that court reporter and its adversary, it is real even in the eyes of the adversary's bank, i.e. when the class goes to the judgment debtor's bank to collect on its judgment.

And this -- this is silly, but is it real to Ronald McDonald, would it be real in the eyes of the drive-thru cashier at McDonalds? How about a marriage counselor? I don't know. How about say a local drain commissioner?

Before we identify how -- how one can be a trustee to a class, let's figure out how this class can exist independent from the lawsuit that it -- it became certified in.

Are there documents -- even that's -- even that's spoon-feeding. I'm not sure -- and it's -- in it's -- in its manifest in Defendant's brief, and I don't agree with the Defendant's characterization that the Plaintiff is this law firm known as Kickham Hanley, because the Plaintiff identifies itself not as Kickham Hanley, but rather as a trustee to a class.

And maybe you can cite to examples out there in jurisprudence where classes that become recognized as entities -- they don't get recognized by filing something with the Secretary of State, they don't get recognized by some birth certificate at a hospital -- they become recognized as entities by virtue of a certification within a particular case number; how that entity maintains its existence independent of that lawsuit is a curiosity that I'm unfamiliar with, but I'm not saying that it can't be.

And now we extrapolate that that class can actually -- I don't even -- I don't want to use the word assign, but --

MR. KICKHAM: Well, it can receive --

THE COURT: -- a trustee is a trustee of a trust. But you're saying this trustee is the trustee of a class. Can you help me in just --

MR. KICKHAM: Sure.

THE COURT: -- in the bare bones --

MR. KICKHAM: I don't have a case that's right on point that says -- where another court has held that you can do this, but here's -- the -- the way we did it is in our final judgment and order approving the settlement --

THE COURT: I -- I understand, you --

MR. KICKHAM: -- under Judge Kumar --

THE COURT: -- pur -- purported to give life to this cause of action. I understand that.

MR. KICKHAM: Well, no, we -- we didn't purport to do anything. Judge Kumar ordered that --

THE COURT: I -- she is a re -- she is a court that serves -- and I've said this before -- we are -- we are reaction -- we are mere reactionaries to the stimuli that is presented to us. We don't create -- I can't create life. I can react to someone saying will you recognize this composite of people as -- as an entity, and

okay, stamp, class is certified.

I'm just asking how that oxygen continues down the hall, upstairs, or downstairs a bit. Forget about the fact that the court -- no offense to her, no offense to her robes, but she doesn't breathe life into that class and say I hereby declare that this class, which I have certified in case ending in whatever, can live independent of this lawsuit somewhere else.

That's not persuading the Court. Maybe there's authority for that proposition that a trial court has that kind of authority. But if you're relying on her, or shall I say it, that trial court giving life to the class, that one -- that gives me a great deal of pause.

MR. KICKHAM: Well, I'm not. The class isn't here before you today. The trustee of the class is.

THE COURT: Okay, so time out --

MR. KICKHAM: And I -- and I know --

THE COURT: -- stop right there.

MR. KICKHAM: Okay.

THE COURT: There's a trustee of a class who's here today. If the trustee gets its life from the class, similar to the pass-through --

MR. KICKHAM: No, they --

THE COURT: -- how can the class be -- if the class isn't alive, how can the trustee be its trustee?

MR. KICKHAM: Because the trustee is -- I was inartful -- we're the trustee of a trust, the beneficiaries are which are the class.

THE COURT: Then maybe all -- maybe my curiosity has been satisfied, because the caption is as trustee for a certified class. But rather, it's as trustee for a trust for a certified class; is that -- or is it -- there -- a trust exists out there for which Kickham Hanley is the trustee?

MR. KICKHAM: Yes.

THE COURT: Is there a trust out there?

MR. KICKHAM: I don't know that --

THE COURT: That has been created?

MR. KICKHAM: I don't know that there's a written trust agreement, but there is a trust. There was a trust created by order of Judge Kumar.

THE COURT: What is a -- a trust in the -- in the layperson's vernacular; I trust you to go and prosecute this case for me?

MR. KICKHAM: No, a -- a trust in the legal sense of a trust with a -- a beneficiary and a trustee.

THE COURT: Okay. A trust has been established --

MR. KICKHAM: Yes.

THE COURT: -- maybe not written. I'm -- I'm

surprised that it's not. But nevertheless, a trust -- there has -- the cymbals rang out there in the legal universe and a trust was born --

MR. KICKHAM: That's correct.

THE COURT: -- and Kickham Hanley was appointed as the trustee?

MR. KICKHAM: We were.

THE COURT: Anything to chime in on that? Not -- nothing that you raised -- and this is just myself, but -- this Court -- but you want to chime in on it at all?

If not, we don't need to waste time. It's just me talking about this case belongs with Judge Kumar. If you don't -- if you are not --

MR. WEBSTER: That issue --

THE COURT: -- following that one, then --

MR. WEBSTER: No, I -- I understand what the Court is saying. I understand the court's inquiry. One, I would point out it's not a basis for our motion, though it -- it is an issue, like others, that we got to look at, because --

THE COURT: This Court's not going to be up in the Court of Appeals. It's just going to be you and him, so --

MR. WEBSTER: I -- I understand, so I just wanted to say that --

THE COURT: -- if it's not -- if it's an appellate issue, then let's put it to rest right now.

MR. WEBSTER: So it's not part of our motion now.

THE COURT: Okay.

MR. WEBSTER: We're not necessarily conceding that. We just pointed out that the creation of the trust is along with the writing of this assignment in which we're brought here today in the shoes of Royal Oak, hence our motion.

THE COURT: Continuing. We're in Defendant's -- oh, you want to --

MR. KICKHAM: Well, I -- I -- I'd just like to -- maybe Your Honor already knows this, but in our -- in the final order in the Royal Oak case, the court said Kickham Hanley, PLLC is hereby appointed trustee of a litigation trust --

THE COURT: I -- yeah.

MR. KICKHAM: -- hereby established for the benefit of the class members. So --

THE COURT: I -- I understand that. And I'm just curious what -- if -- if I -- if in this -- in the context of this CZ case --

MR. KICKHAM: Mm-hmm.

THE COURT: -- I say Matt Spry over there is

hereby appointed as the legal guardian of Sister Counsel back there. Do I have some kind of authority to do that?

It -- you're -- you're saying that in the context of a cause of action of class versus Royal Oak, that presiding trial judge had the power to create a trust or -- and appoint a trustee?

MR. KICKHAM: Yes.

THE COURT: It -- okay. I thought trusts were handled --

MR. WEBSTER: And now I'm a little --

THE COURT: -- by the probate court. But -- again, the -- the pleadings and the -- and the -- in that case speak for themselves and nobody's -- nobody's running with this. So I -- I'm --

MR. WEBSTER: I understand. I just wanted to point out I have now heard two different things, because I wrote a note down that admitted that there wasn't any authority, this is just how the way they did it, and now I hear that there is some authority. So we'll --

MR. KICKHAM: Well, I -- I'm sorry --

MR. WEBSTER: -- just leave that as an open --

THE COURT: He -- he said it was authority --

MR. KICKHAM: I said --

THE COURT: -- and that the authority was through Judge Kumar. I -- I gotcha.

MR. KICKHAM: I said there was no case law that I'm aware of that I can cite to the Court --

THE COURT: Okay.

MR. KICKHAM: -- where another class action has resulted in an assignment to a trust for the benefit of the class.

THE COURT: Yeah. Okay.

MR. KICKHAM: But the -- the authority that we're relying on in this case is Judge Kumar's order.

THE COURT: Sure. Okay. Yeah. Okay.

Continuing with Court's deliberations.

Again, in Plaintiff's -- Defendant's brief, Plaintiff Kickham Hanley, PLLC filed this action, no it didn't, it's not a law firm -- Plaintiff is not a law firm, it purports to be a trust. Plaintiff represented a class. Again, at least according to the pleadings, no it didn't. Plaintiff -- a law firm represented a class and the Plaintiff in this case is not a law firm, but it purports to be the trustee. That's -- that's beating a dead horse.

Page -- I don't know if you are gentlemen are interested in following along -- page five onto six of Defendant's brief. Well, this is just on the same -- the -- what you're referring to Mr. Kickham about the settlement or the pleadings signed by the trial court over

there that Kickham Hanley, PLLC is hereby appointed trustee of a litigation trust, whatever that is, hereby established, however that occurs, in the -- in the context of that litigation for the benefit of the class members.

How does a court in some lawsuit appoint a trustee? A court presiding over a lawsuit can establish a litigation trust, quote, whatever that is? But, again, that's just on that same subject.

Now onto Plaintiff's response brief, page three, bullet point number four; no, this is -- this -- maybe it's not pre -- precisely bullet point four, but maybe it's just an idle thought. If you -- or if -- if taxpayers sued Royal Oak -- maybe I'm repeating myself, I'm not sure -- if taxpayers sued Royal Oak for a dollar, which dollars was but a pass-through from Kuhn, and taxpayer contends that in some other -- no, if you, Plaintiff trust -- yeah, see I'm getting confounded because I'm call -- I'm -- I'm equating Plaintiff with the taxpayer, but that's not so.

Let me just -- if you, Plaintiff taxpayer sued Royal Oak for a dollar, which $1.00 was but a pass-through from Kuhn and you taxpayer contend that in some other case Royal Oak -- oh yeah -- in some other hypothetical case, Royal Oak could sue Kuhn for that same $1.00, despite it having passed it through to Plaintiff, then Plaintiff gets

its $1.00 back from Royal Oak for Royal Oak's -- well, I'll call it quote, illegality, even though Mr. Kickham is not calling it illegality -- and Royal Oak gets its $1.00 back for Kuhn's illegality, what then if taxpayer does not sure Royal Oak, but Royal Oak sues Kuhn? Royal Oak could receive its $1.00 back from Kuhn and keep it, despite having received that very representative dollar from plaintiff. That's a curiosity.

MR. KICKHAM: Well, I think the -- the way -- if I can sum up what I think --

THE COURT: Please.

MR. KICKHAM: -- you're saying is if we prevail in this case, Royal Oak will be unjustly enriched, because it --

THE COURT: No. Let me put it -- let me put it this way. Let's put it -- let's put it a different way. Let's say that you never -- that these two lawsuits never existed. Let's say in truth in that scenario Kuhn -- let's say Kuhn identified X as 6 --

MR. KICKHAM: Okay.

THE COURT: -- with me so far?

MR. KICKHAM: Yes.

THE COURT: Let's assume that X in truth is -- equals 1 --

MR. KICKHAM: Okay.

THE COURT: -- let's say Kuhn charged Royal Oak 6, Royal Oak charged tax -- the taxpayers 6, and let's now add one other ingredient to that parallel universe. Royal Oak sues Kuhn for 5 bucks. Royal Oak could, because it's a real cause of action, you just got assigned it, Royal Oak prevails -- that's maybe -- maybe mine's the long way around what you just said -- Royal Oak gets 5 bucks, puts it in its pocket, even though it received 5 bucks from the taxpayers. No problem?

MR. KICKHAM: Royal Oak would have to distribute that 5 bucks -- and it's not taxpayers -- just to be very precise, it's rate payers --

THE COURT: Thank you. Rate pay --

MR. KICKHAM: -- but Royal Oak would have to distribute that $5.00 per rata to the rate payers.

THE COURT: Why? What -- what if there was no lawsuit? Well, that's too -- that's too far of a hypothetical --

MR. KICKHAM: Well, it -- then if -- if it didn't, then there could be a lawsuit by the rate payers against Royal Oak, because Royal Oak would no longer have charged those rate payers based on what Royal Oak itself was charged.

THE COURT: Then how do you square that reality with the same notion that you contend that Royal Oak

suffered no damages?

MR. KICKHAM: I'm sorry. We don't contend that Royal Oak suffered no damages. We -- we contend they did suffer damages.

THE COURT: Then -- then the taxpayers -- okay, then -- then that's my -- I'm starting to fall apart here --

MR. KICKHAM: Well, I think where I see -- if I may, where you're going with this is --

THE COURT: Okay.

MR. KICKHAM: -- the -- the solution is we're -- we, the trust, are going to distribute this money to all of the class members, to the original rate payers to whom it was passed on anyway.

THE COURT: I -- I -- I gotcha.

MR. KICKHAM: Royal Oak is not keeping this money.

THE COURT: I gotcha. I'm --

MR. KICKHAM: Okay.

THE COURT: -- you're -- you're -- you're kind of doing like he did and giving me empirical, you know, satisfaction. That -- I'm -- let's go back to my question --

MR. KICKHAM: Okay.

THE COURT: -- that these two lawsuits didn't

exist --

MR. KICKHAM: Okay.

THE COURT: -- that a wrong -- a -- a transgression occurred that -- that Kuhn wrongfully charged $5.00 per gallon too much --

MR. KICKHAM: Okay.

THE COURT: -- to Royal Oak --

MR. KICKHAM: Royal Oak --

THE COURT: -- and Royal Oak sued on that --

MR. KICKHAM: Right.

THE COURT: -- and recovered. The only way the universe could be at peace would be if Royal Oak took that judgment proceeds and distributed it to the rate payers.

MR. KICKHAM: Right.

THE COURT: Yet they are -- okay. Okay.

Anything further that you want to chime in on that little nugget? If not, that's okay.

MR. KICKHAM: No, I --

THE COURT: All right.

MR. KICKHAM: -- I think that's our position.

THE COURT: Okay.

MR. KICKHAM: The Court has --

THE COURT: Anything you want to chime in on that nugget? Maybe not. I -- I don't know.

MR. WEBSTER: Well, I -- I don't -- with respect

to that, the fact is the colloquy with counsel is dealing with a hypothetical that is not the allegations contained in the complaint.

THE COURT: Okay.

MR. WEBSTER: Right? So what we're dealing with here is the reality is they're claiming not an amount above or beyond, but the amount of the pass-through is the claimed damages in this case. So -- and -- and interestingly --

THE COURT: Well, if I -- let me -- let me just make sure I'm not completely falling off the map here.

MR. WEBSTER: Sure.

THE COURT: Am I correct, Mr. Kickham, that you're saying that there -- okay. No, you've -- you said it before. Kuhn's gouge to Royal Oak and Royal Oak's pass -- pass-through to the rate payers is not a gouge to the rate payers?

MR. KICKHAM: That's correct. Not --

THE COURT: Gouge meaning a legal wrong.

MR. KICKHAM: It is not a legal wrong.

THE COURT: Mm-hmm.

MR. KICKHAM: Not if Royal Oak itself has been charged that amount.

THE COURT: If -- if, hypothetically, Kuhn's X of 6 was wrong and that X is only 1, do you agree -- in --

not in this case, because you're taking that position -- in such a scenario, Kuhn's gouging of Royal Oak to 5 and Royal Oak's pass-through of that 5 to the rate payers is not a wrong by -- by Royal Oak to the rate payers, and the rate payers have not suffered -- you know, I don't know if that's the same thing to ask if the rate payers suffered -- do you say the rate payers have been suffered -- have suffered?

MR. WEBSTER: That's what the -- that's specifically what the allegations were.

THE COURT: Are you saying that the rate payers suffered?

MR. KICKHAM: Well, they -- they have, but it's in --

THE COURT: They've -- they've occasioned no wrong, but they've suffered a loss?

MR. KICKHAM: They have a suffered a loss, but it's an incidental loss that's not actionable. It's -- it's the same thing --

THE COURT: Okay. Do you agree that it's not actionable? Thank you. That's what I've been --

MR. KICKHAM: Okay.

THE COURT: -- you said it more --

MR. KICKHAM: Not -- not actionable by the rate payers.

THE COURT: Right. Do you agree in that hypothetical that the rate payers have -- have no cause of action?

MR. WEBSTER: No. I mean, that's specifically the allegations that were complained of in the class action matter.

THE COURT: Okay. All right. Thanks. Just a second.

MR. WEBSTER: Your Honor?

THE COURT: Go ahead.

MR. WEBSTER: May we approach for just a minute?

THE COURT: Sure you may.

(At 3:31 p.m., bench conference)

(At 3:32 p.m., bench conference concluded)

THE COURT: Let me see. Let me see.

MR. WEBSTER: And then whatever transpires --

THE COURT: Let --

MR. WEBSTER: -- if the Court make a phone call.

THE COURT: Yeah, yeah. Oh, yeah. Will you call Judge Jarbou; tell her we still have Mr. Webster here, who will be with them shortly.

I'm going to see if I can cut it short here.

Page 9 of Plaintiff's response -- I -- I think I'm going to cut off -- no more colloquy, but just observations and maybe ultimately a ruling.

Courts will construe and enforce government resolutions in the same manner as statutes. Don't you mean or wish to say contracts, Plaintiff? That's kind of an -- an idle comment. I know you're analogizing it to the contract claim.

It seems like Plaintiff what --

MR. WEBSTER: In -- in that regard I would just point out, Your Honor, I mean, we did cite to the Court the case law that identifies resolutions, statutes, and ordinances --

THE COURT: I -- I understand. Right. Thank you.

Your -- Plaintiff, it seems like you're saying that because a contract -- we're -- we're on the topic of breach of contract. It seems like Plaintiff is saying that because a contract obligor is obliged to comply with the contract, and is liable for breaching that contract if he dishonors it, and similarly if a resolution obligor breaches that resolution, he too is liable; therefore, a resolution is a contract.

MR. KICKHAM: Well, that may be a way to put it. I mean, what we're saying is that a resolution, once legally adopted, becomes binding on all citizens; that -- and we have this published case, Hardaway versus Wayne County, if the language of the resolution is certain and

unambiguous, courts must apply the resolution as written. And these -- these are treating resolutions as if they're enforceable like contracts --

THE COURT: I -- I gotcha.

MR. KICKHAM: -- so -- and that's why we have our assumpsit claim, which we pleaded in the alternative, because --

THE COURT: I got it. Yeah, don't worry about the alternative --

MR. KICKHAM: Okay.

THE COURT: -- we're on the breach of contract --

MR. KICKHAM: Right.

THE COURT: Just a second.

(At 3:35 p.m., off the record)

(At 3:35 p.m., on the record)

MR. WEBSTER: I appreciate it. Thank you, Your Honor.

THE COURT: Well, if you're maintaining that that is so -- if John has red hair and Bill has red hair, therefore they are the same person, there is union and -- there is union out there, and then there's intersection out there, there are common features, and there are identical features. You're saying that these common features renders the essence the same; a resolution

therefore is a contract, because breaching both requires damages.

MR. KICKHAM: Well, I would say that it -- it's -- would be binding on both sides. It's not only Royal Oak who can sue for breach of this resolution. I submit that if Royal Oak didn't pay as required, the Kuhn Drainage District would sue Royal Oak, and it would say Royal Oak has breached some sort of contract.

THE COURT: I gotcha.

MR. KICKHAM: What -- what other cause of action -- I mean, I -- rhetorically, what other cause of action would they have?

MR. WEBSTER: I can explain that if -- briefly.

THE COURT: If you want, go ahead.

MR. WEBSTER: I would just simply say -- so a drainage district is a creature of -- this one is a creature of Chapter 20. Chapter 20 authorizes the means in which to effectuate the payment. In addition, Chapter 20 also allows -- which was -- which was not the case here.

Chapter 20 could enter into a contract. You could have a document that says hereby whereas, right, and then it could do that. And so there are two means here. What's notable is there is no contract.

THE COURT: Assumpsit per -- per Plaintiff, and

certainly, I think the Court would agree, as with Defendant, is an equitable cause of action. Okay Plaintiff, so long as you can show me how or that the law authorizes double-dipping -- you're not going to contend that it's double dipping here -- a middleman who passes through an overcharge to a bag man may recover his overpayment, despite having recouped his loss from the pocket of another. And if that middle man who, from the tenure if not explicit words of your pleadings here, and in another case, though authored by you wearing a different hat, has merely passed through, not passed through plus some, neither profited nor lost any money, ought, in equity, specifically assumpsit, as opposed to law, to double-dip, then let me see it. But if the authority for the double dipping is not borne in chancery court, then don't you, Plaintiff, a/k/a Royal Oak, come here to this chancery court with two hands outreached.

I think you already spoke to that in your answer, and the bottom line is no.

The trustee's claim is not barred by governmental immunity, Defendant recognizes that.

Page 15 of the response. The Supreme Court recognized two important principles that destroyed Defendant's immunity argument here. One, dot, dot, dot, and two, that a citizen's claim to recover the money is an

equitable action to recover an unlawful exaction. But you, Plaintiff, a/k/a Royal Oak, are here in equity seeking return of money from -- well, my words, you don't join -- from your thief which vacancy you have filled with money you in turn exacted from someone else. Your coffers have been refilled, your inventory of cash has been restocked, your barn crops have been replenished. Equity via assumpsit beckons not for you double-dipping, it would seem. I -- I'm not --

MR. KICKHAM: Well, Your Honor, again --

THE COURT: Yeah, go ahead. Go ahead.

MR. KICKHAM: -- it's not a double-dip, because Royal Oak -- the trustee standing in the shoes of Royal Oak is going to distribute this money to the class members. Royal Oak is not going to keep a penny of it.

THE COURT: Mm-hmm.

MR. KICKHAM: And this goes back again to the Southern Pacific versus Darnell-Taenzer Lumber --

THE COURT: You're -- you're pre -- you're implying that the Court is not looking at the trustee. You're think -- you're thinking that the Court thinks that the trustee is different than Royal Oak. Ad I'm not. I'm not saying -- I'm say -- you -- I'm running with your contention that you are Royal Oak.

So go -- go ahead --

MR. KICKHAM: But Royal Oak -- if -- if Royal Oak -- again, going back to your hypothetical -- if Royal Oak itself alone, without any prior suit by a class of people, were suing on these overcharges, when it got the money back, it would have to distribute that money to the rate payers.

MR. WEBSTER: Royal Oak specifically is -- is released here now and forever and for all time from the class. That's the way this contract was created.

THE COURT: Okay. Go ahead. Thank you. All right. All right.

MR. KICKHAM: And, Your Honor, I'm not sure I agree with that statement, and I'm looking for a copy of the release we signed in the prior --

THE COURT: Okay. No problem. It -- it -- it's not part of the Court's adjudication. I haven't even got to an adjudication yet.

With respect to the 20 day limitations period, Defend -- Plaintiff, you say that your beef is Kuhn's failure to comply with the resolution. The resolution says, for example, charge Royal Oak $1.00 and instead, Kuhn charged Royal Oak 2. Plaintiff, a/k/a Royal Oak, was obliged -- according to the Defendant -- to object within 20 days of the passage -- passing of that resolution, or to the $1.00 resolution.

This Court agrees with Plaintiff that it, a/k/a Royal Oak, is not obliged to object within 20 days of the passage of the $1.00 resolution that Kuhn is actually charging 2.

So that -- on that argument, the Court agrees with the Plaintiff.

MR. WEBSTER: If -- if I may just point out --

THE COURT: Yes.

MR. WEBSTER: -- that the specific allegation in the complaint is that the resolution obligated the County to pass-through to the City the City's proportionate share of the DWSE/GLWA action charges. That's the basis for their claim. There is no such language in the resolution.

THE COURT: Okay.

MR. WEBSTER: Okay?

THE COURT: Thank you.

MR. WEBSTER: And so -- and so they're arguing a -- they're arguing about trying to insert language in there trying to say what the resolution -- the resolution should have said.

THE COURT: Mm-hmm.

MR. WEBSTER: Chapter 20 says if you have any problems with that resolution, you got to bring it within 20 days.

THE COURT: Mm-hmm.

MR. WEBSTER: And the policy or the purpose behind that is that based upon the adoption of the resolution -- the district, oftentimes then financing is put in place and -- and so it has to rely upon the obligation then of the communities to -- to pay that. That's why the short time frame is there.

Now they're saying we're not trying enforce a resolution -- they're trying to put words in the resolution, they're trying to say oh, we're just trying to enforce it. The Court should recognize that aspect as we outline in our brief.

THE COURT: If class is disqualified to recover for Kuhn's thieving of Royal Oak, which Royal Oak foisted upon the class, because the class wasn't directly robbed by Kuhn and has no privity, or no standing against Kuhn, if Royal Oak is disqualified to recover for Kuhn's thievery of itself, because Royal Oak has recovered its loss from the class, then Kuhn enjoys with impunity its ill-gotten gains. Plaintiff here says that it could not sue Kuhn. Kuhn is beholding only to Royal Oak.

MR. KICKHAM: No, that's -- that's exactly right, Your Honor.

THE COURT: Mm-hmm.

MR. KICKHAM: That's the Southern Pacific case --

THE COURT: I got it.

MR. KICKHAM: -- right there --

THE COURT: That's -- that's the -- I --

MR. WEBSTER: Well, even using though Plaintiff's own analogy, the -- of the antitrust law, it specifically allows for indirect purchaser allegations, right --

THE COURT: I got it.

MR. WEBSTER: -- and so, you know, that assertion and the conclusion of -- of that to serve as a basis to undermine the fact that he doesn't have any damages is not -- there's no authority for that.

THE COURT: The Plaintiff's final analogy about Ford. Supplier number one contracts with Ford to supply parts, Ford to pay $30.00, supplier demands $50.00 in breach of the $30.00 contract term. Supplier number two contracts with Ford to supply the needed parts in exchange for Ford to pay $40.00. Ford contracts with a customer to sell a car at X price plus $10.00, representing the $40.00 additional amount that Ford had to pay supplier number two; Ford's original price of $30.00 plus the added price from supplier number two. What are Ford's damages from supplier one? To compare apples with apples, we must limit Ford's damages to compensatory not punitive, liquidated, etcetera. So what did Ford quote, lose? It

lost sales. Say it lost three sales, $150.00 profit, $50.00 times three cars. Those three customers sue Ford for say false advertising. The price was -- price was X, but it turned out to be X plus ten. In exchange for Ford's dismissal from their lawsuit, Ford assigns them its claim against supplier number one.

But the class in the earlier lawsuit claims what against Royal Oak? If Royal Oak did no wrong against Plaintiff, unlike Ford, which breached its price quote to customer, then Royal Oak had nothing to obtain in exchange for its claim assignment to Plaintiff. Oh, but it did have something to obtain, freedom from defending a frivolous lawsuit, question mark.

So let's say Plaintiff class frivolously sued Royal Oak, let's say Kuhn was gouging Royal Oak, but Royal Oak didn't care, because it was passing all -- passing it all through to Plaintiff class. Plaintiff class can't sue Kuhn directly, or can it? See Kuhn's reply brief concerning MCL 445. If Plaintiff class could have sued Kuhn directly, it didn't; query claim and issue preclusion.

MR. WEBSTER: And I would -- I would also identify that in addition to that concept the Court might have just mentioned, in the context of the prior case, Royal Oak, who's here today, didn't assert any claim to

bring GWK in that lawsuit.

THE COURT: That's empirical, but that -- it's a fact, but it's --

MR. WEBSTER: And it -- it's a fact it didn't happen, so --

THE COURT: -- empirical. Could have.

MR. WEBSTER: -- that's -- that is another --

THE COURT: Arguably.

MR. WEBSTER: -- that is another thing for the Court's consideration here.

THE COURT: Okay. All right.

Go ahead. Go ahead.

MR. KICKHAM: Your Honor, as I've said before probably more than once, the Kuhn District was not a necessary party for the parties to the underlying case to obtain complete relief.

THE COURT: Okay.

MR. KICKHAM: There was no need to join the Kuhn District in that case.

THE COURT: Okay. All right.

MR. WEBSTER: And was not -- it may not have been a necessary party, but then when they settle that out under these terms and conditions, where they -- where they create their own assignment, and they create this cause of action with the trustee, right, then -- and then try to

pursue it where there is no damages, should've been cognizant of that and brought them in if that was what their intention was. That would have been the fair thing to do.

THE COURT: Defendant's reply brief, page 1, II-A, Plaintiff effectively concedes that the quote, resolution contained a final order of apportionment that is not a contract. This subject -- this topic seems to be the heart of the issue; whether or not Kuhn complied with or violated the resolution. If he -- I say he -- if it -- if the Defendant complied with it, then Plaintiff, also known as Royal Oak, had 20 days from its passage to object to it. But despite that time having passed, it's a moot point, since Plaintiff, a/k/a Royal Oak's only arrow in it quiver is the application of the resolution to the numbers.

If it is established that Plaintiff's, Royal Oak, application of the resolution to the numbers was wrong, and Kuhn did comply with the resolution, then Plaintiff, a/k/a Royal Oak's case is over with, since Plaintiff, a/k/a Royal Oak did not object to the resolution in the first place. And even if it, did or upon learning that its application was wrong, didn't come to object, well, it's way beyond 20 days and thus too late.

You would agree, of course, that if you turn out -- if it turns out to be that your application of the resolution to actual dollars was wrong and that Kuhn's was right, you have no cause of action.

MR. KICKHAM: That's correct.

THE COURT: Okay.

MR. KICKHAM: If our numbers are wrong.

THE COURT: Mm-hmm.

Can we put to rest, Defendant, your effort to characterize Plaintiff's cause of action as a negligence claim? He has -- he has disavowed that vehicle of recovery, so can we put it to rest?

MR. WEBSTER: I think we -- yeah, we originally filed this in August --

THE COURT: Okay.

MR. WEBSTER: -- we didn't know the true nature of it.

THE COURT: Fine. No problem. I'm not criticizing. I just want to --

MR. WEBSTER: Understood.

THE COURT: -- make sure we can put it to rest.

The Court -- well, let's see. Hold on. Roman numeral C in the reply brief, Plaintiff's attempt to distinguish the words contest and enforce is an exercise in semantics and does not excuse it from the requirements

in Chapter 20. Indeed, the courts have imposed Chapter 20's requirements on both contest to the language and the enforcement or levying of assessments.

Example hypothetical number one, language. Plaintiff, I object to the language of the resolution, to wit $1.00 per gallon. In such a scenario, the trial court, if it was after 20 days, would say the case is dismissed, Plaintiff's objection is greater than 20 days after the resolution has passed.

Example number two, under the context of enforcement of levying. Plaintiff is heard to say I object to my bill of $1.00 per gallon, trial court would hold case dismissed, or maybe not trial court, but the administrative agency, whatever, would hold that the case or the objection is overruled, Plaintiff's objection to the manifestation of the resolution is greater than 20 days after the resolution's passage. But here, for example, Plaintiff contends ultra vires. Plaintiff, I object to my bill of $2.00 per gallon given the resolution directs $1.00 per gallon. The trial -- the court would hold that the case proceeds. It's not mere semantics.

That is the position of the Plaintiff of course, correct?

MR. KICKHAM: That's right.

THE COURT: The Court has considered the

arguments of counsel, considered the applicable law. The Court finds the motion for summary disposition is to be granted. The Court is -- finds that the case does not sound in contract, for the reasons stated by the Defendant, and adopts those reasons.

With respect to the assumpsit claim, the Court recognizing that it is in equity consistent with the Court's musings and limited to those arguments excusing the arguments that the Court specifically found unpersuasive by the Defendant, the Court otherwise adopts the Defendant's arguments and finds the case is not viable in assumpsit.

And it is without need for argument -- I don't see how, but I'll give you a minute, Mr. Kickham -- with respect to your motion to amend the pleadings, the Court's analysis and -- and its ruling would seem -- I'm -- I'm just going to call it -- is of the opinion that your unjust enrichment claim would fall victim to the same analysis, and it's for that reason the Court would decline, without oral argument, the motion for the amendment.

That also therefore moots the Defendant's request for relief from the time for discovery compliance.

That's the rulings of the Court.

Thank you, gentlemen.

MR. KICKHAM: Thank you, Your Honor.

MR. WEBSTER: Thank you, Your Honor.

THE COURT: Thank you.

(At 3:53 p.m., proceedings concluded)

- - -

CERTIFICATION

I certify that this transcript, consisting of 93 pages, is a true and accurate transcription, to the best of my ability, of the video proceeding in this case before the Honorable Daniel Patrick O'Brien on Wednesday, October 25, 2017, as recorded by the clerk.

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

Deanna L. Harrison

/s/ Deanna L. Harrison, CER 7464
About Town Court Reporting, Inc.
248-634-3369

Exhibit 11

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

KICKHAM HANLEY PLLC, as Trustee
for a Certified Class of Persons Defined
in the Final Judgment and Order Approving
Class Settlement Dated June 14, 2017
Entered in Oakland County Circuit Court
Case No. 14-138919-CZ,

Plaintiff,

v.

GEORGE W. KUHN DRAINAGE DISTRICT,

Defendant.

Honorable Daniel O'Brien

Case 2017-159351-CZ

KICKHAM HANLEY PLLC
Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham III (P70332)
Attorneys for Plaintiff
32121 Woodward, Suite 300
Royal Oak, MI 48073
(248) 544-1500
ghanley@kickhamhanley.com
jwarrow@kickhamhanley.com
ekickhamjr@kickhamhanley.com

DICKINSON WRIGHT PLLC
Peter H. Webster (P48783)
Scott A. Petz (P70757)
Attorneys for the GWKDD
2600 West Big Beaver Road, Suite 300
Troy, MI 48084
(248) 433-7200
pwebster@dickinsonwright.com
spetz@dickinsonwright.com

ORDER (1) GRANTING THE DRAINAGE DISTRICT'S MOTION TO DISMISS, (2) DENYING PLAINTIFF'S MOTION FOR LEAVE, AND (3) DEEMING MOOT THE DRAINAGE DISTRICT'S MOTION TO EXTEND REGARDING PLAINTIFF'S DISCOVERY

At a session of the Court, held in the City of Pontiac, County of Oakland, state of Michigan on 10/27/2017.

Present: Honorable DANIEL PATRICK O'BRIEN
Circuit Court Judge

On October 25, 2017, (1) Defendant George W. Kuhn Drain Drainage District's (the "Drainage District") Motion for Summary Disposition Pursuant to MCR 2.116 (C)(7) and MCR 2.116 (C)(8) ("Motion to Dismiss"), (2) Plaintiff's Motion for Leave to File First Amended Complaint ("Motion for Leave"), and (3) the Drainage District's Motion to Extend the Deadline to Respond to Plaintiff's First Set of Discovery Requests and All Other Discovery ("Motion to Extend Regarding Plaintiff's Discovery") were before the Court, briefing having been submitted and argument having been heard, and the Court being fully advised;

IT IS ORDERED:

1. The Drainage District's Motion to Dismiss is GRANTED for the reasons stated on the record.
2. Plaintiff's Motion for Leave is DENIED for the reasons stated on the record.
3. The Drainage District's Motion to Extend Regarding Plaintiff's Discovery is MOOT as stated on the record because no discovery responses are due based on the above rulings.
4. Plaintiff's case is dismissed with prejudice.

This is a final order as it resolves the last pending claim and closes the case.

/S/DANIEL PATRICK O'BRIEN

Circuit Court Judge MRS

Approved as to form only:

KICKHAM HANLEY PLLC

/s/Edward F. Kickham III (w/consent)
Edward F. Kickham III (P70332)
Attorneys for Plaintiff

DICKINSON WRIGHT PLLC

/s/Peter H. Webster
Peter H. Webster (P48783)
Scott A. Petz (P70757)
Attorneys for Defendant George W. Kuhn Drain Drainage District

BLOOMFIELD 12840-401 1944837v1

Exhibit 12

Order

Michigan Supreme Court
Lansing, Michigan

April 29, 2020

159758

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

KICKHAM HANLEY PLLC,
Plaintiff-Appellant,

v

SC: 159758
COA: 341076
Oakland CC: 2017-159351-CZ

OAKLAND COUNTY MICHIGAN,
Defendant,
and

GEORGE W. KUHN DRAINAGE DISTRICT,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the May 2, 2019 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

t0420

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 29, 2020

Clerk

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

JEFFREY EISENBERG,
individually and as representative of a Class
of similarly-situated persons and entities,

Plaintiff,

v.

GEORGE W. KUHN DRAINAGE DISTRICT,
a component unit of Oakland County with a separate
legal existence, and CITY OF ROYAL OAK,
MICHIGAN, a municipal corporation.

Defendants.

Honorable David M. Cohen

Case 2023-200422-CZ

KICKHAM HANLEY PLLC
Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Attorneys for Plaintiff
32121 Woodward, Suite 300
Royal Oak, MI 48073
(248) 544-1500
ghanley@kickhamhanley.com
jwarrow@kickhamhanley.com
ekickhamjr@kickhamhanley.com

DICKINSON WRIGHT PLLC
Peter H. Webster (P48783)
Scott A. Petz (P70757)
Alma Sobo (P81177)
Attorneys for George W. Kuhn Drainage District
2600 West Big Beaver Road, Suite 300
Troy, MI 48084
(248) 433-7200
pwebster@dickinsonwright.com
spetz@dickinsonwright.com
asobo@dickinsonwright.com

MILLER, CANFIELD,
PADDOCK AND STONE, P.L.C.
Sonal H. Mithani (P51984)
Caroline B. Giordano (P76658)
Sarah C. Reasoner (P85573)
Attorneys for City of Royal Oak
101 North Main Street, 7th Floor
Ann Arbor, MI 48104
(734) 663-2445
mithani@millercanfield.com
giordano@millercanfield.com
reasoner@millercanfield.com

NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendant George W. Kuhn Drainage District's Motion for Summary Disposition Pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8) will be brought on for hearing before the Honorable David M. Cohen on **Wednesday, August 30, 2023**, beginning at **8:30 a.m.** via Zoom.

Respectfully Submitted,

DICKINSON WRIGHT PLLC

/s/Peter H. Webster
Peter H. Webster (P48783)
Scott A. Petz (P70757)
Alma Sobo (P81177)
Attorneys for the George W. Kuhn Drainage District
2600 W. Big Beaver Road, Suite 300
Troy, MI 48084
(248) 433-7200
pwebster@dickinsonwright.com
spetz@dickinsonwright.com
asobo@dickinsonwright.com

Dated: July 25, 2023

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2023, I electronically filed the foregoing paper with the Clerk of the Court using the MiFile TrueFiling system which will send notification of such filing to counsel of record.

/s/Peter H. Webster
Peter H. Webster (P48783)
Attorney for Defendant George W. Kuhn
Drainage District
pwebster@dickinsonwright.com