STATE OF MICHIGAN
COURT OF APPEALS

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

Plaintiff/Appellee,
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.

Defendant.

COA Case No. 369632

Oakland County Circuit Court
Case No 2023-200422-CZ
Hon. David M. Cohen

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PLAINTIFF/APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

Plaintiff/Appellee Jeffery Eisenberg ("Plaintiff") agrees with Defendant/Appellant George W. Kuhn Drainage District's (the "Drainage District") Statement of Jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Circuit Court err when it held that Plaintiff stated a claim for unjust enrichment based on Plaintiff's allegation that the Drainage District systematically charged Plaintiff and the putative Class more for stormwater disposal than the cost the Drainage District incurred in connection with providing stormwater disposal services to Plaintiff and the putative Class?

Plaintiff states: No

Drainage District states: Yes

The Circuit Court held: No

This Court should hold: No

2. For the Circuit Court to hold that Plaintiff stated a claim for unjust enrichment against the Drainage District, was it necessary for Plaintiff to allege that the Drainage District collected more money **from all its member communities** than the total cost of stormwater disposal for **all member communities**? In other words, was it necessary for Plaintiff to allege that the Drainage District had received or retained an unjust benefit in the aggregate, looking at the total amount the Drainage District extracted from all its customers, as opposed to alleging that the Drainage District retained an unjust benefit **it extracted from Plaintiff and the putative Class**?

Plaintiff states: No

Drainage District states: Yes

The Circuit Court held: No

This Court should hold: No

I. INTRODUCTION

At the outset, we summarize the factual allegations relevant to Plaintiff's unjust enrichment claim:

1. The Drainage District collects sewage flows from 14 communities in Oakland County, including the City.

2. The Drainage District conveys the sewage flows to the Great Lakes Water Authority (the "Water Authority") for treatment and disposal.

3. The Water Authority charges the Drainage District almost $50 million per year to treat and dispose of the Drainage District's sewage flows (the "Water Authority Charge").

4. The Drainage District takes the total Water Authority bill and allocates it among the 14 communities.

5. The Drainage District has information that enables it to precisely determine each community's proportionate "share" of the Water Authority's bill.

6. Nonetheless, the Drainage District allocates too much of the Water Authority's bill to sewer users in some of the communities – including the City – and allocates too little of the Water Authority's bill to sewer users in other communities.

7. By paying the overcharge, sewer users in the City are paying not only their proportionate share of the Water Authority's bill, but also are paying to subsidize the sewage disposal costs of the undercharged communities.

In this Appeal, the Drainage District argues that the Circuit Court erred by denying summary disposition because Plaintiff purportedly "fails to allege that the Drainage District has retained any benefit by how it allocates sanitary flow and stormwater flow with respect to" the bills the Drainage District receives from the Water Authority. DD Br., p. 2. The Drainage District claims that it was not unjustly enriched because, even if it overcharged Plaintiff and the Class, **in the aggregate** it did not collect more money than it needed to pay the Water Authority's **entire bill** covering **all 14 communities.** But the Drainage District is answering the wrong question. The issue in this case is not whether the Drainage District ends up with more money than it is entitled to in the aggregate, as

a result of its total charges to all 14 member communities, but whether the Drainage District exacts money **from Plaintiff and the class** that it is not entitled to retain.

The fatal flaw in the Drainage District's argument is that courts must view unjust enrichment from the plaintiff's perspective, not the defendant's. *See, e.g.*, *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 219; 969 N.W.2d 570 (2021) ("Restitution restores a party who **yielded** excessive and unjust benefits to his or her rightful position") (emphasis added). The Drainage District in fact cites the correct standard of review:

> To plead an "unjust enrichment" claim, a plaintiff must allege facts in support of all elements of the claim, including that the "defendant[] received a **benefit from plaintiff** and that an inequity resulted **to plaintiff** as a consequence of defendant[]'s retention of that benefit." *See, e.g., Liggett Rest Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003). [DD Br., p. vi (emphasis added).]

But the Drainage District then immediately turns the standard upside down by arguing that the Court must consider whether "Plaintiff failed to allege facts to show that the Drainage District **retained** a benefit …" *Id.* (emphasis added).

The Drainage District also cites inapposite caselaw that does not involve an **overcharge to one group** so that the defendant can **undercharge another group**, which is the situation in this case. Consider the following analogy, which Plaintiff's counsel used (with slight modification) during oral argument before the Circuit Court, and which the Drainage District quotes at length in its Brief, pp. 6-7. A municipal water utility incurs $1,000 in costs to serve ten homes on a city street, all of whom use the same amount of water. The utility properly charges each house $100. If the utility charges the five houses on the east side of the street $200 per house, and charges the five houses on the west side of the street nothing, then it will have received no more than its $1,000 cost of service, but it will have been unjustly enriched by the five paying customers in the amount of $100 each. The common law would require the utility to apportion the $1,000 among all ten customers, and its failure to do so

would give rise to a claim for unjust enrichment by the customers who paid the overcharge, regardless of whether the utility had any money left over.

In the above analogy, the utility "received a benefit" from the paying customers – the extra $100 – that resulted in an inequity to those customers as a consequence of the utility's retention of that benefit **as against the paying customers**, not as against the world. That the utility spent the money is of no consequence.

The same is true under the facts of the present case. Put simply, the Drainage District purchases sewage disposal services from the Water Authority. The Drainage District incurs an obligation to pay the Water Authority over $48 million per year for those services. The Drainage District satisfies that obligation by imposing charges, through the municipalities the Drainage District's sewer system services, upon end users in those municipalities. The funds the Drainage District collects confer a benefit on the Drainage District because they allow the Drainage District to discharge its obligations to the Water Authority. Just as with the "ten houses" analogy above, the amount of the Overcharge to Plaintiff and the class is quantifiable. The Royal Oak ratepayers' true share of the Drainage District's costs is $X, but the Drainage District charges Royal Oak ratepayers $Y. The difference between $X and $Y is the measure of the Drainage District's unjust enrichment at the expense of Plaintiff and the class.

The Drainage District further argues – apparently for the first time on appeal – that Plaintiff's allegations regarding unjust enrichment are "conclusory" because the Circuit Court referred on the record to "paragraphs 55 through 62" of Plaintiff's Complaint, wherein Plaintiff pleaded its Count II for unjust enrichment against the Drainage District. Id., p. 12. In fact, however, Plaintiff pleaded 30 paragraphs of "General Allegations" which set forth in great detail the facts supporting Plaintiff's

claims, and Plaintiff incorporated those allegations into Count II. See Complaint, Appx. 4, ¶ 54 ("Plaintiff incorporates Paragraphs 1-44 in their entirety as though fully set forth herein.").[1]

In short, the Drainage District wants to avoid any possible liability to anyone for its mis-apportionment of the Water Authority's charges. It already avoided liability to Royal Oak due to this Court's holding that Royal Oak lacked standing to sue because it passed on the Overcharges to the ratepayers. Now the Drainage District argues that because it spent all the money it collected from the Royal Oak ratepayers on an obligation that belonged to another group, it has not been unjustly enriched and the Royal Oak ratepayers (i.e., Plaintiff and the class) cannot state a claim. If that is the case, then the Drainage District can simply apportion its costs however it wants, notwithstanding the common law and the objections of any of the hundreds of thousands of people who live in the Drainage District's service area. At some point, the music must stop and the Drainage District must be called to account for its unreasonable and unlawful charges to Plaintiff and the class. That point has arrived, and this Court should affirm the Circuit Court's decision denying the Drainage District's motion for summary disposition on Plaintiff's claim for unjust enrichment.

II. COUNTER-STATEMENT OF RELEVANT FACTS

The relevant factual allegations in Plaintiff's Complaint, Appx. 4, are as follows. 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. Complaint, ¶ 8.

[1] Citations to "Appx." refer to the Drainage District's Appendix on Appeal. Citations to "Appellee's Appx." refer to Plaintiff's Appendix on Appeal.

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. *Id.*, ¶ 9.

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. *Id.*, ¶ 10. 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. *Id.*, ¶ 11. Even though they have different origins, both sanitary sewage and stormwater collected in a combined sewer system need to be disposed of. *Id.*, ¶ 12.

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 Drainage District. *Id.*, ¶ 13. 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 from the combined sewers of the County System, (*i.e.* the City's stormwater and the stormwater of various other communities in the area) is conveyed by the Drainage District to a treatment plant operated by the Water Authority for ultimate disposal.[2] *Id.*, ¶ 14.

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[2] Prior to January 2016, the Detroit Water and Sewerage Authority ("Detroit") provided wholesale sewage treatment services to the Drainage District. Effective in 2016, the Water Authority, pursuant to agreements with the City of Detroit, became the wholesale supplier of water and sewage treatment services to the City. Notwithstanding that change, the City's public water supply and sewage

The Drainage District'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 Drainage District System into the Water Authority treatment plant. *Id.*, ¶ 15. The Water Authority charges the Drainage District a flat annual rate to dispose of the City's total sewage flows, which include stormwater (the "Water Authority Charge"). *Id.*, ¶ 16. The Water Authority's rate-making methodology (more particularly described below) is sufficiently detailed to allow a mathematical calculation of the amount of the total Water Authority Charge to the Drainage District attributable to the treatment and disposal of stormwater. *Id.*

The Drainage District, in turn, allocates the annual Water Authority Charge among all of the municipalities in the district, including the City, and charges each municipality a flat annual "Sewage Charge" for sanitary sewage disposal (the "Sanitary Charge") and a flat annual charge for "Pollution Control," *i.e.,* stormwater disposal (the "Stormwater Charge"). *Id.*, ¶ 17. The Drainage District collectively charges end-users in the City in excess of $11 million per year for Sanitary Charges and Stormwater Charges. Those charges are imposed in the first instance through billings from the Drainage District to the City. *Id.*, ¶ 18.

The City passes on that cost to its sewer customers (i.e., Plaintiff and the Class) by imposing charges in its sewer rates to recover the entire $11 million plus per year imposed by the Drainage District on an annual basis. *Id.*, ¶ 19.

The amount of the Water Authority Charge to the Drainage District is based on a formula tied to the total volume of sewage flows that enter the Drainage District's system for ultimate disposal by the Water Authority, and the pollutants present in those sewage flows. *Id.*, ¶ 20. An identifiable

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treatment services still are provided by Detroit facilities and the Detroit water and sewage treatment plants.

portion of the total Water Authority Charge to the Drainage District is attributable to the costs to treat stormwater flows that come from the Drainage District service area. *Id.* As described below, the Drainage District's pass-through Stormwater Charge to the City's end-users should be the same amount, but it is not. *Id.*

For a number of years, the Drainage District has charged end-users in the City substantially more than the amount the Water Authority charges the Drainage District for the disposal of the portion of the Drainage District's stormwater flow that originates in the City. *Id.*, ¶ 21. The Drainage District has therefore overcharged the City for stormwater disposal service since at least 2017 and the City, in turn, has passed that overcharge on to end-users in the City, including Plaintiff and the Class. *Id.*

The Drainage District's Final Order of Apportionment dated April 19, 2005 (Exhibit 2 to Complaint) provides that the stormwater charges to the City consist of two components: (1) the Detroit Water and Sewerage Department's charges to the [Drainage District] 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. Complaint, ¶ 22. The Final Order of Apportionment was imposed pursuant to a Resolution of the Board of the Drainage District dated April 19, 2005 (the "Resolution"), Exhibit 3 to Complaint.

Plaintiff does not challenge the Final Order of Apportionment or the Resolution. To the contrary, Plaintiff asserts that the Final Order of Apportionment and the Resolution are valid and binding on the Drainage District. Complaint, ¶ 23.

The Resolution obligated the Drainage District to pass through to the City's end-users the City's proportionate share of the Water Authority's actual charges to the Drainage District for treating the storm water. The Drainage District has breached its obligations, and continues to breach its

obligations, under the Resolution because, in assessing storm water charges to the City, the Drainage District has **not** passed on to the City's sewer end-users the City's proportionate share of the actual costs the Drainage District has incurred to the Water Authority for storm water disposal. Instead, the Drainage District has grossly increased the Water Authority stormwater treatment charges. Complaint, ¶ 24.

As Plaintiff alleged in his Complaint, ¶ 25, the Water Authority's annual rate calculations demonstrate the precise amount the Water Authority includes in the Water Authority Charges to recover from the Drainage District the costs for stormwater disposal from communities within the Drainage District service area. For example, for the fiscal year ending June 30, 2021, the Water Authority charged the Drainage District the total amount of $45,851,800 in Water Authority Charges to cover the costs of disposing of all sewage flows. *See* Exhibit 4 to Complaint. According to the Water Authority rate methodology implemented in 2017 and in effect in 2021, the Water Authority allocated 50% of that $45,851,800 ($22,925,900) based upon the Drainage District's total sewage flows and 50% ($22,925,900) based upon the Drainage District's share of the total pollutant load of all sewage flows treated by the Water Authority. *See* Exhibit 5 to Complaint.

As Plaintiff alleged in his Complaint, ¶ 26, the Water Authority determined that stormwater constitutes 33% of the total sewage flows coming from the Drainage District, and therefore, 33% of the total flow-related costs are attributable to stormwater disposal. *See* Exhibit 5 to Complaint (26.03 cfs of stormwater vs. 78.57 csf of total flows). The Water Authority further determined that stormwater contributed 16.4% of the total pollutant loads attributable to the Drainage District, and therefore, 16.4% of the total pollutant-related costs are attributable to stormwater disposal. *See* Exhibit 5 to Complaint (Water Authority cost of service study) and Exhibit 7 to Complaint (detailed calculation derived from Exhibit 5). As a result, the Water Authority charged the Drainage District

$7,565,547 for stormwater flows ($22,925,900 x 33%) and $3,759,847 ($22,925,900 x 16.4%) for pollutant loadings in the stormwater. The total stormwater charges from the Water Authority to the Drainage District for the fiscal year ending June 30, 2021 thus were **$11,325,394**. The balance of the Water Authority's charges to the Drainage District for that fiscal year ($34,526,406) are attributable to non-stormwater sewage flows.

In contrast, the Drainage District falsely represented to the City that, for the fiscal year ending June 30, 2021:

- The Water Authority charged the Drainage District **$45,939,650** million in total disposal charges;
- The Water Authority charged the Drainage District **$21,963,110** million for sanitary sewage disposal; and
- The Water Authority charged the Drainage District **$23,976,540** million for storm water disposal. [Exhibit 6 to Complaint]. *See* Complaint, ¶ 27.

Instead of allocating the Water Authority's stormwater charge in the amounts actually charged by the Water Authority, the Drainage District improperly reallocated the total charges imposed by the Water Authority to increase the amount of the storm water charges to end-users of the County System by over $12 million ($23,976,540 in actual Stormwater Charges vs. $11,325,394 incurred from the Water Authority for stormwater disposal). Because the Drainage District allocated to the City a higher percentage of the storm water disposal charges (29.7%) than sanitary sewage disposal charges (19.3%), the more of the total Water Authority Charges that the Drainage District allocates to storm water charges, the more the City's end-users pay in the aggregate. *Id.*, ¶ 28.

In other words, for each dollar of storm water disposal charges the Drainage District allegedly incurs, the City pays 29.7 cents. But for each dollar of sanitary sewage disposal charges the Drainage

District allegedly incurs, the City pays only 19.3 cents. *Id.*, ¶ 29. Based upon the Drainage District's representations and the allocation percentage assigned to the City, the Drainage District charged the City's end-users aggregate sewage disposal costs of **$11,361,901** for the fiscal year ending June 30, 2021. This was calculated as follows:

- Sanitary -- $4,240,198 ($21,963,110 in Water Authority charges x .19306 = $4,240,198)
- Storm water -- $7,121,703 ($23,976,540 in Water Authority charges x .297028 = $7,121,703) [*Id.*, ¶ 30.]

Given the Water Authority's actual charges to the Drainage District, however, the Drainage District should have charged the City **$10,029,626** for the fiscal year ending June 30, 2021. This is calculated as follows:

- Sanitary -- $6,665,667 ($34,526,406 in Water Authority charges x .19306 = $6,665,667)
- Storm water -- $3,363,959 ($11,325,394 in Water Authority charges x .297028 = $3,363,959) [*Id.*, ¶ 31.]

Based upon the foregoing, the Drainage District overcharged the City by at least **$1,332,275** for just the fiscal year ending June 30, 2021. *Id.*, ¶ 32. This Overcharge is based solely upon the Drainage District's misallocation of the Water Authority's "common-to-all" sewer charges (*i.e.*, the Water Authority Charges) imposed upon Plaintiff and the Class. The actual Overcharge is even higher because the Drainage District similarly overallocated its own non-Water Authority expenses to stormwater disposal. *Id.*

There are similar overcharges for prior years and for the years since. The total Stormwater Disposal Overcharges imposed by the Drainage District since May 18, 2017 well exceed **$7 million**. *Id.*, ¶ 33. Plaintiff and the Class need not rely upon the Resolution to invalidate the Stormwater Disposal Overcharges because, even in the absence of the Resolution, the Drainage District's

stormwater charges to end-users in the City have been unreasonable and unlawful because the stormwater charges far exceed the actual costs the Drainage District incurs to dispose of the City's stormwater. *Id.*, ¶ 34. The Stormwater Disposal Overcharges have been arbitrary, capricious and/or unreasonable," because the challenged Charges, "viewed as a whole," have been, and continue to be, "excessive." *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 969 N.W.2d 570 (2021). *Id.*, ¶ 35.

III. SUMMARY OF RELEVANT PROCEEDINGS IN THE CIRCUIT COURT

On May 18, 2023, Plaintiff filed his Complaint in this action. *See* Complaint, Appx. 4. On July 25, 2023, the Drainage District filed its Motion for Summary Disposition Pursuant to MCR 2.116(C)(7) and (C)(8). *See* Appx. 5

On January 24, 2024, the Circuit Court heard the Drainage District's Motion for Summary Disposition. *See* Hearing Trans. 1/24/24, Appx. 3. On January 25, 2024, the Circuit Court entered an order denying in part the Drainage District's Motion for Summary Disposition as to Plaintiff's claim for unjust enrichment, which is the subject of this appeal. *See* Appx. 1.[3]

The Circuit Court denied summary disposition to the Drainage District under MCR 2.116(C)(8) as to Plaintiff's unjust enrichment claim. *Id.*; *see also* Summary Disposition Hearing Trans. 1/24/24, Appx. 3, p. 28 ("At the end of the day, I do feel that the plaintiff can maintain a claim for unjust enrichment. Understanding and respecting the argument by the moving party here that they don't show any – that they retained wealth from this or not, I think it's pled. If you read it in their pleadings, it's there and it's commonsense."); *Id*, pp. 29-30 ("I think the pleadings, if you read paragraphs 55 through 62, the entirety of it, you're talking about paying more money to the Drainage

[3] The portion of the Circuit Court's order granting the Drainage District's motion for summary disposition as to Plaintiff's claim for assumpsit is the subject of Plaintiff's pending cross-appeal as of right.

District than what they should have been charged. And that unjustly enriches the Drainage District because they're receiving that money. They're in receipt of it. What they choose to do with it, you know, I think it's there. I think you could -- a jury could find, I think a trier of fact could find how they were unjustly enriched based on what's pled."); *Id.*, p. 32 ("taking the pleadings as truthful for purposes of the motion, that means that the individual citizens in Royal Oak are paying more than they should. The Drainage Commission receives that money, then chooses to pass it along to cover, you know, the charges here, instead of pulling in money from different sources, perhaps as they should.").

This Court thereafter granted the Drainage District's timely Application for Leave to Appeal, and this appeal followed. The Drainage District's appeal challenges only the Circuit Court's ruling that Plaintiff had stated a cognizable unjust enrichment claim.

IV. STANDARD OF REVIEW

Summary disposition under MCR 2.116(C)(8)[4] "tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Feyz v. Mercy Mem. Hosp.,* 475 Mich. 663; 672, 719 N.W.2d 1 (2006). When deciding a motion for summary disposition, "all well-pleaded allegations are accepted as true, and construed most

[4] The Drainage District mentions in passing that it moved for summary disposition in the Circuit Court under MCR 2.116(C)(7). *See* DD Br., pp. v, 5. But the Drainage District did not apply for leave to appeal under MCR 2.116(C)(7) and does not appear to argue in its Brief on Appeal that the Circuit Court erred by denying the Drainage District's motion under subsection (C)(7). *See* DD Br., pp. 1 ("The trial court erred when it denied the Drainage District's motion to dismiss Plaintiff-Appellee Jeffrey Eisenberg's 'unjust enrichment' claim under MCR 2.116(C)(8) for failure to state a valid claim for relief."); p. 3 ("This is a flaw requiring dismissal of Plaintiff's unjust enrichment claim under MCR 2.116(C)(8) for failure to state a valid claim for relief."); pp. 7-8 (discussing (C)(8) standard of review).

favorably to the nonmoving party." *Wade v. Dep't of Corrections,* 439 Mich. 158, 162-163; 483 N.W.2d 26 (1992).

This Court reviews decisions on motions for summary disposition under MCR 2.116(C)(8) *de novo. Maiden v. Rozwood*, 461 Mich. 109, 118; 597 N.W.2d 817 (1999).

V. ARGUMENT

A. This Court Has Already Ruled That End-User Ratepayers, Including Those in Royal Oak, Have Conferred a Benefit Upon the Drainage District

In 2019 and 2021, this Court considered two cases involving challenges to stormwater charges that were similar to Plaintiff's challenge in this case. *See Kickham Hanley PLLC v. Oakland Cty. Mich.*, No. 341076, 2019 Mich. App. LEXIS 1550, at *22-23 (May 2, 2019) (Appellee's Appx. 1) (suit over Royal Oak charges); *Kickham Hanley PLLC v. George W. Kuhn Drainage Dist.*, No. 351317, 2021 Mich. App. LEXIS 234, at *16-17 (Jan. 14, 2021) (Appellee's Appx. 2) (suit over Oak Park charges). In those cases, the plaintiffs were trusts that had received assignments of claims belonging to Royal Oak and Oak Park, and the plaintiffs sought to bring actions against the Drainage District standing in the shoes of Royal Oak and Oak Park.

In the 2021 *Kickham Hanley* opinion, addressing claims assigned by the City of Oak Park, this Court found that the Drainage District was unjustly enriched to the detriment of Plaintiff and the putative Class. As Plaintiff stated in his Complaint in this action, ¶ 6: "The Court of Appeals has explicitly recognized that end-users of the County System are the 'actual ratepayers of the alleged overcharge.' *See Kickham Hanley PLLC v. GWKDD*, COA Case No. 351317 … at p. 7. Absent a release, those end-users are 'entitled to recover the overcharges' from Drainage District and/or the City. *Id.* at p. 9." In other words, this Court has expressly recognized the existence of a claim for unjust enrichment by Plaintiff and the putative Class against the Drainage District, and Plaintiff cited that finding in his Complaint to support his statement of his claims.

More generally, in the 2019 Royal Oak case, *Kickham Hanley PLLC v. Oakland Cty. Mich.*, No. 341076, 2019 Mich. App. LEXIS 1550, at *22-23 (May 2, 2019) (Appellee's Appx. 1), this Court stated:

> **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. [emphasis added].

And in the Oak Park case, *Kickham Hanley PLLC v. George W. Kuhn Drainage Dist.*, No. 351317, 2021 Mich. App. LEXIS 234, at *16-17 (Jan. 14, 2021) (Appellee's Appx. 2), this Court similarly stated:

> 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* [*v. Fuhrmann*], 338 Mich at 223 (quotation marks and citation omitted), or that Oak Park suffered an inequity, *Karaus* [*v. Bank of New York Mellon*], 300 Mich App at 22-23, because the money at issue belonged to Oak Park's ratepayers as opposed to Oak Park itself.

Accordingly, this Court has **already effectively found** that the allegations made here – which are materially the same as made in the *Kickham Hanley* cases – state a claim that the Drainage District was unjustly enriched to the detriment of Plaintiff and the putative Class.

B. Plaintiff Has Stated an Unjust Enrichment Claim Because the Complaint Alleges That, As Between Plaintiff and the Drainage District, It Would Be Unjust For the Drainage District to Retain the Overcharges

The Michigan Supreme Court has held that "'[e]ven where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its **receipt or retention** are such that, **as between the two persons**, it is unjust for him to retain it.'" *Tkachik v. Mandeville*, 487 Mich. 38, 77, 790 N.W.2d 260 (2010) (emphasis added). The inquiry is only "as between the two persons"

in the lawsuit, not as between the plaintiff and the world. This is not a new principle of law. *See, e.g., Dumas v. Auto Club Ins. Ass'n*, 437 Mich. 521, 546; 473 N.W.2d 652 (1991) ("Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it."); *Liggett Rest. Grp., Inc. v. City of Pontiac*, 260 Mich. App. 127, 137; 676 N.W.2d 633 (2003) ("To sustain a claim for unjust enrichment, plaintiff needed to show that defendants received a benefit from plaintiff and that an inequity resulted to plaintiff as a consequence of defendants' retention of that benefit.") (cited in the Drainage District's "Statement of Questions Presented", DD Br. p. vi).

Moreover, the Supreme Court's reference to "receipt or retention" (*Tkachik*, 487 Mich. at 77) establishes that unjust enrichment does not require a showing that the defendant retained the benefit if its initial "receipt" was wrongful. The question is not whether the Drainage District kept Plaintiff's money for itself, but whether its "receipt" of the money was wrongful. *See Wright v. Genesee Cty.*, 504 Mich. 410, 431; 934 N.W.2d 805 (2019). ("This principle of 'justice,' which refers not only to rights protected by tort and contract law but also to rights protected by the court's sense of 'justice under the law,' may broadly be referred to as the law of unjust enrichment. *See Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 N.W.2d 260 (2010) ('Unjust enrichment is defined as the unjust retention of "money or benefits which in justice and equity belong to another."'), quoting *McCreary v Shields*, 333 Mich 290, 294; 52 N.W.2d 853 (1952) (quotation marks omitted).").

C. The GWKDD Fails to Tether its Challenge to Plaintiff's Unjust Enrichment Claims to the Standard Governing Such Claims in Cases Challenging Municipal Utility Rates

The Drainage District's counsel described its argument as follows during the summary disposition hearing: "The allegation in this case is not that the GWKDD collected more than what is

in the pool. It's this idea that too much of the pool was interpreted and allocated to Royal Oak in particular years . . ." Hearing Trans., Appx. 3, p. 9.

The Drainage District accurately describes Plaintiff's factual allegations in the Complaint, but it misses Plaintiff's legal argument completely. As Plaintiff alleged in its Complaint, ¶ 55, the Drainage District's sewer Charges must be "reasonable." *Trahey v. City of Inkster*, 311 Mich. App. 582, 595; 876 N.W.2d 582 (2015); *see also Mapleview Estates, Inc. v. City of Brown City*, 258 Mich. App. 412, 417; 671 N.W.2d 572 (2003) ("As defendant obligingly points out, even if the tap-in fees are not a tax, they must still be reasonable."). A **municipal utility charge** is "unreasonable" if it contains illegal or improper expenses. *Trahey*, 311 Mich. App. at 595; Complaint, ¶ 56. A municipal utility charge is also "unreasonable" if "viewed as a whole" it has been "excessive." *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 219; 969 N.W.2d 570 (2021); Complaint, ¶ 58.

As to Plaintiff and the class – the Royal Oak ratepayers – the Drainage District's charges, viewed as a whole, have been excessive and have contained the illegal and/or improper expense of paying the cost of services provided to ratepayers from other cities who have been undercharged due to the Drainage District's mis-apportionment. The Drainage District does not cite *Youmans* or *Trahey* in its Brief on Appeal and does not address the standards this Court set forth in those cases. *Youmans* and *Trahey* are controlling authority, and they require this Court to affirm the Circuit Court's denial of summary disposition on Plaintiff's unjust enrichment claim.

D. The Drainage District's Case Law Is Inapposite Because None of the Cited Cases Involve a Defendant Overcharging One Group So That It Could Undercharge Another Group

Plaintiff has explained above how controlling authority that is directly on point holds that a defendant's permanent retention of a benefit is not a necessary element of unjust enrichment, probably

in any context, and certainly in the context of municipal utility overcharges. How could "I spent the money" ever be a defense to unjust enrichment?

Plaintiff's published authority contradicts Drainage District's published authority such as *Liggett Rest. Group, Inc. v. City of Pontiac*, 260 Mich. App. 127; 676 N.W.2d 633 (2003); *AFT Michigan v. Michigan*, 303 Mich. App. 651; 846 N.W.2d 583 (2014); and *Morris Pumps v. Centerline Pumping, Inc.*, 273 Mich. App. 187, 195; 729 N.W.2d 898 (2006), which superficially recite that a defendant must "retain" a benefit in order to be unjustly enriched, but which **do not** hold that a defendant who simply spends its ill-gotten gains can thereby avoid liability for unjust enrichment. Indeed, *Liggett Rest. Grp., Inc. v. City of Pontiac*, 260 Mich. App. at 137 holds that "[t]o sustain a claim for unjust enrichment, plaintiff needed to show that defendants received a benefit from plaintiff and that **an inequity resulted to plaintiff** as a consequence of defendants' retention of that benefit" (emphasis added), which is exactly Plaintiff's argument in this case. The "**inequity to Plaintiff**' is the question, not whether the Drainage District has collected in the aggregate an inequitable total amount from all its member communities, such that the Drainage District has excess money left over after it pays the Water Authority's charges.

The Drainage District's unpublished cases are similarly inapposite. In *Ganson v. Detroit Pub. Sch.*, No. 351276, 2021 Mich. App. LEXIS 419, at *1-2 (Jan. 21, 2021) (Appellee's Appx. 3), the plaintiff was an employee of the Detroit Public Schools who sued the school district because he had not received retirement benefits. But the Detroit Public Schools was not the entity that refused to pay the plaintiff's benefits in exchange for his work. The Office of Retirement Services ("ORS") – a separate entity – decided not to pay the benefits. *Id.* at *1. This Court very logically concluded that although the plaintiff had provided work for the Detroit Public Schools, which the plaintiff alleged gave rise to a right to retirement benefits, the ORS "held" the benefits, not the Detroit Public Schools,

and the plaintiff could not compel the Detroit Public Schools to disgorge a benefit that the plaintiff's labor had conferred on the ORS, if it had conferred an unjust benefit on anyone:

> 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 NW2d 782 (2015) ("the Public School Employees Retirement Act (Retirement Act), MCL 38.1301 et seq., . . . governs the Michigan Public School Employees' Retirement System (MPSERS).").

Here, Plaintiff and the putative Class paid their money to the Drainage District, some of which the Drainage District paid to the Water Authority (but not all, *see* Complaint, ¶ 32 and *supra,* pp. 10-11). The Drainage District received the money. *Ganson* might apply if Plaintiff had paid his money to the Water Authority and not received services from the Drainage District, but even that is not clear, and *Ganson* definitely does not apply under the facts alleged in Plaintiff's Complaint.

In *Corey v. Wayne Cty.*, No. 325465, 2016 Mich. App. LEXIS 513, at *19 n.7 (Mar. 15, 2016) (Appellee's Appx. 4), plaintiff challenged an $80 fee he was required to pay to the Court in order to file a child custody motion. This Court held that because a "mandatory statutory scheme" required the Wayne County Treasurer to deposit the fees it collected in the Friend of the Court Fund, the plaintiff could not recover for unjust enrichment:

> However, under the statutory scheme, defendants Wayne County and/or Garrett could not retain any of the fees collected under MCL 600.2529(1)(d)(i) for their own benefit; rather, the fees collected must be used to fund the Friend of the Court, an arm of the circuit court. MCL 600.2529(4); MCL 600.2530(1) & (2). See also MCL 552.503; *Morrison v Richerson*, 198 Mich App 202, 212; 497 NW2d 506 (1992). Without evidence that defendants failed to treat funds in this manner, this mandatory statutory scheme establishes that defendants did not receive a benefit from the fees collected or retained, and it follows that defendants could not have been unjustly

> enriched by collecting the fees pursuant to MCL 600.2529(1)(d)(i). [*Corey*, 2016 Mich. App. LEXIS at *13.]

In *Corey*, however, there was no suggestion that the County overcharged one group of fee payers so that it could undercharge another group. The County merely collected a uniform $80 fee from all persons who filed motions seeking child custody orders.

Moreover, there is no "mandatory statutory scheme" here; there is only the Drainage District's unilateral decision to apportion the cost of its payments to the Water Authority among the ratepayers in the Drainage District's member communities, including Plaintiff and the putative class, in a certain way. This Court has twice held that the written documents establishing the apportionment of charges are not contractually binding on the Drainage District. *Kickham Hanley PLLC v. Oakland Cty. Mich.*, No. 341076, 2019 Mich. App. LEXIS 1550, at *10 (May 2, 2019) ("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.") (Appellee's Appx. 1); *Kickham Hanley PLLC v. George W. Kuhn Drainage Dist.*, No. 351317, 2021 Mich. App. LEXIS 234, at *10 (Jan. 14, 2021) ("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.") (Appellee's Appx. 2).

It is hard to see how the Drainage District could argue that it is **bound by statute** to apportion the Stormwater Charges according to its current scheme, given that this Court twice found that the documents governing apportionment were not even the equivalent of a **mere contract.**[5] **As applied**

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[5] This Court further noted in *Corey* "that a claim to recover fees paid to the state in excess of the amount allowed under applicable law **is properly filed as an action in assumpsit** for money had and received." *Corey*, 2016 Mich. App. LEXIS 513 at *19 (emphasis added). Therefore, if the Court is inclined to follow *Corey*, it will necessarily have to sustain Plaintiff's appeal of the Circuit Court's order granting the Drainage District's motion for summary disposition on Plaintiff's assumpsit claim.

to Plaintiff and the putative Class, the Stormwater Charge is unreasonable because, in allocating sewer charges to the City, the Drainage District grossly and fraudulently inflates the actual Water Authority stormwater disposal charge and therefore it contains improper expenses. Complaint, ¶ 57. Regardless of how much the Drainage District collected from anyone else, **as to Plaintiff and the putative Class** it collected millions of dollars to which it was not entitled (the "Stormwater Disposal Overcharges"). Complaint, ¶ 60. Those excess funds are the Stormwater Disposal Overcharges described in Plaintiff's Complaint, ¶¶ 33-34, and *supra*, p. 11. By paying the Stormwater Disposal Overcharges, Plaintiff and the Class have conferred a benefit upon the Drainage District. *Id.*

The legal question is not, as the Drainage District argues, simply whether it has overfilled the "pool" of money or merely filled it to the brim with all the charges it collects from all its member communities. The question is whether the Drainage District has collected too much **from Plaintiff and the Class.**

Plaintiff's counsel explained this distinction during oral argument with a simplified analogy, which appeared in a modified form in the "Introduction" section above. Imagine the whole of the Drainage District consists of just 10 identical houses, and the cost of disposing of stormwater from those 10 houses is $1,000, which the Drainage District pays to the Water Authority. That's $100 per house, per year. The Drainage District could not simply decide to collect money from only 8 of the 10 houses, charge each of the 8 houses $125, and collect nothing from the remaining 2 houses. It would not matter whether the Drainage District had only collected the $1,000 it needed to pay the Water Authority, because **as to the 8 houses who now pay $125, the Drainage District would have received a benefit to which it was not entitled, $25 of the charges would be unreasonable, and the Drainage District would have been unjustly enriched by the 8 houses who overpaid.** *See generally* Hearing Trans. 1/24/24, Appx. 1, pp. 19-20.

An opinion from the Ohio Court of Appeals, which obviously does not bind this Court, might help illuminate the issue. In *City of Cleveland v. Ohio Bureau of Workers' Comp.*, 109 N.E.3d 84, 92 (Ohio Ct. App. 2018) (Appellee's Appx. 5), *vacated on other grounds* by 152 N.E.3d 172, 176 (Ohio 2020) (Appellee's Appx. 6),[6] the court considered a challenge to a worker's compensation program that was "designed to operate on a 'revenue-neutral' basis" – i.e., without generating an overall profit – like the Drainage District's charges to the ratepayers in its member communities:

> The BWC is designed to operate on a "revenue-neutral" basis. This means that the BWC seeks to collect from employers participating in Ohio's workers' compensation insurance program only the amount of premiums necessary to cover the BWC's projected claims costs and administrative expenses and to maintain a reasonable surplus in the state insurance fund. Each year the BWC separately estimates for each employer segment, i.e., private employers and public employers, the costs of claims and expenses expected to be incurred for that segment. Once the BWC determines the total premiums it needs to collect, the BWC then allocates that sum amongst the employers participating in the workers' compensation system. Under Ohio's workers' compensation system, employers are classified into one or more manual classes based on the type of work in which their employees are engaged and the degree of hazard of the employer's operations. After the BWC determines its total premium needs for the policy year for an employer segment, it distributes the premiums across the manual classes for that segment. [*Id.* at 92.]

The defendant Bureau of Workers' Compensation developed a "group rating program" that allowed multiple employers to group together and be treated as a single employer for the purpose of determining their worker's comp premiums. *Id.*, 109 N.E.3d at 94-95. "By combining the experience of all of the members of the group, totaling it up, and treating the group as a single employer for rating purposes, the group could qualify for premium discounts based on their combined claims experience. These discounts were, at times, quite significant." *Id.* at 94. The plaintiff City of Cleveland alleged

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[6] The Ohio Supreme Court vacated the Court of Appeals' opinion due to lack of subject matter jurisdiction, but did not disturb the other aspects of the Court of Appeals' ruling. *City of Cleveland*, 109 N.E.3d at 176 (vacating the Ohio Court of Appeals' opinion for lack of subject matter jurisdiction). In any event, Plaintiff cites *City of Cleveland* not as binding authority, but because it so clearly illustrates the "undercharge/overcharge" issue in this case.

that the "group rating program" led to an inequity that this Court will probably find familiar in light of Plaintiff's allegations in this case:

> Because the BWC operates on a revenue-neutral basis, the loss in premiums resulting from the discounts provided to employers under the BWC's group-rating program had to be redistributed. **In other words, the premium obligations for nongroup-rated employers needed to be increased in order to offset the substantial discounts provided to employers participating in the group-rating program.** As Christopher Carlson, the BWC's chief actuarial officer and Elizabeth Bravender, the BWC's director of actuarial operations, explained, this was achieved by increasing the off-balance factor used in calculating the base rates for the manual classes. In short, the BWC determines a target amount of total premiums to be collected for each manual class, calculates how much experience rating (including group rating) moves the total away from the target and then uses the off-balance factor to return the total premiums to be collected back to the target.
>
> Increasing the off-balance factor increased the base rate for all employers. **Therefore, employers who were not part of a group (and did not receive the significant discounts off base rates that group members received), in effect, paid "extra premiums" to make up for the discounts granted to group-rated employers under the BWC's group-rating program.** [*Id.* at 94-95 (emphasis added).]

The Ohio Court of Appeals held that "the potential for premium inequity between group-rated and nongroup-rated employers as a result of the generous premium discounts" (*Id.* at 95) was sufficient to support a claim for unjust enrichment:

> The city brought a claim against the BWC for unjust enrichment. The city contends that the BWC was unjustly enriched because the BWC charged nongroup-rated PECs, including the city, excessive workers' compensation premiums in order to subsidize unwarranted discounts given to group-rated PECs under its group-rating program in violation of Ohio law.
>
> Unjust enrichment occurs where "'a person has and retains money or benefits which in justice and in equity belong to another.'" *Smith v. Vaughn*, 174 Ohio App. 3d 473, 2007-Ohio-7061, 882 N.E.2d 941, ¶ 10 (1st Dist.2007), quoting *Johnson v. Microsoft Corp.*, 106 Ohio St. 3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 20; *Hummel v. Hummel*, 133 Ohio St. 520, 528, 14 N.E.2d 923 (1938). The purpose of an unjust enrichment claim is not to compensate the plaintiff for loss or damage suffered by the plaintiff, but to enable the plaintiff to recover the benefit he has conferred on the defendant under circumstances in which it would be unjust to allow the defendant to retain it. *Johnson* at ¶ 21, citing *Hughes v. Oberholtzer*, 162 Ohio St. 330, 335, 123 N.E.2d 393 (1954). Restitution is the remedy provided upon proof of unjust enrichment "to prevent one from retaining property to which he is not justly entitled." *Keco Industries,*

> *Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 256, 141 N.E.2d 465 (1957); *see also Santos*, 101 Ohio St. 3d 74, 2004-Ohio-28, 801 N.E.2d 441 at ¶ 11 ("restitution [is] available as the remedy for an unjust enrichment of one party at the expense of another"), citing Restatement of the Law, Restitution, Section 9 (1937).
>
> To prevail on a claim for unjust enrichment, a plaintiff must prove by a preponderance of the evidence that: (1) the plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge of such benefit and (3) the defendant retained that benefit under circumstances in which it would be unjust for him to retain that benefit. *See, e.g., Patel v. Krushna SS L.L.C.*, 8th Dist. Cuyahoga No. 104655, 2018-Ohio-263,¶ 25; *Johnson* at ¶ 21; *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 12 Ohio B. 246, 465 N.E.2d 1298 (1984).
>
> After reviewing the materials submitted by the parties on summary judgment, the trial court found that the city had met its initial burden under Civ.R. 56, coming forward with evidence establishing the absence of any genuine issues of material fact as to the BWC's liability on the city's unjust enrichment claim, but that the BWC had not met its reciprocal burden of pointing to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact on that issue for trial. Following a thorough review of the record, we reach the same conclusion. [*Id.* at 108-09.]

The *City of Cleveland* case is not binding, but the Ohio Court of Appeals applied the same longstanding principles of unjust enrichment, rooted in restitution, to conclude that the City of Cleveland had stated a claim for unjust enrichment based on the defendant having increased the city's premiums in order to subsidize lower premiums for other insured parties, in violation of substantive law. That is exactly what the Drainage District has done to Plaintiff and the class in this case.

Again, the question under binding caselaw like *Youmans* is not whether the overall charges to all member communities are excessive. The question is whether the charges to **Plaintiff and the putative Class,** viewed as a whole, are excessive. Plaintiff has alleged that the charges are excessive. *See generally* Complaint, ¶¶ 8-37 (general allegations); ¶¶ 54-62 (count for unjust enrichment against the Drainage District). Accordingly, the Drainage District's Application lacks substantive merit.

IV. CONCLUSION

The Circuit Court correctly found that based on Plaintiff's thirty-plus paragraphs of "General" factual allegations, along with the allegations in is unjust enrichment count, Plaintiff stated a claim for

unjust enrichment. Plaintiff alleges that the Drainage District has been unjustly enriched as to Plaintiff, regardless of whether the Drainage District collected more money from the ratepayers in all its member communities, in the aggregate, than it was entitled to retain. This Court should affirm the Circuit Court's decision denying summary disposition to the Drainage District on Plaintiff's unjust enrichment claim.

KICKHAM HANLEY PLLC

By: */s/ Gregory D. Hanley*

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STATEMENT OF WORD COUNT

Pursuant to MCR 7.212(B)(3), Plaintiff's counsel states that Plaintiff's Response to the Drainage District's Application for Leave to Appeal contains 8,230 "countable words" as defined under MCR 7.212(B). Counsel relies on the word count function of its word processing system, as permitted under MCR 7.212(B)(3).

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2024, I electronically served the foregoing document on all counsel of record using the court's electronic filing system.

/s/ Edward F. Kickham Jr.
Edward F. Kickham Jr.

4919-5687-6035 v.1

STATE OF MICHIGAN
COURT OF APPEALS

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

Plaintiff/Appellee/Cross-Appellant,

v.

GEORGE W. KUHN DRAINAGE DISTRICT,
A component unit of Oakland County
with a separate legal existence,

Defendant/Appellant/Cross-Appellee, and

CITY OF ROYAL OAK, MICHIGAN,
a municipal corporation.

Defendant.

COA Case No. 369632

Oakland County Circuit Court
Case No 2023-200422-CZ
Hon. David M. Cohen

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Volume I

EXHIBIT - 1

Kickham Hanley PLLC v. Oakland Cty. Mich.

Court of Appeals of Michigan

May 2, 2019, Decided

No. 341076

Reporter
2019 Mich. App. LEXIS 1550 *; 2019 WL 1965891

KICKHAM HANLEY PLLC, Plaintiff-Appellant, v OAKLAND COUNTY MICHIGAN, Defendant, and GEORGE W. KUHN DRAINAGE DISTRICT, Defendant-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *Kickham Hanley PLLC v. Oakland Cty. Mich., 2020 Mich. LEXIS 704 (Mich., Apr. 29, 2020)*

Prior History: **[*1]** Oakland Circuit Court. LC No. 2017-159351-CZ.

Kickham Hanley PLLC v. Oakland Cty. Mich., 2018 Mich. App. LEXIS 2407 (Mich. Ct. App., May 17, 2018)

Core Terms

trial court, overcharges, assumpsit, summary disposition, Drainage, drain, Apportionment, unjust enrichment, ratepayers, charges, amended complaint, final order, stormwater, disposal, amend, assignee, costs, governmental immunity, water and sewer, equitable, antitrust, parties, money had and received, court rule, municipalities, documents, belongs, novo, express contract, motion for leave

Judges: Before: MURRAY, C.J., and SAWYER and REDFORD, JJ.

Opinion

PER CURIAM.

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. judgment. The circuit court approved the settlement and entered a final

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 **[*2]** 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

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

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 **[*3]** 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.

Royal Oak, in turn, passed through the **[*4]** 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 **[*5]** 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 **[*6]** 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 NW2d 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).

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 NW2d 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 NW2d 766 (2006). Further, whether an **[*7]** 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 NW2d 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 NW2d 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 NW2d 40 (1988) (quotation marks and citation omitted). In AFT Mich v Michigan, 497 Mich 197, 235; 866 NW2d 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 **[*8]** 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 452-453 (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 **[*9]** 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.

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

[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

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 **[*10]** 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 **[*11]** 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 NW2d 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 **[*12]** 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.

"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.

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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 NW2d 489 (1999).

Under Michigan law, an assignee **[*13]** 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 NW2d 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 **[*14]** 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 **[*15]** 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.

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 **[*16]** 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 NW2d 499 (2010)*. "When considering a motion brought under subrule (C)(7), the

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[4] See *Bond v Public Schools of Ann Arbor, 383 Mich 693; 178 NW2d 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*.

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 **[*17]** agencies whenever they are engaged in the exercise or discharge of a governmental function.'" *Milot v DOT, 318 Mich App 272, 276; 897 NW2d 248 (2016)*, quoting *Ross v Consumers Power Co (On Rehearing), 420 Mich 567, 595; 363 NW2d 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 NW2d 762 (1998)*, rev'd on other grounds *464 Mich 21; 627 N.W.2d 236 (2001)*, rev'd *537 U.S. 36; 123 S Ct 371; 154 L Ed 2d 377 (2002)*, 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

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 NW2d 271 (2003)*. We also review for an abuse of discretion a trial court's decision **[*18]** regarding a motion for leave to file an amended complaint. *Kostadinovski v Harrington, 321 Mich App 736, 742-743; 909 NW2d 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 US, Inc, 307 Mich App 472, 478; 861 NW2d 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 NW2d 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 NW2d 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 NW2d 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 **[*19]** 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 NW2d 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.

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 **[*20]** "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 NW2d 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 NW2d 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 **[*21]** 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 **[*22]** 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 **[*23]** 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.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ James Robert Redford

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EXHIBIT - 2

Kickham Hanley PLLC v. George W. Kuhn Drainage Dist.

Court of Appeals of Michigan

January 14, 2021, Decided

No. 351317

Reporter
2021 Mich. App. LEXIS 234 *; 2021 WL 137773

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.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *Kickham Hanley, PLLC v. George W. Kuhn Drainage Dist., 2021 Mich. LEXIS 1733 (Mich., Oct. 8, 2021)*

Prior History: **[*1]** Oakland Circuit Court. LC No. 2019-172077-CZ.

Core Terms

stormwater, trial court, disposal, overcharges, drain, unjust enrichment, assumpsit, drainage, class action, Apportionment, final order, quotation, marks, summary disposition, promise, rates, sewer, contract formation, ratepayers, parties, municipal, damages, apportionment of costs, water treatment plant, breach of contract, public corporation, reply brief, de novo, benefiting, customers

Counsel: For KICKHAM HANLEY PLLC TRUSTEE, Plaintiff-Appellant: HANLEY GREGORY D.

For GEORGE W KUHN DRAINAGE DISTRICT, Defendant-Appellee: WEBSTER PETER H.

Judges: Before: FORT HOOD, P.J., and CAVANAGH and TUKEL, JJ.

Opinion

PER CURIAM.

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 **[*2]** 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

[1] See *MCL 280.5*.

[2] See *MCL 280.464*.

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 **[*3]** 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 **[*4]** defendant on behalf of the plaintiffs, and was also appointed counsel for the litigation trust.

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.

[3] These class action plaintiffs were legally represented by 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 storm-water. 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 **[*5]** 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 NW2d 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 **[*6]** basis of the pleadings." *Dalley v Dykema Gossett, 287 Mich App 296, 304; 788 NW2d 679 (2010)* (alteration in original), quoting *Corley v Detroit Bd of Ed, 470 Mich 274, 277; 681 NW2d 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 NW2d 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 NW2d 216 (2018) (alteration in original), quoting Estes v Titus, 481 Mich 573, 578; 751 NW2d 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 NW2d 380 (2014). 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 NW2d 766 (2006). This Court reviews equity cases "de novo on the record on appeal." Tkachik v Mandeville, 487 Mich 38, 44-45; 790 NW2d 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 NW2d 897 (2012).

B. BREACH OF CONTRACT

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 **[*7]** as a result of the breach." Dunn v Bennett, 303 Mich App 767, 774; 846 NW2d 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 NW2d 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 NW2d 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 NW2d 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 NW2d 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 NW2d 816 (2016) (quotation marks and citation omitted). "Contracts necessarily contain promises: **[*8]** 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 NW2d 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 NW2d 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 **[*9]** that require[d] acceptance . . . ."

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, LLC v City of Jackson, 277 Mich App 159, 174; 744 NW2d 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 NW2d 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. Southeast Mich. Council of Gov'ts, 270 Mich App 401, 417; 716 NW2d 278 (2006)*.

Plaintiff did not raise any **[*10]** 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 **[*11]** 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 280.469*, 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.

Plaintiff also briefly contends that municipal resolutions **[*12]** are enforceable by their beneficiaries, citing our Supreme Court's holding in *Hardaway v Wayne Co, 494 Mich 423; 835 NW2d 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 **[*13]** 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 NW2d 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 NW 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 NW 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 **[*14]** equitable counterpart of a legal claim for breach of contract." *AFT Mich v Michigan, 303 Mich App 651, 677; 846 NW2d 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 NW2d 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).

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 **[*15]** 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 **[*16]** 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 **[*17]** of the alleged overcharge (i.e., the

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[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 NW2d 453 (2004)*.

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.

The earliest decision upon which plaintiff relies, *Southern Pacific Co v Darnell-Taenzer Lumber Co, 245 US 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 **[*18]** 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 US 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 **[*19]** 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 F2d 839, 844-846 (CA 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 P2d 696 (Ariz App, 1984)*, where the Arizona Court of Appeals held that **[*20]** 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

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[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 NW2d 901 (2018)*.

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.

In its complaint, plaintiff supported **[*21]** 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 NW2d 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 **[*22]** 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.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Jonathan Tukel

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[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 NW2d 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 NW2d 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 - 3

Ganson v. Detroit Pub. Sch.

Court of Appeals of Michigan

January 21, 2021, Decided

No. 351276

Reporter
2021 Mich. App. LEXIS 419 *; 2021 WL 219225

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

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Wayne Circuit Court. LC No. 18-001363-CK.

Ganson v. Detroit Pub. Schs, 2020 Mich. App. LEXIS 1098 (Mich. Ct. App., Feb. 12, 2020)

Core Terms

statute of limitations, retirement, unjust enrichment, retirement benefits, trial court, motion to dismiss, entire contract, contract claim, res judicata, incentivized, argues

Counsel: For WESLEY GANSON, PLAINTIFF-APPELLANT: JERARD M. SCANLAND.

For DETROIT PUBLIC SCHOOLS, DEFENDANT-APPELLEE: THEOPHILUS CLEMONS.

Judges: Before: K. F. KELLY, P.J., and STEPHENS and CAMERON, JJ.

Opinion

PER CURIAM.

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 **[*2]** 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 **[*3]** 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 **[*4]** 1.1 through 1.10. There was no signature page.

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 NW2d 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 NW2d 665 (2019)*.]

"[W]hether **[*5]** 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 NW2d 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 NW2d 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 **[*6]** 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, 387; 751 NW2d 431 (2008)* (citation omitted) ("Michigan generally follows the 'raise or waive' rule of appellate review."). While this Court "may overlook preservation requirements **[*7]** 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 NW2d 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.

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* (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 NW2d 759 (2002)* (quotation marks and citation omitted). "However, a contract will be implied only if there is no express **[*8]** contract covering the same subject matter." *Barber v SMH (US), Inc, 202 Mich App 366, 375; 509 NW2d 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 NW2d 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 **[*9]** 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 NW2d 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 NW2d 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 **[*10]** 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 NW2d 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 NW2d 217 (2007).[1]

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 **[*11]** 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. **[*12]** 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 **[*13]** 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 NW2d 310 (2000); See MCL 2.111(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 NW2d 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.

/s/ Kirsten Frank Kelly

/s/ Cynthia Diane Stephens

/s/ Thomas C. Cameron

End of Document

[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. __, __.

EXHIBIT - 4

Corey v. Wayne Cty.

Court of Appeals of Michigan

March 15, 2016, Decided

No. 325465

Reporter
2016 Mich. App. LEXIS 513 *

JAMES ROBERT COREY, Plaintiff-Appellant, v WAYNE COUNTY and CATHY M. GARRETT, Defendants-Appellees.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Wayne Circuit Court. LC No. 14-010111-NZ.

Corey v. Wayne Cnty., 497 Mich. 1028, 863 N.W.2d 323, 2015 Mich. LEXIS 1286 (May 28, 2015)

Core Terms

refund, summary disposition, collected, unjust enrichment, circuit court, executive authority, due process, filing fee, defendants', custody, executive official, plaintiff's claim, collect fees, trial court, immunity, collection of fees, tort liability, county clerk, memorandums, conversion, mandates, clerk of the court, absolute immunity

Judges: Before: SAAD, P.J., and SAWYER and HOEKSTRA, JJ.

Opinion

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition and dismissing his complaint. Because the trial court properly granted defendants' motion for summary disposition, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In March 2012, plaintiff's then-wife filed for divorce in Wayne Circuit Court and paid $230 in filing fees. In June 2012, plaintiff filed a motion regarding custody of his minor child in the divorce action, at which time plaintiff paid an $80 "Friend of the Court" fee, collected by the clerk of the court pursuant to the former *MCL 600.2529(1)(d)(i)*, which provided:

> (1) In the circuit court, the following fees shall be paid to the clerk of the court:
> * * *
> (d) Before entry of a final judgment or order in an action in which the custody, support, or parenting time of minor children is determined or modified, the party submitting the judgment or order shall pay 1 of the following fees:
>
> (*i*) In an action in which the custody or parenting time of minor children is determined, $80.00.[1]

In August **[*2]** of 2014, plaintiff filed a class action lawsuit in Wayne County Circuit Court, alleging claims of common law conversion, fraud, statutory conversion, unjust enrichment, and violations of due process. This lawsuit pertains to the collection of the $80 fee by the clerk of the court, Cathy Garrett and, in particular, the assertion that Garrett illegally collected this fee contrary to *MCL 600.2529(1)(d)(i)* and the directives of the Supreme Court Administrative Office (SCAO). Simply stated, plaintiff contends that Garrett could not collect a fee when he filed his motion because his wife paid any filing fees when she initiated the divorce action and the assessment of a duplicative fee was not appropriate given that the relief plaintiff sought in his motion for custody was temporary and would not have resulted in a final disposition. Plaintiff claims that, after collecting the

[1] *MCL 600.2529(1)(d)* was amended by Pub Acts 2014, No. 532, effective April 14, 2015.

unauthorized $80 fee, Garrett did not refund the fee to him, but transferred the funds to the Wayne County Treasurer, MCL 600.2529(4), and then appropriated the funds pursuant to MCL 600.2530(2). Plaintiff brought this action "on behalf of himself and all other individuals who have been illegally charged the $80 fee contrary to MCL 600.2529(1), and who have not received a refund **[*3]** of that particular fee."

To support his claims, plaintiff relied on two memorandums issued by the SCAO, in 2009 and again in 2012, advising circuit courts that the fee prescribed by MCL 600.2529(1)(d)(i) applies only to orders and judgments finally disposing of a specific action or motion in the case and do not apply to interim or temporary orders, which are not final dispositions of an action or motion, or to any orders entered while a final determination is pending. In these memorandums, the SCAO recommended the circuit courts establish policies and procedures governing the collection and management of the fees prescribed by MCL 600.2529(1)(d), including, among other things, establishing procedures (1) to assure that the judgment fee is only collected once per final judgment or order and (2) for refunding the fees in cases in which a final judgment or order is not entered.

After plaintiff filed his complaint, defendants brought a motion for summary disposition under MCR 2.116(C)(7) and (C)(8). Defendants argued that they are immune from tort liability under the Governmental Tort Liability Act, (GTLA) MCL 691.1401 et seq., and that plaintiff's non-tort claims could not be maintained. After conducting a hearing, the court granted defendants' motion for summary **[*4]** disposition with respect to all of plaintiff's claims and dismissed the complaint against defendants. Plaintiff appeals as of right.

II. STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision regarding a motion for summary disposition. Nuculovic v Hill, 287 Mich App 58, 61; 783 NW2d 124 (2010). "Questions of law, such as construction of a statute, are also reviewed de novo." *Id.* "When a claim is barred by governmental immunity, summary disposition is appropriate under MCR 2.116(C)(7)." Petipren v Jaskowski, 494 Mich 190, 201; 833 NW2d 247 (2013). Under MCR 2.116(C)(7), the moving party may support its motion with affidavits, depositions, admissions, or other documentary evidence. *Id.* "In reviewing a motion under MCR 2.116(C)(7), we accept the factual contents of the complaint as true unless contradicted by the movant's documentation." *Id.* When the material facts are not in dispute, courts may decide whether a plaintiff's claim is barred by immunity as a matter of law. *Id.*

Defendant also moved for summary disposition under MCR 2.116(C)(8). However, with respect to this motion, the parties both relied on evidence beyond the pleadings in support of their positions in the trial court. See MCR 2.116(G)(5). Because the trial court considered materials outside of the pleadings, the motion is properly considered under MCR 2.116(C)(10). Hughes v Region VII Area Agency on Aging, 277 Mich App 268, 273; 744 NW2d 10 (2007). A motion under MCR 2.116(C)(10) tests the factual sufficiency **[*5]** of a complaint and is properly granted when no material question of fact remains. Beckett-Buffum Agency, Inc v Allied Prop & Cas Ins Co, 311 Mich App 41; 873 NW2d 117 (2015). In analyzing a motion brought under (C)(10), a reviewing court must consider the affidavits, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. Corley v Detroit Bd of Ed, 470 Mich 274, 278; 681 NW2d 342 (2004). "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." West v Gen Motors Corp, 469 Mich. 177, 183; 665 N.W.2d 468 (2003).

III. TORT CLAIMS AND GOVERNMENTAL IMMUNITY

Plaintiff's complaint includes three tort claims subject to the GTLA: common law conversion, statutory conversion,[2] and fraud. The trial court concluded that Garrett and Wayne County were entitled to immunity from tort liability under the GTLA. Plaintiff now contests this determination on appeal with respect to Garrett, asserting that Garrett could not claim absolute immunity under MCL 691.1407(5) because her collection and retention of the fee in question fell outside of her authority as the highest ranking executive official of a level of government.[3] We disagree.

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[2] Although the trial court did not dismiss plaintiff's statutory conversion claim on governmental immunity grounds, **[*6]** statutory conversion is a tort, Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc, 497 Mich 337, 361; 871 NW2d 136 (2015), and the GTLA provides immunity from *all* tort liability, Nawrocki, 463 Mich at 158.

[3] Plaintiff confines his appellate arguments to Garrett's entitlement to immunity and he does not challenge the trial court's determination that the GTLA provided Wayne County

Under the GTLA, "[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." MCL 691.1407(5). This provision provides the identified high-ranking officials with "absolute **[*7]** immunity from tort liability." Petipren, 494 Mich at 204. The purpose of this broad grant of immunity is to ensure that "these officials and, therefore, their governmental agencies, will not be intimidated nor timid in the discharge of their public duties." Grahovac v Munising Twp, 263 Mich App 589, 595; 689 NW2d 498 (2004) (quotation omitted). To qualify for this absolute immunity, the individual governmental employee must (1) be a judge, legislator, or the elective or highest appointive executive official of a level of government and (2) he or she must have acted within the scope of his or her judicial, legislative, or executive authority. Petipren, 494 Mich at 204.

In this case, Garrett is the Wayne County Clerk, an elected executive official of the County. See Const. 1963, art 7, § 4. In this role of high-ranking executive official in county government, "county clerks are absolutely immune if they are acting within their executive authority." Gracey v Wayne Co Clerk, 213 Mich App 412, 416-417; 540 NW2d 710 (1995), abrogated on other grounds by Am Transmissions, Inc v Attorney Gen, 454 Mich. 135; 560 N.W.2d 50 (1997). Therefore, pursuant to MCL 691.1407(5), Garrett is entitled to absolute immunity from tort liability so long as she was acting within the scope of her "executive authority."

As used in MCL 691.1407(5), the phrase "executive authority" refers to "*all* authority vested in the highest executive official by virtue of his or her role in the executive branch." Petipren, 494 Mich at 193-194, 208 (emphasis is original). **[*8]** This includes the performance of acts that might otherwise be performed by a lower-level employee if those actions fall within the authority vested in the official by virtue of his or her role as an executive official. Id. at 194. "The determination whether particular acts are within their [executive] authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government." Id. at 206, quoting American Transmissions, Inc, 454 Mich at 141. Acts expressly or impliedly authorized by constitution, statute, or other law are part of the actor's "executive authority." See Petipren, 494 Mich at 213; Marrocco v Randlett, 431 Mich 700, 708; 433 N.W.2d 68 nn 7 & 8; 431 Mich. 700, 433 N.W.2d 68 (1988).

In Garrett's case, she undoubtedly had the statutory authority, as a result of her election as Wayne County Clerk, to collect case filing fees, including fees related to cases involving custody or parenting time. See former MCL 600.2529. In particular, by virtue of her position as Wayne County Clerk, Garrett became vested with the authority to act as clerk of the circuit court. See Const. 1963, art 6, § 14; MCL 600.571(a). Thus, as directed by the judiciary, Garrett must perform **[*9]** noncustodial ministerial duties related to court administration. See Lapeer Co Clerk v Lapeer Circuit Court, 469 Mich 146, 149-150, 161-164, 170-171; 665 NW2d 452 (2003). It follows that Garrett's authority included the authority to collect case filing fees, including fees related to cases involving custody or parenting time. See former MCL 600.2529. Indeed, MCL 600.2529(1)(d)(i) explicitly directs the clerk of the court to collect the $80 filing fee before entry of a final judgment in an action in which the custody or parenting time of minor children is determined or modified. Thus, as prescribed by MCL 600.2529(1)(d)(*i*), Garrett had the authority to collect such fees.

Plaintiff does not dispute Garrett's authority under MCL 600.2529 to collect fees as a general proposition. Rather, plaintiff contends that the manner in which Garrett carried out this function was improper and illegal in light of the SCAO memorandums advising circuit courts on the proper collection and return of fees. In other words, because of Garrett's purported violation of these memoranda, plaintiff argues that Garrett acted outside the scope of her "executive authority" when she collected duplicative filing fees from plaintiff and failed to refund these amounts. This argument is without merit. It is true that the judiciary possesses the authority to prescribe the clerk **[*10]** of the court's ministerial duties.

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with immunity from tort liability. Because plaintiff fails to brief this issue on appeal, we consider it abandoned. See Houghton v Keller, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). In any event, the collection and retention of fees incident to court filings plainly constitutes a governmental function, and Wayne County is immune from all tort liability when engaged in a governmental function. See MCL 691.1407(1); MCL 691.1401(a), (b), and (e). None of the statutory exceptions to this broad grant of immunity apply, and the trial court thus properly granted summary disposition to Wayne County on the basis of governmental immunity. See MCL 691.1407(1); Nawrocki, 463 Mich at 158.

See Lapeer Co Clerk, 469 Mich at 161-164, 171; MCL 600.571(f); MCR 8.110(C)(1) and (3). But, in this case, neither the Supreme Court, nor the Chief Judge of Wayne Circuit Court, mandated or ordered Garrett, in her capacity as the clerk of the court, to collect the fees in accordance with the SCAO's interpretation of MCL 600.2529(1)(d) or in the manner set forth in the SCAO memorandums. Although the SCAO provided guidance and recommendations regarding the collection of the fees under MCL 600.2529(1)(d), an advisory memorandum does not constitute a Supreme Court order.[4] Consequently, unlike the statutory provisions empowering Garrett to collect filing fees, the SCAO recommendations and memorandums do not constitute binding authority. See Chelsea Inv Group LLC v Chelsea, 288 Mich. App. 239, 260; 792 N.W.2d 781 (2010). The statute does not prohibit the collection of the judgment fee at the time an action or motion is filed; nor does the statute provide a specific refund mechanism. Absent such a directive from the judiciary, Garrett's collection of fees fell within the scope of her authority as set forth in MCL 600.2529 and it was within her discretion how to discharge these duties. She is therefore entitled to the immunity provided by MCL 691.1407(5), and this immunity applies to all of plaintiff's tort claims, including conversion, statutory conversion, and fraud. **[*11]** Thus, summary disposition was properly granted under MCR 2.116(C)(7) with respect to plaintiff's tort claims.

IV. UNJUST ENRICHMENT

Next, plaintiff argues that the trial court erred in granting summary disposition on his claim for unjust enrichment. According to plaintiff, his pleadings set forth a claim of unjust enrichment and, when viewed in a light most favorable to plaintiff, a question of fact remains regarding this issue. We disagree.

Whether a claim for unjust enrichment 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 NW2d 898 (2006). "Unjust enrichment is defined as the unjust retention of 'money or benefits which in justice and equity belongs to another.'" Tkachik v Mandeville, 487 Mich 38, 47-48; 790 NW2d 260 (2010) (quotation omitted). A claim alleging unjust enrichment **[*12]** requires a plaintiff to 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. "[T]he 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.*

Plaintiff's claim alleging unjust enrichment arises from Wayne County Clerk Garrett's collection of the $80 fee under MCL 600.2529(1)(d)(i), which he alleges defendants improperly retained and converted for the County's use and benefit. However, under the statutory scheme, MCL 600.2529(4) mandates that each fee collected under MCL 600.2529(1)(d)(i) "shall be paid to the county treasurer and deposited by the county treasurer as provided under section 2530 to be used to fund services." MCL 600.2530(1), in turn, mandates that the county treasurer "shall deposit *all* fees collected under MCL 600.2529(1)(d)" in an interest-bearing account known as the "Friend of the Court fund." MCL 600.2530(2) mandates that the county board of commissioners must appropriate *all* sums in the Friend of the Court fund for the purposes of fulfilling the statutory obligations of the Friend of the Court as provided in the Friend of the Court Act, MCL 552.501 et seq. In short, **[*13]** under the statutory scheme, defendants Wayne County and/or Garrett could not retain any of the fees collected under MCL 600.2529(1)(d)(i) for their own benefit; rather, the fees collected must be used to fund the Friend of the Court, an arm of the circuit court. MCL 600.2529(4); MCL 600.2530(1) & (2). See also MCL 552.503; Morrison v Richerson, 198 Mich App 202, 212; 497 NW2d 506 (1992). Without evidence that defendants failed to treat funds in this manner, this mandatory statutory scheme establishes that defendants did not receive a benefit from the fees collected or retained, and it follows that defendants could not have been unjustly enriched by collecting the fees pursuant to MCL 600.2529(1)(d)(i).

In response to defendants' motion for summary disposition, plaintiff did not set forth any specific facts or present any evidence to dispute that Garrett acted according to the statutory mandates or otherwise to establish that she benefited from the fees collected. To the contrary, the only evidence on this point is the sworn

[4] The role of the SCAO is to "supervise and examine the administrative methods and systems employed in the offices of the courts, including the offices of the clerks and other officers, and make recommendations to the Supreme Court for the improvement of the administration of the courts." MCR 8.103(1). Thus, the SCAO memorandums, which were advisory in nature, did not have the effect of an order of the Supreme Court that the chief judge and the clerk of the court must comply with. See MCR 8.110(C)(3); Lapeer Co Clerk, 469 Mich at 162-164.

affidavit of the supervisor of accounting of the Wayne County Clerk's office, who processes the filing fees collected under MCL 600.2529(1). The supervisor indicated that the fees collected are transmitted to the circuit court in accordance with the statutory mandates of MCL 600.2529(4) and MCL 600.2530 and are not retained by the County Clerk. **[*14]** Rather than present documentary evidence to the contrary, plaintiff's argument in response to this evidence rests on the unsupported allegation that the benefit to defendants is "obvious." However, in response to a motion for summary disposition, plaintiff's mere allegations of this nature are insufficient to defeat a motion for summary disposition. See Quinto v Cross & Peters Co, 451 Mich 358, 362; 547 NW2d 314 (1996). Given the statutory scheme and the complete dearth of evidence supporting plaintiff's position, plaintiff has not shown the existence of a material question of fact with respect to defendants' receipt of a benefit from these funds.[5] Viewing the evidence in the light most favorable to plaintiff, there is no factual dispute and defendants are entitled to summary disposition under MCR 2.116(C)(10).

V. DUE PROCESS VIOLATIONS

Finally, plaintiff argues that the trial court erred by granting summary disposition to defendants with respect to plaintiff's claims of due process violations. Specifically, plaintiff claims that MCL 600.2529 creates a substantive due process **[*16]** right to the return of fees and that defendants failed to establish a meaningful mechanism for refund of the fees in question thereby violating plaintiff's procedural due process rights. We disagree.

With regard to plaintiff's substantive due process argument, "[t]he underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power.'" Cummins v Robinson Twp, 283 Mich App 677, 700; 770 NW2d 421 (2009) (citation omitted). "In the context of individual government actions or actors . . . to establish a substantive due process violation, the governmental conduct must be so arbitrary and capricious as to shock the conscience." Id. at 701 (quotation and citation omitted). "The Due Process Clause is not a guarantee against incorrect or ill-advised [governmental] decisions." Mettler Walloon, LLC v Melrose Twp, 281 Mich App 184, 206; 761 NW2d 293 (2008) (citation omitted). Rather, under this standard, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." Id. at 197.

In the present case, even if incorrect or ill-advised, Garrett's collection of the fees and defendants' failure to devise a specific process for refunds does not rise to the level of arbitrary and capricious conduct as to shock the conscience. MCL 600.2529(1)(d)(i)) authorizes the collection of fees in custody matters, meaning that **[*17]** there was some basis for Garrett's collection of the fees in question. Although the SCAO recommended the imposition of procedures for refunding the fee under certain circumstances, MCL 600.2529(1)(d)(i)) provides no specific refund procedures or mechanisms. Moreover, the undisputed evidence shows that defendants provided a refund of the fees in question to any litigant who requested such a refund.[6] Even if imperfect, the collection of fees and the payment of refunds upon request does not rise to the level of arbitrary and capricious conduct giving rise to a substantive due process claim.

With regard to plaintiff's claim of procedural due

[5] On appeal, plaintiff contends that the trial court's summary dismissal of his claim, without allowing plaintiff additional discovery to remedy the prejudice caused by the late filing of defendants' affidavits, constitutes reversible error. Plaintiff failed to properly present this issue for our review because he did not separately identify it as a question presented, meaning that the issue need not be considered. See MCR 7.212(C)(5); Michigan's Adventure, Inc v Dalton Twp, 290 Mich App 328, 337 n 3; 802 NW2d 353 (2010). Additionally, plaintiff does not cite **[*15]** any law to support his position, and this failure to properly brief the claim of error constitutes abandonment of the issue. Houghton, 256 Mich App at 339-340. In any event, we find no abuse of discretion in the court's consideration of the late-filed affidavits given that the affidavits assisted in the determination of the motion and were not unfairly prejudicial to plaintiff, particularly in light of the statutes mandating the transmittal of the collected fees. See Prussing v Gen Motors Corp, 403 Mich 366, 370; 269 NW2d 181 (1978). Moreover, contrary to plaintiff's argument, he could not have been unduly surprised by the affidavits because defendants submitted a similar affidavit from the former supervisor of accounting in other recent litigation between the parties. Ultimately, while plaintiff claims additional discovery was warranted, we see no basis for concluding that further discovery would have benefited plaintiff's position. See Village of Dimondale v Grable, 240 Mich App 553, 566; 618 NW2d 23 (2000). The trial court did not err by granting summary disposition without allowing further discovery.

[6] Defendants' undisputed evidence indicated that refunds of the $80 judgment fee have been issued when requested and there has been no litigant who has sought a refund of their final judgment fee that has been denied.

process, "[t]he United States and Michigan Constitutions preclude the government from depriving a person of life, liberty, or property without due process of law." *Hinky Dinky Supermarket, Inc v Dep't of Community Health, 261 Mich App 604, 605-606; 683 NW2d 759 (2004)*, citing *US Const, Amend XIV*; *Const 1963, art 1, § 17*. "Procedural due process serves as a limitation on governmental action and requires a government to institute safeguards in proceedings that might result in a deprivation of life, liberty, **[*18]** or property." *Mettler Walloon, LLC, 281 Mich App at 213*. "'A procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient.'" *Hinky Dinky, 261 Mich App at 606* (citation omitted). Generally, due process requires notice and a meaningful opportunity to be heard before an impartial decision-maker. *Id.* In certain circumstances, a meaningful postdeprivation remedy may satisfy due process. See, e.g., *DaimlerChrysler Corp v Mich Dep't of Treasury, 268 Mich App 528, 540; 708 NW2d 461 (2005)*; *Am States Ins Co v State Dep't of Treasury, 220 Mich App 586, 590; 560 NW2d 644 (1996)*.

The actual owner of money has a property interest protected by due process. See *Dow v State, 396 Mich 192, 204; 240 NW2d 450 (1976)*. Thus, in this case, plaintiff has an interest in his $80. In particular, given the plain language of *MCL 600.2529* and the SCAO memoranda, plaintiff arguably had a legitimate claim of entitlement to the return of this $80. Nevertheless, we conclude that plaintiff cannot maintain his claim that defendants' conduct denied him the right to procedural due process. Defendants' failure to establish a mechanism for an automatic refund did not interfere with, or deprive plaintiff of, his right to a refund of the fees or a meaningful opportunity to be heard on the issue because plaintiff could have sought a refund of the allegedly **[*19]** erroneously charged fee. Because there was an adequate remedy available, the trial court properly dismissed plaintiff's due process claim.[7]

Affirmed. **[*20]**

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Joel P. Hoekstra

End of Document

[7] Our opinion today addresses the claims raised by plaintiff in his complaint in the trial court, i.e., conversion, fraud, statutory conversion, unjust enrichment, and due process. However, we note that a claim to recover fees paid to the state in excess of the amount allowed under applicable law is properly filed as an action in assumpsit for money had and received. *Yellow Freight Sys Inc v State of Mich, 231 Mich App 194, 203; 585 NW2d 762 (1998)*, rev'd on other grounds *Yellow Freight Sys, Inc v State, 464 Mich 21; 627 NW2d 236 (2001)*, rev'd *537 U.S. 36; 123 S. Ct. 371; 154 L. Ed. 2d 377 (2002)*. See also *Serv Coal Co v Mich Unemployment Comp Comm, 333 Mich 526, 531; 53 N.W.2d 362 (1952)*. Thus, when there has been an illegal or excessive collection of fees, it may be possible to maintain a class "action of assumpsit to recover back the amount of the illegal exaction." *Bond v Pub Sch of Ann Arbor Sch Dist, 383 Mich 693, 704; 178 NW2d 484 (1970)*. But, plaintiff did not frame his complaint in this way, and "as a court of review that is principally charged with the duty of correcting errors," we think it inappropriate to rewrite plaintiff's complaint or address unpreserved claims. See *Burns v Detroit (On Remand), 253 Mich App 608, 615; 660 NW2d 85 (2002)*. Consequently, we confine our review to the claims pleaded in plaintiff's complaint, and we offer no opinion on the legality of the fees collected or whether plaintiff should receive a refund of those amounts under *MCL 600.2529*.

EXHIBIT - 5

City of Cleveland v. Ohio Bureau of Workers' Comp.

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

March 8, 2018, Released and Journalized

No. 105604

Reporter
2018-Ohio-846 *; 109 N.E.3d 84 **; 2018 Ohio App. LEXIS 897 ***; 2018 WL 1217430

CITY OF CLEVELAND, OHIO, PLAINTIFF-APPELLEE vs. OHIO BUREAU OF WORKERS' COMPENSATION, ET AL., DEFENDANTS-APPELLANTS

Subsequent History: Discretionary appeal allowed by *Cleveland v. Bureau of Workers' Comp., 153 Ohio St. 3d 1432, 2018-Ohio-2639, 2018 Ohio LEXIS 1697, 101 N.E.3d 464 (July 5, 2018)*

Motion granted by *Cleveland v. Bureau of Workers' Comp., 153 Ohio St. 3d 1483, 2018-Ohio-3867, 2018 Ohio LEXIS 2252, 108 N.E.3d 82, 2018 WL 4613287 (Sept. 26, 2018)*

Reversed by, Remanded by *City of Cleveland v. Ohio Bureau of Workers' Comp., 159 Ohio St. 3d 459, 2020-Ohio-337, 2020 Ohio LEXIS 323, 152 N.E.3d 172, 2020 WL 557311 (Feb. 5, 2020)*

Prior History: [*1]** Civil Appeal from the Cuyahoga County Court of Common Pleas. Case No. CV-13-809883.

City of Cleveland v. Ohio Bureau of Workers' Comp., 2017 Ohio Misc. LEXIS 20488 (Ohio C.P., Feb. 27, 2017)

Disposition: AFFIRMED.

Core Terms

premiums, rating, group-rating, unjust enrichment, trial court, off-balance, calculating, overcharges, discounts, workers' compensation, nongroup-rated, actuarial, restitution, summary judgment, manual, private employer, retrospective, statute of limitations, base rate, credibility, equitable, factors, contends, affirmative defense, collected, assigned error, retrospective-rating, inequity, costs, funds

Case Summary

Overview

HOLDINGS: [1]-Because adjudication of the lawfulness of the rating system of the Bureau of Workers' Compensation (BWC) and the relief sought by the city were outside the scope of the administrative review process set forth in *R.C. 4123.291*, the trial court did not err in concluding that the city was not obligated to exhaust administrative remedies prior to filing its complaint; [2]-The city's cause of action for unjust enrichment did not accrue until the city made its last premium "overpayment," i.e., its last premium payment for policy year 2009, and thus the city's claim was not time-barred under *R.C. 2305.07*; [3]-The BWC's group-rating plan violated *R.C. 4123.34(C)* and *4123.39* as well as former *R.C. 4123.29(A)(4)(c)*, as it violated the mandate that the BWC develop fixed and equitable rules controlling the rating system and did not result in an equitable determination of contributions.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN1 **Standards of Review, De Novo Review**

Subject-matter jurisdiction is the power conferred on a

court to decide a particular matter on its merits and render an enforceable judgment over the action. When evaluating subject matter jurisdiction, the appellate court applies a de novo standard of review.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

HN2[] Standards of Review, De Novo Standard of Review

The determination of whether a complaint should be dismissed for failure to exhaust administrative remedies presents a question of law that is reviewed de novo. It is a long settled rule of judicial administration that no one is entitled to judicial relief for a supposed injury until the prescribed administrative remedy has been exhausted. Thus, a party must generally exhaust any administrative remedy that could provide him with the relief he seeks before seeking judicial intervention.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Evidence > Burdens of Proof > Allocation

HN3[] Reviewability, Exhaustion of Remedies

Exhaustion of remedies is required to avoid premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. Exhaustion of administrative remedies is an affirmative defense, which the agency bears the burden of proving.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

HN4[] Reviewability, Exhaustion of Remedies

Where an administrative agency has no power to afford the relief sought or an administrative appeal would otherwise be futile, exhaustion of administrative remedies is not a prerequisite to seeking judicial relief. In determining futility for exhaustion of remedies purposes, it does not matter that it may be improbable that the claimant will receive the requested relief. The focus is on the power of the administrative body to afford the requested relief, and not on the happenstance of the relief being granted.

Administrative Law > Agency Adjudication > Review of Initial Decisions

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements for Adequate Coverage

HN5[] Agency Adjudication, Review of Initial Decisions

Pursuant to R.C. 4123.291(A), any employer desiring to file a request, protest, or petition regarding certain categories of matters specified in the statute must file such with the adjudicating committee within 24 months after the administrator sends notice of the determination that is the subject of the request, protest or petition. The matters that the adjudicating committee has the authority to address includes any decision relating to any other risk premium matter under R.C. Chapters 4121, 4123, and 4131. R.C. 4123.291(B)(6). If an employer does not prevail before the adjudicating committee, the employer may appeal the decision of the committee to the administrator or the administrator's designee. R.C. 4123.291(B); Ohio Admin. Code 4123-14-06(E).

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

HN6[] Reviewability, Exhaustion of Remedies

Where an administrative agency lacks the power to grant the relief sought, an administrative remedy may be inadequate.

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN7[] Appellate Review, Standards of Review

An appellate court reviews summary judgment rulings de novo, applying the same standard as the trial court. The appellate court accords no deference to the trial court's decision and conducts an independent review of the record to determine whether summary judgment is appropriate.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN8 **Entitlement as Matter of Law, Appropriateness**

Under *Civ.R. 56*, summary judgment is appropriate when no genuine issue as to any material fact exists and, viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party, entitling the moving party to judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN9 **Entitlement as Matter of Law, Appropriateness**

On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate its entitlement to summary judgment. If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has the reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. Summary judgment is appropriate if the nonmoving party fails to meet this burden.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN10 **Summary Judgment, Evidentiary Considerations**

Although courts are cautioned to construe the evidence in favor of the nonmoving party, summary judgment is not to be discouraged where a non-movant fails to respond with evidence supporting the essentials of its claim. *Civ.R. 56* must be applied in a manner that balances the right of the nonmoving party to have a factfinder try claims or defenses that are adequately based in fact with the right of the moving party to demonstrate, prior to trial, that the claims or defenses have no factual basis.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN11 **Equitable Relief, Quantum Meruit**

Unjust enrichment occurs where a person has and retains money or benefits which in justice and in equity belong to another. The purpose of an unjust enrichment claim is not to compensate the plaintiff for loss or damage suffered by the plaintiff, but to enable the plaintiff to recover the benefit he has conferred on the defendant under circumstances in which it would be unjust to allow the defendant to retain it. Restitution is the remedy provided upon proof of unjust enrichment to prevent one from retaining property to which he is not justly entitled.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Evidence > Burdens of Proof > Preponderance of Evidence

HN12 **Equitable Relief, Quantum Meruit**

To prevail on a claim for unjust enrichment, a plaintiff must prove by a preponderance of the evidence that: (1) the plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge of such benefit and (3)

the defendant retained that benefit under circumstances in which it would be unjust for him to retain that benefit.

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements for Adequate Coverage

HN13 **Actions Against Employers, Statutory Requirements for Adequate Coverage**

Although *Ohio Admin. Code 4123-17-17(C)* places a two-year limit on premium "adjustments" covered by the regulation, this limitation applies only to adjustments related to errors affecting the payroll reports and the premium.

Governments > State & Territorial
Governments > Claims By & Against

HN14 **State & Territorial Governments, Claims By & Against**

By its terms, *R.C. 126.301* applies only to actions against the state or a state agency for failure to make any distribution or other payment.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Governments > Legislation > Statute of Limitations > Time Limitations

HN15 **Equitable Relief, Quantum Meruit**

A six-year statute of limitations applies to claims for unjust enrichment. A claim for unjust enrichment accrues on the date that money is retained under circumstances that make it unjust to do so. The discovery rule has not been extended to unjust enrichment claims.

Contracts Law > Defenses > Volunteers

HN16 **Defenses, Volunteers**

The voluntary payment doctrine provides that in the absence of fraud, duress, compulsion or mistake of fact, money, voluntarily paid by one person to another on a claim of right to such payment cannot be recovered merely because the person who made the payment mistook the law as to his liability to pay. A mistake of law occurs when a person, having full knowledge of the facts, reaches an erroneous conclusion regarding their legal effect. It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of judgment on facts as they are real. A mistake of fact is a mistaken supposition of the existence of a specific fact.

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements for Adequate Coverage

HN17 **Actions Against Employers, Statutory Requirements for Adequate Coverage**

Former *R.C. 4123.29(A)(4)(c)* and *4123.34(C)* require the Bureau of Workers' Compensation to consider an employer group as a single employing entity for purposes of retrospective rating and to develop fixed and equitable rules controlling the rating system, which rules shall conserve to each risk the basic principles of workers' compensation insurance.

Civil Procedure > Preliminary Considerations > Equity > Relief

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN18 **Equity, Relief**

Enrichment alone is insufficient to invoke the remedial powers of a court of equity. When a plaintiff seeks equitable relief based upon a claim of unjust enrichment, it is required to go further and show that under the circumstances, it has superior equity so that it would be unconscionable for the defendant to retain the benefit. This requires consideration of the sum of the circumstances, as well as the equities involved in the case.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Governments > State & Territorial
Governments > Claims By & Against

HN19[] **Equitable Relief, Quantum Meruit**

A plaintiff is not always entitled to equitable restitution, as a matter of law, whenever funds are unlawfully collected and retained by the state. Equity demands that, in fashioning an equitable remedy, the court look at the full picture. Where the state collects and retains funds to which the state is not lawfully entitled, those funds must be returned as the equities require. In certain cases, the unlawful collection and retention of funds by the state may, in and of itself, constitute a sufficient basis for an award of equitable restitution, i.e., where the only issue is whether the collection and retention of funds by the state was unlawful and there is no dispute, once the state's conduct is determined to be unlawful, that (1) the state was unjustly enriched by its unlawful collection and retention of funds and (2) the equities require return of the funds. In others, where there are a number of equitable considerations bearing on whether the state was unjustly enriched and, if so, the extent to which it was unjustly enriched, those considerations must be weighed and a determination of unjust enrichment made before a court may properly award equitable restitution on a unjust enrichment claim.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Pretrial Matters > Motions in Limine > Appellate Review

HN20[] **Standards of Review, Abuse of Discretion**

An appellate court reviews a trial court's ruling on a motion in limine for abuse of discretion. A trial court abuses its discretion when its decision is unreasonable, arbitrary or unconscionable.

Civil Procedure > Appeals > Standards of Review

Evidence > Weight & Sufficiency

HN21[] **Appeals, Standards of Review**

Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. When conducting a manifest weight review, the appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. However, in weighing the evidence, the appellate court must always be mindful of the presumption in favor of the finder of fact. If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.

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Judges: BEFORE: E.A. Gallagher, A.J., S. Gallagher, J., and Laster Mays, J. SEAN C. GALLAGHER, J., and ANITA LASTER MAYS, J., CONCUR.

Opinion by: EILEEN A. GALLAGHER

Opinion

[91]** JOURNAL ENTRY AND OPINION **[***2]**

EILEEN A. GALLAGHER, A.J.:

[*P1] Defendant-appellant, the Ohio Bureau of Workers' Compensation (the "BWC") appeals from a judgment of the Cuyahoga County Court of Common Pleas awarding plaintiff-appellee the city of Cleveland (the "city") over $4.5 million in restitution on the city's claim that it was unlawfully charged excessive workers' compensation insurance premiums in order to subsidize overly generous premium discounts given to public employers who participated in the BWC's group-rating program. The city's unjust enrichment claim was patterned after a similar claim raised by private employers in *San Allen v. Buehrer, 2014-Ohio-2071, 11 N.E.3d 739 (8th Dist.)*.

[*P2] The BWC asserts that this case is "materially different" from *San Allen*. It contends that "threshold legal issues" regarding the court's subject matter jurisdiction, the city's alleged failure to exhaust administrative remedies and several other affirmative defenses "independently demand dismissal" of the city's lawsuit and that the equities in this case, unlike in *San Allen*, do not entitle the city to restitution. The BWC argues that the trial court erred in denying its motions to dismiss and for summary judgment and in granting, in part, the city's motion for summary judgment on the issue **[***3]** of liability. The BWC further contends that the trial court erred in precluding the BWC from raising its affirmative defenses at trial and that the trial court's restitution award is against the manifest weight of the evidence. For the reasons that follow, we affirm the trial court's judgment.

[92] I. Factual Background and Procedural History**

A. The BWC's Rating System

1. The State Insurance Fund

[*P3] The city, a municipal corporation, is a public employer taxing district ("PEC") governed by Ohio's workers' compensation laws. The administrator of the BWC, with the approval of its board of directors, sets the premiums employers pay into the state insurance fund for workers' compensation coverage each year. Pursuant to *R.C. 4123.38*, the city is required to "contribute to the public insurance fund the amount of money determined by the administrator of workers' compensation." The state insurance fund is comprised of two separate funds administered by the BWC, i.e., a "public fund" consisting of the net premiums (after adjustments and dividends) contributed by public employers, and a "private fund," consisting of the net premiums (after adjustments and dividends) contributed by private employers. *R.C. 4123.01(B)*, *(H)*, *(J)*; *4123.30*. **[***4]** *R.C. 4123.30* requires that each fund be "collected, distributed, and its solvency maintained without regard to or reliance upon the other."

[*P4] The BWC is designed to operate on a "revenue-neutral" basis. This means that the BWC seeks to collect from employers participating in Ohio's workers' compensation insurance program only the amount of premiums necessary to cover the BWC's projected claims costs and administrative expenses and to maintain a reasonable surplus in the state insurance fund. Each year the BWC separately estimates for each employer segment, i.e., private employers and public employers, the costs of claims and expenses expected to be incurred for that segment. Once the BWC determines the total premiums it needs to collect, the BWC then allocates that sum amongst the employers participating in the workers' compensation system. Under Ohio's workers' compensation system, employers are classified into one or more manual classes based on the type of work in which their employees are engaged and the degree of hazard of the employer's operations. After the BWC determines its total premium needs for the policy year for an employer segment, it distributes the premiums across the manual classes **[***5]** for that segment.

[*P5] There are approximately 3,800 PECs in Ohio. PECs are assigned to one or more of 14 different manual classes based on the type of entity, e.g., city, county or township. The policy year for PECs participating in Ohio's workers' compensation program begins on January 1 and ends on December 31 each calendar year. A PEC can change the plan in which it participates from one policy year to the next.

2. Base Rating and Experience Rating

[*P6] Employers are either base rated or experience rated under Ohio's workers' compensation system. Base rated employers — employers that are too small to be rated on their own loss and payroll history — are charged workers' compensation premiums according to the base rates of the manual class or classes to which they are assigned, i.e., based on the projected average costs of claims expected to be filed against all employers in the manual class for the policy year for

which rates are being set. For a base-rated employer, no adjustment is made for the employer's actual historical loss experience.

[*P7] Employers that are not base rated are experience rated. Under experience rating, an employer's past claims experience, adjusted by a credibility factor **[***6]** based on the statistical reliability of the employer's **[**93]** experience, is used to determine the employer's premium.[1] With experience rating, an "experience modification factor" is applied that raises or lowers the premium from the base rate. Experience-rated employers are either credit-rated or debit-rated depending on their claims history. An employer whose loss experience is lower than average, compared with other employers in the same class, will receive a credit and pay a rate lower than the base rate. An employer whose loss experience is higher than average, compared with other employers in the same class, will receive a debit and may pay a premium higher than the base rate.

[*P8] The BWC determines base rates on an annual basis for each manual class by projecting the future costs of the combined loss experience of all employers in the manual class based on historical data and applying certain other factors, including a factor for catastrophic losses, a rate level factor (to reflect the overall statewide rate level), a factor to fund the operations of the division of safety and hygiene and an off-balance factor. The off-balance factor adjusts the base rate for the impact that experience **[***7]** rating (including group rating and the discounts given to group-rated employers under the group-rating program, discussed *infra*) has on the overall expected collection of premiums.[2] Before comprehensive rate reforms were implemented in 2010, the off-balance factor varied from manual class to manual class for PEC employers.

[*P9] Annual assessments are added to the base rate or the experience-modified base rate, as applicable, to cover administrative costs of the BWC and Industrial Commission and to fund certain relief funds for disabled workers (the "assessments"). The assessments are calculated as a percentage of premium.

[*P10] A base-rated employer's "pure premium" is **[***8]** calculated by multiplying the employer's payroll in each manual class by the base rate for each manual class. An experience-rated employer's "pure premium" is calculated by multiplying the employer's payroll in each manual class by the experience-modified rate for each manual class. The employer's "blended premium" is calculated by adding the assessments and subtracting any discounts earned by the employer for participating in the BWC's discount programs. The total of the premiums assessed for each manual class to which the employer is assigned, plus assessments, less any rebates or discounts the employer receives based on its participation in various programs offered by the BWC, is the employer's total workers' compensation premium.

3. Retrospective Rating

[*P11] During the time period at issue, the BWC offered a retrospective-rating plan for individual employers. A "step closer to self insurance," retrospective rating allows employers to assume more of the risk themselves in exchange for lower upfront **[**94]** premiums. A retrospectively rated employer pays a reduced portion of the premium it would have otherwise paid had it chosen not to participate in the retrospective-rating plan. In exchange, **[***9]** the employer assumes financial responsibility for the actual paid claim costs incurred for the next ten years,[3] up to individual and overall claim limits that the employer selects. Premiums are determined on an annual basis. A retrospectively rated employer pays an annual "minimum pure premium" equal to the employer's experience-modified pure premium multiplied by a

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[1] Credibility is essentially the weight given to an employer's experience.

[2] As the court previously explained in *San Allen*:

> The off-balance factor is used to offset a premium shortfall or overage condition in the overall level of premiums collected from employers due to experience rating (including both individual experience rating and group rating) and discounts or rebates given to employers participating in the BWC's discount programs. Even if there had been no group rating, use of an off-balance factor would still be necessary to account for discounts given as a result of individual experience rating and the BWC's other discount programs.

San Allen, 2014-Ohio-2071, 11 N.E.3d 739, at ¶ 18, fn. 5.

[3] A retrospectively rated employer pays annual billings of the actual paid claims costs (i.e., the medical and indemnity payments the BWC makes on its employees' claims) in years one through nine. In the tenth year, the employer pays the actual paid claims costs for that year plus the value of any remaining reserves on yet unsettled claims.

"minimum premium percentage" determined by the claim limits selected by the employer, e.g., payroll times base rate times experience modifier times minimum premium percentage. The minimum premium percentage is based on the BWC's estimates of the cost of insurance risks transferred to the BWC (i.e., the risk associated with the claim limits selected by the employer) and other administrative expenses and charges; a lower percentage is applied for employers that assume a greater share of the risk and a higher percentage is applied for employers who assume less risk. The minimum premium percentages are periodically adjusted by the BWC. The annual assessments paid by an employer are the same regardless of whether the employer participates in experience rating or retrospective rating. An employer's "minimum retrospective blended **[***10]** premium" is equal to the minimum retrospective pure premium plus the assessments.

4. The BWC's Group-rating Program

[*P12] In 1989, the General Assembly amended *R.C. Chapter 4123* to require the BWC to develop and implement a plan "that groups for rating purposes, employers, and pools the risk of the employers within the group." Am.Sub.H.B. No. 222.

[*P13] In response to this mandate, the BWC began offering group-rating plans to employers. The BWC established a group-rating plan for private employers in the policy year beginning July 1, 1991 and for public employers in the policy year beginning January 1, 1992. *See Ohio Adm.Code 4123-17-61-4123-17-68*. Initially, the BWC implemented only a prospective group-rating plan. The BWC did not offer a retrospective group-rating plan until 2009 for private employers and 2010 for public employers.

[*P14] Before group rating, employers could qualify for experience rating only on an individual basis. Group experience rating allowed employers to group together their claims history and receive experience-related premium discounts similar to larger employers. Group rating thus enabled employers with good safety records, but who were statistically too small to be individually experience rated and who would otherwise be base **[***11]** rated or experience rated with minimal credibility, to group together with other employers to qualify for experience rating. By combining the experience of all of the members of the group, totaling it up, and treating the group as a single employer for rating purposes, the group could qualify for premium discounts based on their combined claims experience. These discounts were, at times, quite significant.

[*P15] Because the BWC operates on a revenue-neutral basis, the loss in premiums resulting from the discounts provided to employers under the BWC's group-rating program had to be redistributed. In **[**95]** other words, the premium obligations for nongroup-rated employers needed to be increased in order to offset the substantial discounts provided to employers participating in the group-rating program. As Christopher Carlson, the BWC's chief actuarial officer and Elizabeth Bravender, the BWC's director of actuarial operations, explained, this was achieved by increasing the off-balance factor used in calculating the base rates for the manual classes. In short, the BWC determines a target amount of total premiums to be collected for each manual class, calculates how much experience rating (including **[***12]** group rating) moves the total away from the target and then uses the off-balance factor to return the total premiums to be collected back to the target.

[*P16] Increasing the off-balance factor increased the base rate for all employers. Therefore, employers who were not part of a group (and did not receive the significant discounts off base rates that group members received), in effect, paid "extra premiums" to make up for the discounts granted to group-rated employers under the BWC's group-rating program.

5. Problems with the BWC's Group-Rating Program

[*P17] The group rating program was flawed from the start. Bravender testified that even before the BWC's prospective group rating program went into effect concerns were raised by the BWC's actuarial consultants regarding the program's susceptibility to manipulation by group sponsors and the potential for premium inequity between group-rated and nongroup-rated employers as a result of the generous premium discounts provided to group-rated employers under the program.

[*P18] Equity concerns continued to be raised once the group rating program was underway. From 1990 through 2009, the BWC commissioned ten independent actuarial studies to evaluate the BWC's **[***13]** group rating plans. Each of these studies concluded that, as a result of the large discounts given to group-rated employers, the BWC's group rating program was creating substantial premium inequity between group-

rated and nongroup-rated employers, i.e., group-rated employers were not paying enough premiums to cover the risk they presented, and nongroup-rated employers were paying too much in premiums, subsidizing the discounts given to the group-rated employers. Each of these studies also recommended that changes be made to the group rating program to correct this inequity.

[*P19] According to Bravender, the early studies commissioned by the BWC focused on the effect of group rating on private employers and did not specifically address whether premium inequity existed between group-rated and nongroup-rated PECs.[4] In 2004, the BWC's actuarial section in conjunction with actuarial consultant Mercer Oliver Wyman conducted an analysis of the group rating program with respect to both private employers and PECs. According to an August 2004 report, "[t]he results of the study indicate that the merit rating methodology allows for too great of credits to employers and that the non-group rated employers **[***14]** are subsidizing the group rated employers[.]" The report stated that "[t]he off-balance factor that results from the introduction of the group rating program indicates that the base rates have had to be increased **[**96]** * * * over the normal rate increases in order to obtain the desired level of overall premiums given the large credits that were calculated for the groups." The report further indicated that the total nongroup PEC employer "premium subsidy" for rating years 1992-2001 (the time period referenced in the report) was $69,722,959.

[*P20] A 2006 study by Pinnacle Actuarial Resources, Inc. ("Pinnacle") and a 2009 study by Deloitte Consulting L.L.P. ("Deloitte") also specifically analyzed the equity of the group rating program as applied to PECs. In a December 2006 report, Pinnacle concluded that the credits that were being issued to both private and public group-rated employers exceeded the credits they should have received based on their losses: "Similar to the private employers, the public employer — taxing district experience shows that the group rated policies with the lower experience modification factors have better manual loss ratios than the other insured but the impact of the experience **[***15]** rating plan is generally too generous resulting in a situation where the losses are double the premium collected to cover them." Carlson, who authored the Pinnacle report,[5] testified that the problems with the group-rating program as applied to PECs were not as "widespread" or "as large in magnitude" as they were with private employers, but that each of the conclusions reached in the report "would apply to publics as they did to privates," including that the size of the credits being given to PECs who participated in group rating were larger than would have been indicated by their loss experience.

[*P21] Bravender offered similar testimony. She acknowledged that the problem of nongroup-rated employers subsidizing excessive discounts to group-rated employers existed both with respect to private employers and PECs, but that the problem was "less severe" on the PEC side. John Pedrick, the BWC's chief actuarial officer from July 2007 until June 2011, testified that, during the time period at issue, nongroup-rated PECs were subsidizing over-sized discounts given to group-rated public employers through an increased off-balance factor.

[*P22] In its 2009 report, Deloitte concluded that "[t]he current pricing **[***16]** structure" under the BWC's rating system "has created substantial inequity in the premiums paid by different employers," that the "primary driver of this inequity is the [BWC's] current approach to group rating" and that the "performance results of the group rating program indicate a substantial lack of actuarial soundness with respect to equitable rating." Deloitte concluded, with respect to the premiums paid by private employers, that "[t]he results of this analysis indicate a material inequity from group rating and therefore group rated employers on an overall basis receive substantially more premium credit than is merited by their experience." With respect to premiums paid by PECs, Deloitte indicated: "In general, similar conclusions reached for [private employers] hold for PEC policies. However, the results are not as strong as there is a significantly lower policy count in PEC. * * * [I]nequity similar to [private employer] policies is indicated due to the use of the charged [experience-modification rating] for group rated policies."

[*P23] Bravender and Pedrick expressly acknowledged the "inequities" of the BWC's group-rating program as related to PECs — albeit to a lesser extent than **[***17]** private employers — and testified that rate reforms initiated for PECs in 2010 remedied

[4] Only certain of these studies are part of the appellate record. Accordingly, we are unable to confirm whether all of the early studies were limited to an analysis of the group rating program as applied to private employers.

[5] At the time, Carlson was employed by Pinnacle and was the lead project actuary for the 2006 study of the BWC's group-rating program.

[97]** those inequities by lowering the off-balance factor and standardizing it across the board.

B. The City's Participation in the Workers' Compensation System

[*P24] During the time period at issue, the city's employees fell within two manual classes — 9431 ("cities") and 9439 ("public employer emergency service organization"). Most of its employees were in the 9431 class. Eduardo Romero, the city's risk manager, testified that the city evaluated its workers' compensation insurance options and each year selected a plan that it believed represented the best value for the city. Through the 2002 policy year, the city was experience-rated. Beginning in 2003, the city switched to an individual retrospective-rating plan. Romero testified that the city decided to switch to a retrospective-rating plan because experience rating was a "Cadillac policy for [w]orkers' [c]ompensation," the city felt it could have greater autonomy over claims management by shifting to a retrospective-rating plan and the retrospective-rating plan provided cash flow advantages by reducing the city's "upfront obligation." The city was never **[***18]** group rated under the BWC's group-rating program.

[*P25] Through 2002, when the city was experience rated, it paid a pure experience-rated premium to the BWC. Beginning in 2003, when it was retrospectively rated, the city paid a minimum premium, i.e., an agreed percentage of what would have otherwise been its pure experience-rated premium, plus assessments and separately paid actual losses incurred for employee claims up to the agreed limits.

C. Rate Reforms

1. The BWC's 2010 Group-Rating Rate Reforms

[*P26] With the policy year beginning July 1, 2009, the BWC began making significant changes to its rating system to set more equitable premium rates for group-rated and nongroup-rated private employers.

[*P27] A key element of the BWC's reforms involved the calculation of the off-balance factor. As then-BWC administrator Marsha Ryan explained when testifying before the Ohio Senate Insurance Commerce and Labor Committee in October 2009:

> The signature achievement of this plan is that the connection between discounts for group-rated employers and base rates for non-group rated employers has been severed. This means that non-group employers' premiums are not inflated to cover premium shortages caused by the group-experience **[***19]** rating program. By setting the base rates for all employers independent of the pricing actions in group experience rating, BWC eliminated any chance of non-group employers bearing additional costs created by group-rated employers * * * .

[*P28] Instead of calculating separate off-balance factors for each manual class as it had in the past, the BWC applied a uniform off-balance factor in setting rates for all manual classes. The BWC made other changes to its rating program as well, including reducing the maximum credibility to 77 percent and applying a group "break-even factor," which had the effect of decreasing the premium discounts received by group-rated employers.

[*P29] These changes took effect beginning in 2010 for PECs (the "2010 rate reforms"). During an August 2009 BWC actuarial committee meeting, Pedrick explained that "[t]he goal" of the rate reforms as applied to PECs was "to achieve rate equity by setting the rate structure to **[**98]** reach the relative rate levels of 1.10 for non-group and 0.70 for group and eliminate the impact of group discounts on base rates by establishing a uniform off-balance factor for all PEC manual classes at 1.01." In 2010, the uniform off-balance factor for PECs **[***20]** was set at 1.01; however, it was subject to change each year.[6]

2. 2016 Changes to the BWC's Retrospective-Rating Plans

[*P30] Unrelated to the group-rating program, in January 2016, the BWC also made certain changes to its retrospective-rating plans, including increasing the minimum premium factors and adopting a loss conversion factor, a multiplier, to be applied to retrospective payments. In 2012, the BWC retained Deloitte to analyze its individual retrospective-rating plans, including the minimum premium percentages. In

[6] The city admitted that the rate reforms the BWC implemented for PECs beginning in year 2010 resolved the premium equity problems with the group-rating program and that the city has not experienced any premium overcharges relating to group rating since 2009.

a September 2013 report, Deloitte recommended an "overall minimum premium increase" of 29% for private employers and 23.5% for PECs participating in the BWC's individual retrospective-rating plans due to "the apparent lack of provisions for certain costs in the current minimum premium percentages." According to the Deloitte report, "there was no information or rationale as to why the current minimum percentages do not appear to have appropriate loadings for these costs."

[*P31] Carlson indicated that the BWC revised its retrospective-rating factors "on a periodic basis," "hopefully, every five years," but that the minimum premium factors had been last studied in 2006. Carlson testified **[***21]** that the Deloitte report revealed that the BWC "didn't effectively design" its retrospective-rating plans and had been undercharging employers who participated in its individual retrospective-rating plans for the risk they transferred to the BWC. He indicated that the "major reason" for this was because the BWC had failed to include the cost of its health partnership program in either the minimum premiums or the collections on individual paid losses. He stated that the BWC had also failed to include a provision for loss development past 120 months, i.e., to reflect the fact that, after the end of the ten-year period when the BWC collects reserves from the employer, the reserves would continue to escalate.

C. The Litigation

1. The City's Complaint Against the BWC

[*P32] On June 28, 2013, the city filed suit against the BWC. The city amended its complaint in December 2013. Asserting "a claim in equity for ***unjust enrichment***" against the BWC, the city alleged that "[f]or many years," the BWC had charged the city and other nongroup-rated PECs "excessive and inequitable workers' compensation premiums" to fund overly generous discounts given to group-rated PECs under its group-rating plan, knowingly **[***22]** ***undercharging*** group-rated PECs and knowingly ***overcharging*** nongroup-rated PECs for their respective risk. The city claimed the BWC's group-rating plan violated former R.C. 4123.29, 4123.34 and 4123.39 and that the BWC had been ***unjustly enriched*** by its wrongful collection and retention of excessive premiums from the city. The city sought (1) a declaration that the BWC's group-rating plan violated R.C. 4123.29. 4123.34 and 4123.39, (2) an order requiring the BWC to disgorge and repay the excessive premiums that had been wrongfully **[**99]** collected and retained by the BWC, (3) an award of its "return on investment in connection with the excess premiums" along with pre-judgment and post-judgment interest, costs and attorney fees and (4) "such other and further relief as [the] Court may deem just."

2. The BWC's Motion to Dismiss

[*P33] In February 2014, the BWC filed a motion to dismiss the city's amended complaint. The BWC argued that the common pleas court lacked subject matter jurisdiction over the city's lawsuit because, despite its characterization of its claim as equitable, the city was actually seeking "the legal remedy of money damages" which "falls within the exclusive jurisdiction of the Court of Claims." The BWC also argued that **[***23]** former R.C. 4123.29 and 4123.34(C) did not apply to the premiums charged the city because they were not among "the specific statutes governing the BWC's rate-making for contributions made by public employers" and that the only statutory provision governing rate-making for public employers that the city alleged had been violated — R.C. 4123.39 — did not apply because the city did not challenge the BWC's manual classification of public employers. The BWC further argued that the city's unjust enrichment claim was barred, in whole or in part, by the applicable statute of limitations and because the city had failed to exhaust its administrative remedies under R.C. 4123.291. The city opposed the motion.

3. The *San Allen* Decision

[*P34] While the BWC's motion to dismiss was pending, this court issued its decision in San Allen, 2014-Ohio-2071, 11 N.E.3d 739. In *San Allen*, a class of private, nongroup-rated employers sued the BWC to recover excessive premiums they had been charged to subsidize discounts given to group-rated employers under the BWC's group-rating program from 2001-2008. The class included employers who had been nongroup rated during any of the years at issue and, therefore, included employers who had been group rated in certain years and nongroup rated in others. Id. at ¶ 25. **[***24]**

[*P35] The trial court held that the BWC had been unjustly enriched as a result of its unlawful collection of excessive workers' compensation premiums from nongroup-rated employers and that the plaintiffs were entitled to restitution of the amounts by which they had

been overcharged as a result of the BWC's violation of former R.C. 4123.29 and 4123.34(C). Id. at ¶ 47. Following a hearing on the final restitution amount, the trial court awarded plaintiffs $859,440,258.79 in restitution on their unjust enrichment claim. Id. at ¶ 49. This court affirmed the trial court's findings that the BWC's prospective group-rating plan violated former R.C. 4123.29 and that the BWC had knowingly maintained an inequitable rating system, resulting in excessive premiums payments by nongroup-rated private employers, in violation of R.C. 4123.34(C). Id. at ¶ 78-82, 112. However, it reversed and remanded the case for recalculation of the portion of the restitution award relating to class members who were group rated during part of the class period, to include an offset for the subsidy benefits those class members received under the group-rating plan during the years within the class period in which they were group rated. Id. at ¶ 137.

4. The Trial Court's [*25] Ruling on the BWC's Motion to Dismiss**

[*P36] In June 2014, the trial court denied the BWC's motion to dismiss, concluding that it had subject matter jurisdiction over the dispute, that the city was not required to exhaust any administrative **[**100]** remedies provided for in R.C. 4123.291 before filing suit and that the city "had succeeded in alleging legal causes of action." The trial court pointed out that in *San Allen* this court had previously determined that former R.C. 4123.29(A)(4)(c) "contained a mandate that the BWC use a retrospective group rating system" — not a prospective group-rating system — and that the BWC violated R.C. 4123.34 "by overcharging non-group participants relative to the risks they posed." The trial court rejected the BWC's arguments that R.C. 4123.29 and R.C. 4123.34(C) applied only to private employers and held that if, as the city alleged, the BWC had "overcharged [the city] as a non-group participant relative to the risk it imposed," that would constitute a violation of R.C. 4123.34(C). The trial court also held that the city had "properly alleged a violation of R.C. 4123.39" and rejected the BWC's arguments that the city's unjust enrichment claim was time-barred.

[*P37] On June 26, 2014, the BWC filed its answer. The BWC denied the material allegations of the city's amended **[***26]** complaint and asserted twenty-three "defenses."[7]

5. Cross-Motions for Summary Judgment

[*P38] In September 2016, the city and the BWC filed cross-motions for summary judgment. The BWC argued that it was entitled to summary judgment because (1) the city's unjust enrichment claim was barred by the voluntary payment doctrine; (2) the city's unjust enrichment claim was time-barred, in whole or in part, by the two-year limitations period set forth in Ohio Adm.Code 4123-17-17, the five-year limitations period set forth in R.C. 126.301 or the six-year limitations period set forth in R.C. 2305.07; (3) the city's unjust enrichment claim was barred by laches and (4) the premiums paid by the city "were not excessive considering the totality of the circumstances."[8]

[*P39] The city argued that the BWC was collaterally estopped from challenging "key factual and legal findings" relevant to its claim based on this court's decision in San Allen, supra. The city argued that it was entitled to summary judgment because there were "no material issues of disputed fact" that the BWC's rating system as applied to the city violated former R.C. 4123.29(A)(4)(c), 4123.34(C) and 4123.39, that the city had been overcharged premiums under the same group-rating program found to be illegal in *San Allen* and that the BWC had been unjustly **[***27]** enriched by

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[7] The BWC's "defenses" included failure to state a claim for which relief could be granted, lack of jurisdiction, improper venue, failure to join a necessary party, failure to exhaust administrative remedies, failure to mitigate damages, lack of standing, waiver, estoppel, release, laches, setoff and recoupment, payment, accord and satisfaction, "applicable immunities" and the statute of limitations. The BWC also contended that the city's amended complaint was barred in whole or in part because: the city is a public employer who is "subject to specific rate-making statutes," the amended complaint "seeks the determination of discrete facts," the city was retrospectively rated, the BWC did not charge the city excessive premiums, the city's claim for repayment was not liquidated, the statutes at issue do not invoke a private right of action and equity favors the BWC.

[8] In support of its motion for summary judgment, the BWC attached excerpts from the depositions of Romero, Carlson, Pedrick, the city's expert, Allan Schwarz, the BWC's expert, Gary Josephson, and an affidavit from Ronald Suttles, the BWC's director of employer programs and business analysis, in which he explained the claims costs paid by retrospectively rated employers.

the "millions of dollars" it had overcharged the city "to cover excessive **[**101]** discounts granted to group-rated PECs." The city also asserted that, based on the undisputed facts, it was entitled to restitution of $4,524,392 in premium overcharges.[9]

6. The Parties' Actuarial Experts

a. The City's Expert

[*P40] The city retained actuarial consultant Allan Schwartz ("Schwartz"), who was also the plaintiffs' expert in *San Allen*, to support its unjust enrichment claim. Schwartz opined that the city had been overcharged for its workers' compensation premiums under the BWC's rating system based on (1) actuarial reports that concluded that nongroup-rated employers as a whole had been overcharged as a result of the BWC's group-rating program and (2) testimony by BWC representatives, including Bravener, Pedrick and Carlson, that excessive discounts and subsidies had been given to group-rated PEC employers funded by nongroup-rated PEC employers. He further opined that the amounts the BWC charged the city were "legally inequitable" and, therefore, "actuarially inequitable," based on the BWC's use of an illegal and inequitable group-rating **[***28]** program as found in *San Allen*.

[*P41] Schwartz claimed that from 1997 to 2009, the BWC overcharged the city $4,524,392 for its workers' compensation premiums by using an inflated off-balance factor. For each of the years at issue, Schwartz calculated a rate adjustment factor by comparing the off-balance factor the BWC had actually used when calculating the city's premiums to a "corrected" off-balance factor of 1.01 — the uniform off-balance factor the BWC applied to all PEC manual classes beginning in policy year 2010 when attempting to eliminate the impact of group discounts on the base rate.[10] He then subtracted the rate adjustment factor (as a percentage) from 100 to determine the percentage overcharge. He multiplied the premiums paid by the city (less **[**102]** the amount of any rebates or dividends received) by the percentage overcharge to determine the dollar value of the premium overcharges for each of the years at issue. For the years in which the city participated in retrospective rating, the amount of the "retro billings," i.e., the actual claims costs, was not included in the premium overcharge calculations because it was not impacted by the base rate and, therefore, was not affected by the **[***29]** inflated off-balance factor. However, administrative assessments, which were set as a percentage of premium, were included in the calculation of the premium overcharges for the years for which data was available.[11] Based on Schwartz's calculations, the annual percentage overcharges during the period 1997 to 2009 ranged from 0.15% in 2009 to 12.22% in 2003. Schwartz testified that his methodology represented a "reasonable," "actuarially sound basis" for determining the amount by which the BWC overcharged the city.

[9] In support of its motion for summary judgment, the city attached excerpts of the depositions of Bravender and Carlson taken in this case, excerpts of the depositions of Bravender and Pedrick taken in *Parma v. Ohio Bur. of Workers' Comp.*, Cuyahoga C.P. No. CV-13-814017 (the "*Parma* case"), the trial court's decision in *San Allen*, the trial court's journal entry denying the BWC's motion for summary judgment in the *Parma* case, excerpts from the BWC's "Plan for Adequacy and Equity in Ohio's Group-Experience-Rating Program" (Oct. 26, 2009), reports relating to studies conducted by the BWC's independent actuaries of the BWC's group-rating program in 1993, 1994, 2004, 2006 and 2009, BWC Administrator Marsha Ryan's testimony before the Senate Insurance Commerce and Labor Committee regarding group rating and comprehensive review (Oct. 20, 2009), a report on group and nongroup rate levels presented to the actuarial committee of the BWC's Board of Directors (Feb. 19, 2009), minutes from a August 27, 2009 meeting of the actuarial committee of the BWC's Board of Directors, a Powerpoint presentation entitled, "Rate Reform for Public Employer-Taxing Districts," an affidavit from Carlson (from the *Parma* case), an affidavit from Romero regarding the city's participation in the workers' compensation system and a declaration from Schwartz setting forth his opinions, analysis and calculations.

[10] Although the city paid premiums in two manual classes during the time period at issue — 9431 and 9439 — "for ease of calculation," Schwartz used only the actual off-balance factor for class 9431 in calculating the amount of premium overcharges because, according to Schwartz, it had "99.9 percent of the premium in it, or maybe even more than that." Schwartz explained that, had he done the calculation for each class separately, the amount of the overcharge would have been "slightly higher," because class 9439 had a higher actual off-balance factor. Because the actual off-balance factor was not available for 1997, Schwartz estimated the actual off-balance factor for that year as the average of the actual off-balance factors for the next three years.

[11] This data was available for 2003 to 2009. The alleged premium overcharges related to assessments constituted approximately $814,000 of the $4,524,392 total premium overcharges calculated by Schwartz.

b. The BWC's Expert

[*P42] The BWC retained actuarial consultant Gary Josephson to (1) evaluate Schwartz's opinions and calculations and (2) determine the impact of group rating on the premiums the city would have paid had the changes to the group-rating program that were implemented in 2010 been in place during the policy years at issue. Josephson claimed that because the off-balance factor is used to offset the aggregate impact of experience rating and because experience rating values change from year to year, Schwartz's use of a single off-balance factor of 1.01 for all years was "actuarially inappropriate." Josephson also criticized Schwartz's failure to take into account the implementation **[***30]** of a group break-even factor and reduction of maximum credibility. He claimed that these factors should be considered in calculating the impact of the rate reforms because a change in credibility or a decrease in the discounts given to group-rated employers could change the experience rating calculations which, in turn, could affect the off-balance factor.

[*P43] Josephson offered an "alternative calculation." Under his alternative calculation, Josephson estimated that the city would have paid approximately $2.7 million in lower premiums had the 2010 rate reforms been in effect from 1997 to 2009. The primary difference between his calculation and Schwartz's calculation involved the off-balance factor used in the calculation. Whereas Schwartz used 1.01 — the uniform off-balance factor adopted by the BWC in 2010 — in calculating premium overcharges for all years, Josephson recalculated a new, alternative uniform off-balance factor for each year. Josephson also incorporated the breakeven factor and credibility limits added in 2010 in his calculation. Josephson testified that he took the BWC's premium, payroll and loss data, replaced the credibility factors that had been used, applied the credibility **[***31]** limit implemented in 2010, added in the group break-even factor, recalculated the groups' experience rating factor and then recalculated "what the off-balance was as a result of that."

[*P44] Josephson claimed that Schwartz's analysis did not support the conclusion that the city had been "overcharged" for its workers' compensation premiums. Josephson opined that the $2.7 million premium impact he calculated, i.e., a 2.2% reduction in premiums from the approximately $120 million in premiums **[**103]** the city actually paid, was "well within the range of normal variability that exists in the ratemaking process" and that, therefore, "group rating did not materially impact Cleveland's premiums." He further opined that the BWC should not be required to return any premium payments to the city because it is "not practical" to go back and repay or recollect premiums for changes that are made in the rating process. He indicated that just "[b]ecause the methodology is changed or different assumptions are used does not mean the insuring entity should adjust historical premiums paid by policyholders" and that "[i]nsuring entities typically do not adjust prior years' premiums for changes in the ratemaking methodology." **[***32]**

[*P45] Josephson also disputed the suggestion that the city had been "overcharged" for its workers' compensation premiums because the city had been charged less than it should have been charged for its minimum premiums during the years in which it was retrospectively rated. Josephson testified that had the 2016 changes to the minimum premiums been in effect in 2003-2009, the difference in the city's minimum premiums would have likely been greater than the impact of the 2010 rate reforms for that time period.

7. The Trial Court's Ruling on Summary Judgment

[*P46] On December 22, 2016, the trial court granted the city's motion for summary judgment in part and denied it in part. It granted the city's motion as to liability on its unjust enrichment claim concluding that, after the city met its initial burden under *Civ.R. 56*, the BWC "failed to raise genuine issues of material fact with evidence satisfying the requirements of *Civ. R. 56(E)* on the issue of liability, as was its burden." However, the trial court determined that there were "questions of material fact * * * as to the amount of restitution owed to Plaintiff." It held that the case would proceed to a bench trial "to determine the amount of restitution due to Plaintiff." **[***33]** The trial court denied the BWC's motion for summary judgment.

8. Trial on Restitution

[*P47] In January 2017, the trial court held a bench trial on the amount of restitution due the city. The city presented testimony from Bravender, Carlson, Pedrick and Schwartz[12] and argued that it should be awarded

[12] Bravender, Carlson, Schwartz and Josephson testified live at trial. The city also designated deposition testimony from Bravender, Carlson and Pedrick. The parties entered into a number of pretrial stipulations, including stipulations as to the

$4,524,392 in restitution for the premium overcharges it paid to fund discounts given to group-rated PECs under the BWC's group-rating program. The BWC argued, based primarily on testimony from Josephson, that the city was not entitled to any restitution on its unjust enrichment claim because there was no credible evidence that the city had been "impacted to [its] detriment" by group rating. The BWC contended that Schwartz's methodology and calculations were deficient and unreliable, that Josephson's methodology and calculations were credible and reliable and that the equities favored the BWC because the minimum premiums the city paid during the years it was retrospectively rated were insufficient **[**104]** to cover the risk it transferred to the BWC.

[*P48] At the conclusion of the city's case-in-chief, the BWC moved to dismiss the case pursuant to *Civ.R. 41(B)(2)*. The BWC argued that the city had failed to prove that it was **[***34]** entitled to restitution because Schwartz's methodology was not actuarially reliable. The trial court denied the motion. At the conclusion of the BWC's case, the BWC renewed its motion to dismiss arguing that, considering the weight of the testimony of both experts, the relief sought by the city was not supported by the evidence in the record. Once again, the court denied the motion.

[*P49] On February 27, 2016, the trial court issued its decision, awarding the city $4,524,392 in restitution plus post-judgment interest at the statutory rate.

[*P50] The BWC appealed, raising the following five assignments of error for review:

> Assignment of Error No. I: The trial court erred in denying the motion of Defendant-Appellant Ohio Bureau of Workers' Compensation (the "Bureau") to dismiss the First Amended Complaint of Plaintiff-Appellee City of Cleveland ("Plaintiff" or Cleveland").
>
> Assignment of Error No. II: The trial court erred in denying the Bureau's motion for summary judgment and in granting in part Cleveland's motion for summary judgment.
>
> Assignment of Error No. III: The trial court erred in granting Cleveland's motion in limine regarding the Bureau's affirmative defenses.
>
> Assignment of Error No. IV: **[***35]** The trial court erred in denying the Bureau's motion to dismiss during the trial.
>
> Assignment of Error No. V: The trial court erred in awarding Cleveland more than $4.5 million.

II. Law and Analysis

[*P51] In its first assignment of error, the BWC contends that the trial court erred in failing to dismiss the city's complaint for lack of subject matter jurisdiction and failure to exhaust administrative remedies. We disagree.

A. Motion to Dismiss

1. Subject Matter Jurisdiction

[*P52] *HN1*[] "'Subject-matter jurisdiction is the power conferred on a court to decide a particular matter on its merits and render an enforceable judgment over the action.'" *ABN AMRO Mtge. Group, Inc. v. Evans, 8th Dist. Cuyahoga No. 96120, 2011-Ohio-5654, ¶ 5*, quoting *Udelson v. Udelson, 8th Dist. Cuyahoga No. 92717, 2009-Ohio-6462*. When evaluating subject matter jurisdiction, we apply a de novo standard of review. *Id.*

[*P53] The BWC contends that the city's claim for restitution is actually a claim for money damages, i.e., a legal remedy over which the court of claims has exclusive jurisdiction. As such, the BWC argues, the trial court erred as a matter of law in determining that it had subject matter jurisdiction over the case.

[*P54] The city's claim in this case is the same claim raised by the plaintiffs in *San Allen*, i.e., a claim for unjust enrichment seeking equitable restitution of the **[***36]** amount of workers' compensation insurance premiums collected by the BWC in excess of the premiums the city should have been charged. Accordingly, for the same reasons this court concluded that the common pleas court had subject matter jurisdiction over the plaintiffs' claims in *San Allen, see San Allen, 2014-Ohio-2071, 11 N.E.3d 739, ¶ 53-61*, we find that the common pleas court had subject matter **[**105]** jurisdiction over the city's claim here. Accordingly, the trial court did not err in refusing to

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net premiums paid by the city (premiums paid less rebates received) from 1997-2009, the assessments paid by the city from 2003-2009, the off-balance factors applied by the BWC for the two manual classes at issue during the years 1998-2009 and the uniform off-balance factors applied by the BWC during the years 2010-2015, and also stipulated that each of the parties' experts was qualified as an expert to testify regarding the actuarial issues in the case.

dismiss the city's amended complaint for lack of subject matter jurisdiction.

2. Exhaustion of Administrative Remedies

[*P55] The BWC also contends that the trial court erred as a matter of law in failing to dismiss the city's amended complaint for failure to exhaust administrative remedies. The BWC claims that the city was required to comply with the administrative review process set forth in R.C. 4123.291 and Adm.Code 4123-14-06 for challenges to "risk premium matters" before seeking relief in the court of common pleas and that because the city did not "protest" their premium rates through the administrative process, they are not entitled to judicial relief. The BWC further argues that exhaustion of administrative remedies is a condition precedent to the granting of equitable relief **[***37]** and that because the city did not plead, in its amended complaint, that it exhausted any administrative remedies, the city failed to state a claim upon which relief can be granted. The BWC's arguments are meritless.

[*P56] HN2[] The determination of whether a complaint should be dismissed for failure to exhaust administrative remedies presents a question of law that we review de novo. Martin v. Ohio Dept. of Rehab. & Corr., 140 Ohio App. 3d 831, 835, 2001-Ohio-2678, 749 N.E.2d 787 (4th Dist.2001). "It is a 'long settled rule of judicial administration that no one is entitled to judicial relief for a supposed * * * injury until the prescribed administrative remedy has been exhausted.'" State ex rel. Teamsters Local Union No. 436 v. Bd. of Cty. Commrs., 132 Ohio St. 3d 47, 2012-Ohio-1861, 969 N.E.2d 224, ¶ 19, quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L. Ed. 638 (1938). Thus, a party must generally "exhaust any administrative remedy that could provide him with the relief he seeks" before seeking judicial intervention. Driscoll v. Austintown Assocs., 42 Ohio St.2d 263, 273, 328 N.E.2d 395 (1975).

[*P57] HN3[] Exhaustion of remedies is required to avoid "'premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.'" State ex rel. Teamsters Local Union No. 436 at ¶ 19, quoting Weinberger v. Salfi, 422 U.S. 749, 765, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). Exhaustion of administrative remedies is an affirmative **[***38]** defense, which the BWC bore the burden of proving. AMM Property Invest., Inc. v. Cleveland, 8th Dist. Cuyahoga No. 99848, 2014-Ohio-821, ¶ 3; Cleveland Constr., Inc. v. Kent State Univ., 10th Dist. Franklin No. 09AP-822, 2010-Ohio-2906, ¶ 48.

[*P58] HN4[] Where an administrative agency has no power to afford the relief sought or an administrative appeal would otherwise be futile, exhaustion of administrative remedies is not a prerequisite to seeking judicial relief. State ex rel. Teamsters Local Union No. 436 at ¶ 23-24; *see also* Kaufman v. Newburgh Hts., 26 Ohio St.2d 217, 219, 271 N.E.2d 280 (1971) ("'failure to exhaust administrative remedies available' may be a defense * * * only if interposed * * *, and if a remedy exists which is effectual to afford the relief sought"). In determining futility for exhaustion of remedies purposes, it does not matter that it may be improbable that the claimant will receive the requested relief. "'The focus is on the power of the administrative body to afford the requested relief, **[**106]** and not on the happenstance of the relief being granted.'" (Emphasis omitted.) State ex rel. Teamsters Local Union No. 436 at ¶ 24, quoting Nemazee v. Mt. Sinai Med. Ctr., 56 Ohio St.3d 109, 115, 564 N.E.2d 477 (1990); *see also* McNally v. Cleveland, 8th Dist. Cuyahoga No. 92697, 2010-Ohio-512, ¶ 12 ("'[a] vain act is defined in the context of lack of authority to grant administrative relief and not in the sense of lack of probability that the application for administrative relief will be granted'"), quoting **[***39]** Gates Mills Invest. Co. v. Pepper Pike, 59 Ohio App.2d 155, 167, 392 N.E.2d 1316 (8th Dist.1978).

[*P59] HN5[] Pursuant to R.C. 4123.291(A), any employer "desiring to file a request, protest, or petition" regarding certain categories of matters specified in the statute must file such with the adjudicating committee within 24 months after the administrator sends notice of the determination that is the subject of the request, protest or petition. Relevant to this case, the matters that the adjudicating committee has the authority to address includes "[a]ny decision relating to any other risk premium matter under Chapters 4121., 4123., 4131. of the Revised Code." R.C. 4123.291(B)(6); *see also* Ohio Adm.Code 4123-14-06(F).

[*P60] If an employer does not prevail before the adjudicating committee, the employer may appeal the decision of the committee to the administrator or the administrator's designee. R.C. 4123.291(B); Ohio Adm.Code 4123-14-06(E).

[*P61] Once again, this court's decision in *San Allen* controls the result here. As we explained in *San Allen*:

> [T]his case is materially different from * * * one in which an individual employer challenges a premium it has been assessed, based on a particular application of the BWC's rules, classifications, or calculations. *Compare* *Arth Brass & Aluminum Castings, Inc. v. Conrad, 104 Ohio St. 3d 547, 2004-Ohio-6888, 820 N.E.2d 900*; *State ex rel. Cafaro Mgt. Co. v. Kielmeyer, 113 Ohio St. 3d 1, 2007-Ohio-968, 862 N.E.2d 474*; *State ex rel. RMS of Ohio, Inc. v. Ohio Bur. of Workers' Comp., 113 Ohio St. 3d 154, 2007-Ohio-1252, 863 N.E.2d 160*. In such cases, any "errors" impacting an individual employer (or even multiple employers) are fully correctable in the normal course upon administrative review. Because of the BWC's **[***40]** expertise in administering its own rules and regulations, it ordinarily should be given the opportunity to review the application of those rules and regulations to a particular factual context.
>
> Plaintiffs' challenges to their rates, however, do not involve individualized decisions concerning particular employers' risk accounts, but rather, a system-wide challenge to the manner in which premium rates were set by the BWC and a request for system-wide relief. Although the adjudicating committee (or, upon further review, the administrator or his [or her] designee) may have had the authority to make individual, manual premium rate adjustments under certain circumstances, nothing in the record (or the applicable rule and statute) suggests that the plaintiff class had an administrative remedy pursuant to which it could have required the BWC to change the manner in which it set premium rates. *See, e.g.,* *AMM Peric Property Invest., Inc. v. Cleveland, 8th Dist. Cuyahoga No. 99848, 2014-Ohio-821, ¶ 4, 6, 12* (***HN6***[⬆] where administrative agency lacks power to grant relief sought, administrative remedy may be inadequate); *Bowen v. New York, 476 U.S. 467, 484-485, 106 S.Ct. 2022, 90 L. Ed.2d 462 (1986)* (exhaustion of administrative **[**107]** remedies would have been futile and, therefore, was not required where challenged agency action involved a "systemwide, unrevealed policy" that was inconsistent **[***41]** with established regulations and did not "depend on the particular facts of the case before it"); *New Mexico Assn. for Retarded Citizens v. New Mexico, 678 F.2d 847, 851 (10th Cir.1982)* (plaintiff class was not required to exhaust administrative remedies before filing lawsuit where the "gravamen" of the lawsuit was that "the entire special education service system offered by the State is infirm" and the remedies offered at the administrative level did not include "a restructuring of the State's system" as sought by the class); *see also* *Espinoza-Gutierrez v. Smith, 94 F.3d 1270, 1273 (9th Cir.1996)* (exhaustion of administrative remedies doctrine did not bar review of a question concerning the validity of an INS regulation due to conflict with a statute).

San Allen, 2014-Ohio-2071, 11 N.E.3d 739, at ¶ 73-74.

[*P62] As in *San Allen*, the city's contention that the BWC charged it excessive worker's compensation premiums is based on a system-wide challenge to the manner in which premium rates were set by the BWC, i.e., that the city was charged unlawful and unfair rates due the manner in which discounts given to group-rated PECs were funded under the BWC's group-rating program. There is nothing in the record in this case to suggest that the adjudicating committee (or, upon further review, the administrator or his or her designee) had the authority to address the city's claim that the BWC's group-rating **[***42]** program, the method by which the BWC set premiums as a result of that program and the excessive premiums the city was allegedly charged as a result of that program, were unlawful. Thus, the BWC did not show that the wrongs alleged by the city could have been corrected by the administrative review process. Because adjudication of the lawfulness of the BWC's rating system and the relief sought by the city were outside the scope of the administrative review process set forth in *R.C. 4123.291*, the trial court committed no error in concluding that the city was not obligated to exhaust administrative remedies prior to filing its complaint. The BWC's first assignment of error is overruled.

B. Summary Judgment

[*P63] In its second assignment of error, the BWC contends that the trial court erred in granting the city's motion for summary judgment as to liability and denying its own motion for summary judgment on the city's unjust enrichment claim.

1. Standard of Review

[*P64] HN7[↑] We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co., 77 Ohio St.3d 102, 105, 1996- Ohio 336, 671 N.E.2d 241 (1996)*. We accord no deference to the trial court's decision and conduct an independent review of the record to determine whether summary judgment is appropriate.

[*P65] **[***43]** HN8[↑] Under *Civ.R. 56*, summary judgment is appropriate when no genuine issue as to any material fact exists and, viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party, entitling the moving party to judgment as a matter of law.

[*P66] HN9[↑] On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate its entitlement to summary judgment. *Dresher v. Burt, 75 Ohio St. 3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264 [**108] (1996)*. If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has the reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id. at 293*. Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Id.*

[*P67] HN10[↑] "Although courts are cautioned to construe the evidence in favor of the nonmoving party, summary judgment is not to be discouraged where a non-movant fails to respond with evidence supporting the essentials of [its] claim." *Mayhew v. Massey, 2017-Ohio-1016, 86 N.E.3d 758, ¶ 11 (7th Dist.)*, citing *Leibreich v. A.J. Refrig., Inc., 67 Ohio St.3d 266, 269, 1993- Ohio 12, 617 N.E.2d 1068 (1993)*. *Civ.R. 56* must be applied in a manner that balances the right of the nonmoving party to have a factfinder **[***44]** try claims or defenses that are adequately based in fact with the right of the moving party to demonstrate, prior to trial, that the claims or defenses have no factual basis. *See, e.g., Mayhew at ¶ 11*, citing *Byrd v. Smith, 110 Ohio St. 3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 11*. In this case, the trial court struck the right balance.

2. The City's Unjust Enrichment Claim

[*P68] The city brought a claim against the BWC for unjust enrichment. The city contends that the BWC was unjustly enriched because the BWC charged nongroup-rated PECs, including the city, excessive workers' compensation premiums in order to subsidize unwarranted discounts given to group-rated PECs under its group-rating program in violation of Ohio law.

[*P69] HN11[↑] Unjust enrichment occurs where "'a person has and retains money or benefits which in justice and in equity belong to another.'" *Smith v. Vaughn, 174 Ohio App. 3d 473, 2007-Ohio-7061, 882 N.E.2d 941, ¶ 10 (1st Dist.2007)*, quoting *Johnson v. Microsoft Corp., 106 Ohio St. 3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 20*; *Hummel v. Hummel, 133 Ohio St. 520, 528, 14 N.E.2d 923 (1938)*. The purpose of an unjust enrichment claim is not to compensate the plaintiff for loss or damage suffered by the plaintiff, but to enable the plaintiff to recover the benefit he has conferred on the defendant under circumstances in which it would be unjust to allow the defendant to retain it. *Johnson at ¶ 21*, citing *Hughes v. Oberholtzer, 162 Ohio St. 330, 335, 123 N.E.2d 393 (1954)*. Restitution is the remedy provided upon proof of unjust enrichment "to prevent one from **[***45]** retaining property to which he is not justly entitled." *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 256, 141 N.E.2d 465 (1957)*; *see also Santos, 101 Ohio St. 3d 74, 2004-Ohio-28, 801 N.E.2d 441 at ¶ 11* ("restitution [is] available as the remedy for an unjust enrichment of one party at the expense of another"), citing *Restatement of the Law, Restitution, Section 9* (1937).

[*P70] HN12[↑] To prevail on a claim for unjust enrichment, a plaintiff must prove by a preponderance of the evidence that: (1) the plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge of such benefit and (3) the defendant retained that benefit under circumstances in which it would be unjust for him to retain that benefit. *See, e.g., Patel v. Krushna SS L.L.C., 8th Dist. Cuyahoga No. 104655, 2018-Ohio-263,¶ 25*; *Johnson at ¶ 21*; *Hambleton v. R.G. Barry Corp., 12 Ohio St.3d 179, 183, 12 Ohio B. 246, 465 N.E.2d 1298 (1984)*.

[*P71] After reviewing the materials submitted by the parties on summary **[**109]** judgment, the trial court found that the city had met its initial burden under *Civ.R. 56*, coming forward with evidence establishing the absence of any genuine issues of material fact as to the BWC's liability on the city's unjust enrichment claim, but that the BWC had not met its reciprocal burden of pointing to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact on that issue for trial. Following a thorough review of the record, we reach the same conclusion.

[*P72] Both in opposing the city's motion for summary judgment and in **[***46]** its own motion for summary judgment, the BWC focused primarily on its affirmative defenses rather than the elements of the city's unjust enrichment claim. Likewise, the BWC's arguments on appeal are centered on several affirmative defenses. For this reason, we begin our review of the trial court's summary judgment ruling with the BWC's affirmative defenses.

3. The BWC's Affirmative Defenses

[*P73] The BWC contends that the trial court erred in failing to consider three of its affirmative defenses on summary judgment: (1) that *Ohio Adm.Code 4123-17-17(C)* precludes the city from recovering any premium overcharges; (2) that the city's unjust enrichment claim is barred, in whole or in part, by the statute of limitations set forth in *R.C. 126.301* or *2307.05* and (3) that the city's unjust enrichment claim is barred by the voluntary payment doctrine.[13]

a. Applicability of Two-Year Reimbursement Limitation in Ohio Adm.Code 4121-7-17(C)

[*P74] The BWC contends that because the city first brought its alleged premium overcharges to the BWC's attention in June 2013 when it filed its complaint and the city admits that the 2010 rate reforms resolved the issues with its premiums, the trial court should have granted summary judgment in favor of the BWC based on the "two-year limit **[***47]** on the recovery of alleged overcharges" in *Ohio Adm.Code 4123-17-17(C)*. We disagree.

[*P75] *Ohio Adm.Code 4123-17-17* governs "[a]uditing and adjustment of payroll reports." *See also State ex rel. Roberds, Inc. v. Conrad, 86 Ohio St.3d 221, 223, 1999-Ohio 97, 714 N.E.2d 390 (1999)*. The version of *Ohio Adm.Code 4123-17-17(C)* in effect at the time the BWC filed its complaint[14] provides, in relevant part:

> **[**110]** (C) The bureau shall have the right at all times * * * to inspect, examine or audit any or all books, records, papers, documents and payroll of * * * employers for the purpose of verifying the correctness of reports made by employers of wage expenditures as required by law and *rule 4123-17-14 of the Administrative Code*. The bureau shall also have the right to make adjustments as to classifications, allocation of wage expenditures to classifications, amount of wage expenditures, premium rates or amount of premium. No adjustments, however, shall be made in an employer's account which result in reducing any amount of premium below the amount of contributions made by the employer to the fund for the periods involved, except in reference to adjustments for the semi-annual or adjustment periods ending within twenty-four months immediately prior to the beginning of the current payroll reporting period. * * * The twenty-four month period shall be determined by the date when such errors affecting the reports and the **[***48]** premium are brought to the attention of the bureau

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[13] The BWC also asserts that it was not collaterally estopped, based on the *San Allen* decision, from asserting these affirmative defenses in this case. We need not address the BWC's collateral estoppel argument because the trial court expressly stated that it did not rely on collateral estoppel in deciding the city's motion for summary judgment; its decision was based on the summary judgment evidence presented by the parties. Likewise, we do not rely on the doctrine of collateral estoppel in resolving the issues raised in this appeal; we base our decision on the evidence presented by the parties in this case.

[14] In its brief, the BWC quotes the current version of Ohio Adm.Code 4121-17-17(C), which reflects amendments effective July 1, 2015. The current version states:

> The bureau shall have the right at all times to inspect, examine or audit any or all books, records, papers, documents and payroll of an employer for the purpose of verifying the correctness of reports made by employers as required by law.
>
> (1) The bureau shall have the right to make adjustments as to classifications, allocation of wage expenditures to classifications, amount of wage expenditures, premium rates or amount of premium.
>
> (2) Except as provided in *rules 4123-17-14* and *4123-17-28 of the Administrative Code*, adjustments in an employer's account which result in changes to the amount of premium due from an employer for a policy year shall be limited to the annual or adjustment periods ending within twenty-four months immediately prior to:
>
> (a) The date when such error affecting the reports and the premium are brought to the attention of the bureau by an employer through written application for adjustment, or
>
> (b) The date that the bureau provides written notice to the employer of **[***49]** the bureau's intent to inspect, examine, or audit the employer's records.

by an employer through written application for adjustment or from the date that the bureau provides written notice to the employer of the bureau's intent to inspect, examine, or audit the employer's records.

[*P76] The BWC cites *State ex rel. Able Temps, Inc. v. Indus. Comm. of Ohio, 66 Ohio St.3d 22, 1993- Ohio 199, 607 N.E.2d 450 (1993)*, *State ex rel. Granville Volunteer Fire Dept. v. Indus. Comm. of Ohio, 64 Ohio St. 3d 518, 1992-Ohio-129, 597 N.E.2d 127 (1992)*, and *State ex rel. Harry Wolsky Stair Builder, Inc. v. Indus. Comm. of Ohio, 58 Ohio St.3d 222, 569 N.E.2d 900 (1990)*, for the proposition that "employers cannot recover alleged workers' compensation premium overcharges that were paid more than two years before demand for their repayment" pursuant to *Ohio Adm.Code 4123-17-17(C)*. However, this case is distinguishable from those cases. Each of those cases involved the time period for which premium adjustments could be sought due to a misclassification of the employer's business or employees. *See Able Temps, 66 Ohio St.3d 22, 1993- Ohio 199, 607 N.E.2d 450* (where classification was invalidated by Ohio Supreme Court, period for which temporary employment agencies could obtain reimbursement of overpaid premiums was governed by two-year limitation in Ohio Adm.Code 4121-7-17(C)[15]); *Granville, 64 Ohio St.3d 518, 1992-Ohio 129, 597 N.E.2d 127* (where fire department paid workers' compensation insurance premiums to the state fund unaware of a statute designated volunteer firefighters as township employees for purposes of workers' compensation insurance, Ohio Adm.Code 4121-7-17(C)'s two-year limitation on reimbursement prohibited reimbursement of premiums beyond two years prior to the date that the classification error was brought to the attention of the BWC); *Harry Wolsky, 58 Ohio St.3d 222, 569 N.E.2d 900* (two-year limitation in Ohio Adm.Code 4121-7-17(C) applied where employer sought a refund for premium overpayments after the **[***50]** BWC erroneously assigned the employer to a manual class with a higher risk classification with **[**111]** higher premium rates). That is not the situation here.

[*P77] Based on its plain language, *Ohio Adm.Code 4123-17-17* does not preclude or limit the relief requested in this case. ***HN13***[↑] Although *Ohio Adm.Code 4123-17-17(C)* places a two-year limit on premium "adjustments" covered by the regulation, this limitation applies only to adjustments related to "errors affecting the [payroll] reports and the premium." *See also State ex rel. Aaron's, Inc. v. Ohio Bur. of Workers' Comp., 148 Ohio St. 3d 34, 2016-Ohio-5011, 68 N.E.3d 757, ¶ 22* ("[t]he purpose of retroactive adjustment is to correct an error or mistake"). The city is not seeking an "adjustment" to its premiums due to any "error" relating to or affecting its payroll reports. The premium overcharges for which the city seeks restitution in this case were the result of an alleged deliberate policy decision by the BWC to charge excessive premiums to nongroup-rated PECs in order to subsidize unlawful discounts given to group-rated PECs under its group-rating program. As such, the two-year limitation on premium adjustments set forth in *Ohio Adm.Code 4123-17-17(C)* does not apply.

b. Applicability of the Five-year Statute of Limitations in *R.C. 126.301* and the Six-Year Statute of Limitations in *R.C. 2305.07*

[*P78] The BWC also argues that, based on the five-year statute of limitations **[***51]** set forth in *R.C. 126.301* or the six-year statute of limitations set forth in *R.C. 2305.07*, the trial court erred by denying its motion for summary judgment as to any claim for premiums paid before June 28, 2008 (applying the five-year statute of limitations) or June 28, 2007 (applying the six-year statute of limitations). Once again, we disagree.

[*P79] *R.C. 2305.07* provides: "Except as provided in *sections 126.301* and *1302.98 of the Revised Code*, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued." *R.C. 126.301* provides: "Except for unclaimed funds under *Chapter 169. of the Revised Code*, an action against the state or an agency thereof for failure to make any distribution or other payment shall be brought within five years after the cause of action has accrued."

[*P80] The BWC argues that because this case is "an action against the state or an agency thereof," the five-year statute of limitations set forth in *R.C. 126.301* governs the city's claim. The BWC cites no authority beyond *R.C. 126.301* for this proposition. ***HN14***[↑] By its terms, however, *R.C. 126.301* applies only to actions against the state or a state agency "for failure to make any distribution or other payment." This case does not involve the BWC's **[***52]** "failure to make any

[15] Ohio Adm.Code 4121-7-17(C) was the predecessor to *Ohio Adm.Code 4123-17-17(C)*.

distribution or other payment" due the city. Rather, the city seeks the return of specific funds wrongfully collected by the state under its unlawful group-rating program. Accordingly, R.C. 126.301 does not apply.

[*P81] Alternatively, the BWC argues that the city's claim is "an action * * * upon a liability created by statute" governed by the six-year statute of limitations in R.C. 2305.07.

[*P82] The city's claim in this case is a claim for unjust enrichment. ***HN15***[⬆] A six-year statute of limitations applies to claims for unjust enrichment. *See, e.g.,* State ex rel. Cty. of Cuyahoga v. Jones Lang Lasalle Great Lakes Co., 8th Dist. Cuyahoga No. 104157, 2017-Ohio-7727, ¶ 118, citing Hambleton, 12 Ohio St.3d at 182, 465 N.E.2d 1298; Pomeroy v. Schwartz, 8th Dist. Cuyahoga ***[**112]*** No. 99638, 2013-Ohio-4920, ¶ 41. "'[A] claim for unjust enrichment accrues on the date that money is retained under circumstances that make it unjust to do so.'" Pomeroy at ¶ 41, quoting Palm Beach Co. v. Dun & Bradstreet, 106 Ohio App.3d 167, 175, 665 N.E.2d 718 (1st Dist.1995). The discovery rule has not been extended to unjust enrichment claims. Jones Lang at ¶ 118; *Drozeck v. Lawyers Title Ins. Corp., 140 Ohio App.3d 816, 749 N.E.2d 775 (8th Dist.2001)*; *see also* Marok v. Ohio State Univ., 10th Dist. Franklin No. 13AP-12, 2014-Ohio-1184, ¶ 25.

[*P83] Citing Zion Nursing Home, Inc. v. Creasy, 6 Ohio St.3d 221, 224, 6 Ohio B. 293, 452 N.E.2d 1272 (1983), and several other "periodic payment" cases, the BWC contends that each of the city's workers' compensation premium payments has "its own statute of limitations" and that, therefore, the six-year statute of limitations bars the city from obtaining restitution of any premiums paid prior to June 28, 2007. None of those cases **[***53]** involves an unjust enrichment claim.

[*P84] We find this court's prior decision in Pomeroy instructive in determining when the city's unjust enrichment claim accrued in this case. In *Pomeroy*, an insurance agent and his insurance agency (collectively, the "agent") brought an action against a commercial client and its president (collectively, the "client") to recover funds the agent advanced to the client to pay non-covered "trail claims," after the client failed to purchase "trail claims coverage" when it switched health insurance plans from a self-insured plan to a fully insured plan in November 2002. Pomeroy, 2013-Ohio-4920, at ¶ 5-7. To avoid losing the client, from February 2003 to September 2003, the agent paid a number of the unpaid "trail claims" himself. Id. at ¶ 8. The relationship between the client and insurance agent deteriorated and, in April 2006, the agent demanded that the client reimburse him for the "trail claims" payments he had made in 2003. Id. at ¶ 11-13. In November 2011, eight years after he made the last "trail claims" payment, the agent sued the client, asserting various claims, including a claim for unjust enrichment, based on his "trail claims" payments. Id. at ¶ 16. The trial court granted summary **[***54]** judgment in favor of the client on the agent's unjust enrichment claim. The trial court found that the unjust enrichment claim accrued in September 2003, when the last "trail claims" payment was made — rather than the date repayment was first demanded — and was, therefore, time barred under the applicable six-year statute of limitations. Id. at ¶ 17, 41-42. This court agreed. The court explained: "This is the date the last of the benefit that was allegedly (1) conferred to [the defendant], (2) with [the defendant's] knowledge, and (3) was retained, under circumstances where it would be unjust without payment." Id. at ¶ 42, 45-46.

[*P85] The court noted its decision was consistent with a decision by the First District in *Palm Beach.* Id. at ¶ 44-45. In *Palm Beach*, the plaintiff had paid the defendant for credit information from 1979 to 1982, relying on the defendant's assurances that it would sell it only so much credit information as it could use. In 1989, the plaintiff learned that it had paid for more units of credit information in 1979-1982 than it had used. Palm Beach, 106 Ohio App.3d at 169-170, 665 N.E.2d 718. Four years later, the plaintiff filed suit against the defendant, asserting various claims, including a claim for unjust enrichment **[***55]** seeking restitution of the excess payments. Id. at 170. The trial court found that the plaintiff's unjust enrichment claim accrued in 1982, i.e., when the last of the allegedly excessive charges was paid and was, therefore, time-barred. **[**113]** *Id.* The First District affirmed the trial court's judgment, concluding that the plaintiff's unjust enrichment claim accrued "at the latest * * * in 1982 when the last of the alleged overcharges, or false billings or accountings, occurred." Id. at 175.

[*P86] The Ninth District reached a similar conclusion in Desai v. Franklin, 177 Ohio App. 3d 679, 2008-Ohio-3957, 895 N.E.2d 875 (9th Dist.). In *Desai*, the plaintiff and defendant were business partners. The plaintiff resigned in 2000 and filed suit against the defendant in 2002, alleging that the defendant was unjustly enriched because he had underpaid the plaintiff for many years. Id. at ¶ 2-5. At trial, a jury awarded the plaintiff $301,597.34, which covered payments the defendant

failed to make to the plaintiff from 1987 to 2000. *Id. at ¶ 8*. On appeal, the defendant argued that the plaintiff could only recover the payments due for the six years preceding the 2002 filing of the complaint and that the jury's award should, therefore, be reduced to $128,705.67. *Id. at ¶ 11, 13*.

[*P87] The Ninth District disagreed and **[***56]** held that the plaintiff's entire unjust enrichment claim, i.e., for payments dating back to 1987, did not accrue until the last point in time that the plaintiff conferred a benefit on the defendant, which was in 2000 when the plaintiff resigned. *Id. at ¶ 23*.

[*P88] In *Bank of Am., N.A. v. Darkadakis, 2016-Ohio-7694, 76 N.E.3d 577 (7th Dist.)*, a homeowner claimed that the bank lacked standing to bring a foreclosure action because he did not sign the note or mortgage, notwithstanding the fact that he had initialed every page of the mortgage and the mortgage was used to pay off a prior note and mortgage for which he was liable. *Id. at ¶ 2-7*. The bank brought an unjust enrichment claim against the homeowner, which the homeowner asserted was time-barred. *Id. at ¶ 6*. The trial court granted summary judgment in favor of the bank and entered a decree of foreclosure. The home owner appealed. *Id. at ¶ 8-12*. Among the issues raised on appeal was the statute of limitations on the bank's unjust enrichment claim. The homeowner claimed that the statute of limitations began to run in September 2004 when the bank's mortgage was used to pay off the homeowner's prior mortgage. *Id. at ¶ 41*. The Seventh District disagreed. It indicated that because payments were made on the note from **[***57]** 2004 to 2012, the bank's unjust enrichment claim could not have accrued until those payments stopped. The court explained:

> This reasoning * * * fails to acknowledge payments made on the September 4, 2004 note secured by the mortgage. It may be unjust to hold the accrual date as September 4, 2004, because it would allow [the homeowner] to unilaterally control the statutory time. *See Pomeroy, 2013-Ohio-4920 at ¶ 46*. [The homeowner] could ensure the mortgage was paid for six years and then stop payment but retain the benefit of having his previous mortgage paid off and getting to keep his house free and clear of debt. * * * The benefit was being conferred and retained as long as payments on the note were made. Conference and retention of the benefit would not cease until [the homeowner] was in default on the note. Thus, the cause of action may not accrue until payments were no longer made on the note. The trial court found the note went into default in February 2012.

Id. at ¶ 50-51. The court ultimately held that the statute of limitations on the bank's unjust enrichment claim did not accrue until June 2012 when the bank filed its foreclosure action because that was when the homeowner first asserted his claim **[**114]** that the bank could not **[***58]** foreclose on his interest in the property. *Id. at ¶ 52-53*.

[*P89] In each of these cases, where one party conferred benefits on another, with the other's knowledge, over a period of time, the courts did not regard each benefit conferred as giving rise to a separate cause of action with a separate statute of limitations. Rather, the courts looked at the entire period of time over which the party conferred benefits as giving rise to a single claim for unjust enrichment, subject to a single statute of limitations that accrued when the last benefit was conferred that unjustly enriched the defendant.

[*P90] Accordingly, we conclude that the city's cause of action for unjust enrichment did not accrue until the city made its last premium "overpayment," i.e., its last premium payment for policy year 2009, which was the last point in time the BWC allegedly unjustly received a benefit from the city. We believe that such a rule is more consistent with the equitable nature of an unjust enrichment claim than the "payment-by-payment" approach to the statute of limitations advocated for by the BWC.[16] Because, the city's 2013 complaint was within the six-year limitations period applicable to unjust enrichment claims, **[***59]** the trial court did not err in concluding that the city's claim was not time-barred, in whole or in part, under *R.C. 126.301* or *2307.05*.

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[16] This is also more consistent with the manner in which the court determined equitable relief should be awarded in the *San Allen* case. Although there was no statute of limitations issue in that case, this court held that it was not appropriate for the trial court to consider the plaintiffs' unjust enrichment claim on a policy-year-by-policy basis (or a payment-by-payment basis) and simply award the plaintiffs the sum of the premium overcharges class members received during each year within the class period in which the class members were nongroup rated. Rather, this court held that it was necessary for the trial court to consider the class period as a whole and include an offset for the subsidy benefits class members who were group rated during part of the class period received during the years within the class period in which they were group rated.

c. Voluntary Payment Doctrine

[*P91] The BWC also contends that the city's unjust enrichment claim is barred by the voluntary payment doctrine. ***HN16***[⬆] The voluntary payment doctrine provides that "[i]n the absence of fraud, duress, compulsion or mistake of fact, money, voluntarily paid by one person to another on a claim of right to such payment cannot be recovered merely because the person who made the payment mistook the law as to his liability to pay." *State ex rel. Dickman v. Defenbacher, 151 Ohio St. 391, 395, 86 N.E. 2d 5 (1949)*; *Consol. Mgmt. v. Handee Marts, 109 Ohio App.3d 185, 189, 671 N.E.2d 1304 (8th Dist.1996)*; *Meeker R&D, Inc. v. Evenflo Co., 2016-Ohio-2688, 52 N.E.3d 1207, ¶ 75 (11th Dist.)*; *see also Culberson Transp. Serv. Inc. v. John Alden Life Ins. Co., 10th Dist. Franklin No. 96 APE11-1501, 1997 Ohio App. LEXIS 2854, *18 (June 30, 1997)* ("[w]hen a party with knowledge of the facts, but without legal liability to do so, pays money voluntarily, that person has no claim to recovery for the monies so paid"), A mistake of law occurs when a person, having full knowledge of the facts, reaches an erroneous conclusion regarding their legal effect. "It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of judgment on facts as they are real." *Consol. Mgmt. at 189*; *see also Sheet Metal Workers Local 98 v. Whitehurst, 5th Dist. Knox No. 03 CA 29, 2004-Ohio-191, ¶ 33* (defining a mistake of law as "'a mistake of a person who knows the **[***60]** facts of the case but is ignorant of their legal consequence'"), quoting *69 Ohio Jurisprudence 3d, Mistake, **[**115]** Section 9*, at 13-14 (1986). A mistake of fact is a "mistaken supposition of the existence of a specific fact." *Sheet Metal Workers Local 98 at ¶ 34*; *see also Meeker R&D at ¶ 63-64* (defining mistake of fact as "'a mistake not caused by the neglect of a legal duty?on the part of the person making the mistake, and consisting in (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing or material to the contract which does not exist, or in the past existence of such thing which has not existed'"), quoting *Black's Law Dictionary* (5th Ed.).

[*P92] The BWC contends that there is no genuine issue of material fact that the voluntary payment doctrine bars the city's unjust enrichment claim because (1) the city did not allege any fraud, duress, compulsion or mistake of fact in its amended complaint and (2) the city "knowingly paid any allegedly 'excess premiums.'" The city contends that the voluntary payment doctrine does not apply because (1) the evidence shows that it lacked the "specific knowledge" necessary for application of the doctrine and **[***61]** (2) its premium payments were not "voluntary" because they were "compelled by law" and because the city's workers' compensation coverage would have immediately lapsed and the city would have been responsible for payment of all claims made during the lapsed period as well as fines, penalties (and possibly liens) assessed against it by the BWC. We do not decide whether the other requirements of the voluntary payment doctrine have been met because, based on a thorough review of the record, we find no evidence that the city made any of the premium payments at issue with full knowledge of the relevant facts.

[*P93] The BWC's claim that the city "knowingly paid any allegedly 'excess premiums'" is based on the testimony of Eduardo Romero, the city's risk manager. Romero began working for the city in 2002. Prior to working for the city, Romero worked for the BWC. Romero testified that when he worked for the BWC he became aware of "BWC studies, actuarial studies" that showed that nongroup-rated employers were subsidizing group-rated employers who were receiving a "humongous discount" and that this was "internal knowledge within the [BWC]." He testified that he "first became aware of the possibility **[***62]** that these rate differences were creating problems for nongroup-rated employers" in the late 1990s. He explained:

> Q. And do you recall precisely how you became aware?
>
> A. I became aware in the '90s from internal discussions that I overheard other people talking about. * * *
>
> Q. * * * Did you understand at the time what the cause of these alleged subsidies was?
>
> A. My understanding was that [the] BWC, in reaction to these formulation of groups, employer groups, in order to get superior discounts to their premiums, were being offset, they were encouraging the formulations of these groups in order to lower the actual costs of Workers' Compensation for a select group of people.

[*P94] He further testified that the "humongous discounts and subsidies" became public knowledge in the early 2000s and that he "remember[ed] reading about it in the media" at that time. Romero testified that he had no "firsthand knowledge" of the impact that group rating had on the city or the basis for the assertion that nongroup-rated employers were subsidizing group-rated employers. He further testified

that he had no "specific discussions" **[**116]** with anyone about these alleged subsidies while he worked at the BWC.

[*P95] Even assuming **[***63]** the knowledge Romero acquired while he was an employee of the BWC could be properly imputed to the city, the BWC presented no evidence that Romero knew that the problems that were being reported in the early 2000s related to nongroup-rated PEC employers like the city. Bravender and Carlson testified that the early studies commissioned by the BWC focused on the effect of group rating on private employers and that it was not until 2004, when the BWC's actuarial section, in conjunction with Mercer Oliver Wyman, analyzed the effect of the group-rating program on private employers and PECs, or 2006, when Pinnacle issued its study, that any actuarial study specifically addressed whether premium inequity existed between group-rated and nongroup-rated public employers under the BWC's group-rating plan. The BWC did not offer any evidence in its opposition to the city's summary judgment motion or its own motion for summary judgment that the results of these later studies were available to Romero or the city at time the city made any of the premium payments at issue.[17] Accordingly, the trial court did not err in rejecting the BWC's voluntary payment defense.

4. Evidence on the [*64] Issue of Liability**

a. Statutory Requirements and Premium Overcharges

[*P96] The BWC argues that even if the trial court did not err in rejecting its affirmative defenses, it still erred in granting summary judgment to the city on the issue of liability because the city failed to show that there were no genuine issues of material fact that the BWC overcharged the city for its workers' compensation premiums and violated its statutory duties under *R.C. 4123.29*, *4123.34* or *4123.39*.

[*P97] *R.C. 4123.39* provides, in relevant part:

> The administrator of workers' compensation shall determine the amount of money to be contributed under *section 4123.38 of the Revised Code* by the state itself and each county and each taxing district within each county. In fixing the amount of contribution to be made by the county, for such county and for the taxing districts therein, the administrator shall classify counties and other taxing districts into such groups as will equitably determine the contributions in accordance with the relative degree of hazard, and also merit rate such individual counties, taxing districts, or groups of taxing districts in accordance with their individual accident experience so as ultimately to provide for each taxing subdivision contributing an amount sufficient **[***65]** to meet its individual obligations and to maintain a solvent public insurance fund. * * *

[*P98] ***HN17***[↑] Former *R.C. 4123.29(A)(4)(c)* and *4123.34(C)* further require the BWC to "consider an employer group as a single employing entity for purposes of retrospective rating" and to "develop fixed and equitable rules controlling the rating system, which rules shall conserve to each **[**117]** risk the basic principles of workers' compensation insurance."

[*P99] As detailed above, the city presented evidence of numerous actuarial studies and testimony by BWC representatives establishing that under the BWC's group-rating program, group-rated employers received excessive, unwarranted discounts off their workers' compensations premiums and that nongroup-rated employers, including PECs like the city, were charged higher premiums to make up for and subsidize those discounts. The evidence showed that during the time period at issue, the BWC used an inflated off-balance factor in calculating workers' compensation premiums for both private and PEC employers, resulting in higher premiums for all nongroup-rated employers, including the city. The city further showed that the BWC's use of an inflated off-balance factor adversely impacted the city's premiums both **[***66]** when it was experience rated (from 1997 to 2002) and when it was retrospectively rated (from 2003 to 2009) because the minium premium it paid as a retrospectively rated employer was a percentage of the experience-rated premium it would have otherwise paid if it were not

[17] The BWC asserts in its brief that Romero testified that he knew prior to January 2002 that *"Cleveland* had 'overpaid' workers' compensation premiums," that he first learned of "*Cleveland's* payment of the allegedly 'excess premiums,'" when he worked for the BWC and that "this issue was 'public knowledge' in the early 2000s." (Emphasis added.) This is not correct. As indicated above, Romero's testimony was much more general and did not establish that he knew in the 1990s or early 2000s that the city, specifically, was being overcharged for its workers' compensation premiums based on the impact of group rating.

retrospectively rated.

[*P100] The city presented evidence that the BWC's group-rating program, as it impacted nongroup-rated PECs, was inequitable and violated Ohio law. In *San Allen*, this court held that the BWC's group-rating program violated former R.C. 4123.29(A)(4)(c) because the BWC's group-rating plans were prospective group-rating plans and that statute by its terms, authorized only "retrospective" group-rating plans. The *San Allen* court also held that, as applied to private employers, the group-rating program was inequitable and unlawful under R.C. 4123.34(C) and that the BWC was unjustly enriched by the premium overcharges it received from class members who were nongroup rated throughout the class period.

[*P101] Bravender, Carlson and Pedrick testified that the same inequities in the group-rating program at issue in *San Allen* with respect to nongroup-rated private employers also existed with respect to nongroup-rated PEC employers like the city — i.e., the **[***67]** difference between the inequities from the group-rating program as applied to private and PEC employers was a matter of degree, not of kind.

[*P102] The city's evidence supports the conclusion that, as applied to nongroup-rated PECs like the city, the BWC's group-rating plan violated R.C. 4123.34(C) and 4123.39 as well as former R.C. 4123.29(A)(4)(c). The BWC's group-rating program violated the mandate under R.C. 4123.34(C) that the BWC "develop fixed and equitable rules controlling the rating system, which rules shall conserve to each risk the basic principles of workers' compensation insurance" and did not result in an "equitabl[e] determin[ation] [of] contributions in accordance with the relative degree of hazard" and "merit rat[ing] * * * in accordance with * * * individual accident experience" as required under R.C. 4123.39.

[*P103] The BWC asserts that it "presented a host of evidence" on summary judgment that "disputed whether Cleveland was overcharged" and "rebutted whether the Bureau violated various provisions of the Ohio Revised Code and * * * was unjustly enriched"; however, the record reflects otherwise. The BWC did not present any evidence on summary judgment challenging the actuarial studies and testimony from Bravender, Carlson and Pedrick regarding **[***68]** the inequities in the group-rating program as applied to both private employers and PECs. Further, the BWC did not dispute that it used an inflated off-balance factor in order to fund excessive **[**118]** discounts given to group-rated employers under its group-rating program, resulting in higher premiums for nongroup-rated employers.

[*P104] Although the BWC offered deposition testimony from its expert, Josephson, in opposing the city's motion for summary judgment, that testimony did not demonstrate the existence of any genuine issue of material fact on the issue of liability. Josephson estimated that the city paid $2.7 million in higher premiums from 1997 to 2009 as a result of the BWC's group-rating program. Josephson testified that he was not asked to evaluate whether the city was "overcharged" for its workers' compensation premiums during the time period at issue and, therefore, did not formulate an opinion on that issue. He did not consider whether the city's premiums during this time period were "fair" given the impact of group rating and had no opinion as to whether the rating system violated Ohio law as applied to nongroup-rated PEC employers. Josephson testified that his opinions would not **[***69]** change even if the BWC "may not have followed statutory requirements in this case related to Cleveland."

b. "Unjust" Enrichment

[*P105] The BWC also argues that the trial court applied an "incorrect standard" when ruling on the parties' motions for summary judgment, failing to "balance the equities" and consider the "totality of the circumstances." It contends that a genuine issue of material fact exists as to whether the BWC was "actually unjustly enriched" because (1) the "alleged premium overcharges" in this case were "not nearly of the same magnitude as those experienced by private employers" in *San Allen* and did not "fall outside the general variability of rate-making" and (2) there were "material factual disputes" regarding the "calculation of the alleged premium overcharges" that precluded summary judgment on the city's unjust enrichment claim.

[*P106] HN18[↑] "'Enrichment alone'" is insufficient to "'invoke the remedial powers of a court of equity.'" Chesnut v. Progressive Cas. Ins. Co., 166 Ohio App. 3d 299, 2006-Ohio-2080, 830 N.E.2d 751, ¶ 30 (8th Dist.), quoting Directory Servs. Group v. Staff Builders Internatl., 8th Dist. Cuyahoga No. 78611, 2001 Ohio App. LEXIS 3108 (July 12, 2001). Because the city sought equitable relief based upon a claim of unjust enrichment, it was required to "go further and show that under the circumstances," it has "'superior equity'" so that "'it would be unconscionable for [the BWC] to

retain **[***70]** the benefit.'" *United States Health Practices, Inc. v. Blake, 10th Dist. Franklin No. 00AP-1002, 2001 Ohio App. LEXIS 1291,*6 (Mar. 22, 2001)*, quoting *Katz v. Banning, 84 Ohio App.3d 543, 552, 617 N.E.2d 729 (10th Dist.1992)*. This requires consideration of "the sum of [the] circumstances, as well as the equities involved in the case." *United States Health Practices at *8*.

[*P107] As this court explained in *San Allen*, ***HN19***[↑] a plaintiff is not always entitled to equitable restitution, as a matter of law, whenever funds are unlawfully collected and retained by the state. "Equity * * * demands that, in fashioning an equitable remedy, the court look at the full picture." *San Allen, 2014-Ohio-2071, 11 N.E.3d 739, at ¶ 174*.

> [W]here the state collects and retains funds to which the state is not lawfully entitled, those funds must be returned as the equities require. * * * In certain cases, the unlawful collection and retention of funds by the state may, in and of itself, constitute a sufficient basis for an award of equitable restitution, i.e., where the only issue is whether the collection and retention of funds by the state was unlawful and there is no dispute, **[**119]** once the state's conduct is determined to be unlawful, that (1) the state was unjustly enriched by its unlawful collection and retention of funds and (2) the equities require return of the funds. *See, e.g., State ex rel. Minutemen [, Inc. v. Indus. Comm., 62 Ohio St.3d 158, 161, 580 N.E.2d 777 (1991)]*; *Arth Brass [& Aluminum Castings, Inc. v. Conrad], 104 Ohio St. 3d 547, 2004-Ohio-6888, 820 N.E.2d 900*; **[***71]** *Judy [v. Ohio Bur. of Motor Vehicles], 100 Ohio St. 3d 122, 2003-Ohio-5277, 797 N.E.2d 45*. In others, * * * where there are a number of equitable considerations bearing on whether the state was unjustly enriched and, if so, the extent to which it was unjustly enriched, those considerations must be weighed and a determination of unjust enrichment made before a court may properly award equitable restitution on a unjust enrichment claim.

San Allen at ¶ 126.

[*P108] As this court stated in *San Allen*, we recognize that rate-making is "not an exact science." *San Allen at ¶ 105, fn. 21*. If the only evidence in the record was that the BWC had charged the city 2.2% to 4% in higher premiums than it arguably should have charged the city due to the "general variability of rate-making," perhaps it would be that the equities would not require restitution of the overcharges. However, that is not this case. In determining whether to award equitable relief and, if so, the amount of restitution to be awarded, the trial court was required to consider the "totality of the circumstances." This is not a case in which employers were overcharged for their premiums due to a difference of opinion in actuarial assumptions or because the loss experience turned out to be better or worse than **[***72]** expected — elements within the "general variability of rate-making." In this case, the "totality of the circumstances" included undisputed evidence that the BWC knowingly overcharged nongroup-rated PEC employers, including the city, for their workers' compensation premiums in order to fund excessive premium discounts for group-rated employers. Undisputed evidence further established that the BWC continued to operate its inequitable rating system long after its actuarial consultants warned the BWC that the group-rating program was creating substantial premium inequity between group-rated and nongroup-rated employers. The trial court properly considered the "totality of the circumstances" in concluding that the BWC had been unjustly enriched and granting summary judgment in favor of the city on the issue of liability.

[*P109] The parties' factual disputes regarding the "calculation of the alleged premium overcharges," including the BWC's challenges to Schwartz's assumptions and methodology and its claim that the minimum premiums the city paid during 2003-2009 did not fully compensate the BWC for the risk the city transferred to the BWC under its retrospective-rating plan, did not preclude summary **[***73]** judgment as to liability. Those factual disputes involved the extent to which the city was entitled to equitable restitution on its unjust enrichment claim — as to which the trial court denied summary judgment.

[*P110] The record reflects that the city met its burden on summary judgment on the issue of liability. The city showed that there was no genuine issue of material fact that it conferred benefits on the BWC in the form of excessive premium payments and that the BWC had knowledge of the benefits conferred. If nongroup-rated employers had not paid the excessive premiums they were charged, the BWC would have experienced a shortfall in the total premiums collected due to the large discounts **[**120]** it gave group-rated employers under its group-rating plan.

[*P111] The city also showed that there was no genuine issue of material fact that these benefits were

conferred under circumstances in which it would be unjust to allow the BWC to retain them.

[*P112] Once the city met its burden, the burden shifted to the BWC. However, the BWC did not meet its reciprocal burden. It did not point to any evidence of specific facts demonstrating the existence of a genuine issue of fact for trial on these issues.

[*P113] Accordingly, **[***74]** the trial court did not err in entering summary judgment in favor of the city as to liability. The BWC's second assignment of error is overruled.

C. Trial on Restitution

1. Motion in Limine to Exclude Evidence of Affirmative Defenses

[*P114] In its third assignment of error, the BWC contends that the trial court abused its discretion by denying the BWC an opportunity to assert at trial that Ohio Adm.Code 4123-17-17(C), the statute of limitations and the voluntary payment doctrine barred or limited the restitution the city could properly recover on its unjust enrichment claim.

[*P115] Prior to trial, the city filed a motion in limine to preclude the BWC from presenting evidence of and arguing at trial any of the affirmative defenses it had relied upon in opposing the city's motion for summary judgment. The trial court granted the motion, indicating that the BWC would not be permitted to "relitigat[e] the issue [of liability] with respect to the affirmative defenses" at trial. The BWC then filed written offers of proof setting forth anticipated testimony from Romero and other evidence it would have presented at trial related to five affirmative defenses: (1) the voluntary payment doctrine, (2) Ohio Adm.Code 4123-17-17(C), (3) the statute of limitations, (4) laches **[***75]** and (5) "equitable discretion when examining the totality of the circumstances."[18]

[*P116] HN20[↑] We review a trial court's ruling on a motion in limine for abuse of discretion. *See, e.g.,* Cohen & Co. v. Breen, 8th Dist. Cuyahoga No. 100775, 2014-Ohio-3915, ¶ 18. A trial court abuses its discretion when its decision is unreasonable, arbitrary or unconscionable. The trial court did not abuse its discretion in granting the city's motion in limine in this case.

[*P117] The trial court had already considered and rejected each of the affirmative defenses at issue when ruling on the parties' cross-motions for summary judgment. For the reasons explained above, these affirmative defenses were not meritorious and the trial court did not err in granting summary judgment in favor of the city on liability notwithstanding these affirmative defenses. Accordingly, the trial court did not abuse its discretion in granting the city's motion in limine. The BWC's third assignment of error is overruled.

2. Manifest Weight of the Evidence

[*P118] The BWC's fourth and fifth assignments of error involve challenges based on the manifest weight of the evidence. In its fourth assignment of error, the BWC contends that the trial court's denial of its motion to dismiss the city's claim under *Civ.R. 41(B)(2)* was against **[**121]** the manifest **[***76]** weight of the evidence because Schwartz's testimony was not based on "actuarially sound assumptions." In its fifth assignment of error the BWC contends that the trial court's restitution award should be reversed as against the manifest weight of the evidence because (1) the premium overcharges were not material and did not "fall outside the general variability of rate-making so as to require the BWC to pay restitution," (2) the BWC's rate-making process is prospective and adjustments due to changes in the ratemaking process are applied to future premiums, not as refunds related to prior periods, (3) Schwartz failed to use actuarially sound principles in calculating the amount of the premium overcharges and (4) the trial court's restitution award does not account for the fact that, during the years the city was retrospectively rated, the minimum premiums the city paid did not fully compensate the BWC for the risk it transferred to the BWC. None of these arguments is persuasive.

[*P119] HN21[↑] Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." State v. Thompkins, 78 Ohio St.3d 380, 387, 1997- Ohio 52, 678 N.E.2d 541 (1997), quoting *Black's Law Dictionary* 1594 **[***77]** (6th Ed.1990). When conducting a manifest weight review,

[18] On appeal, the BWC does not contend that the trial court erred in granting the motion with respect to its defenses of laches and "equitable discretion when examining the totality of the circumstances."

this court reviews the entire record, "'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.'" *Eastley v. Volkman, 132 Ohio St. 3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20*, quoting *Tewarson v. Simon, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001)*. However, in weighing the evidence, we "must always be mindful of the presumption in favor of the finder of fact." *Eastley at ¶ 21*, citing *Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 10 Ohio B. 408, 461 N.E.2d 1273 (1984), fn. 3*. "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." *Seasons Coal at 80, fn. 3*, quoting *5 Ohio Jurisprudence 3d, Appellate Review, Section 60*, at 191-192 (1978).

[*P120] First, we already considered and rejected the BWC's materiality and "rate-making" arguments in reviewing the BWC's second assignment of error.

[*P121] With respect to the claimed deficiencies in Schwartz's testimony, the BWC stipulated that Schwartz was qualified as an actuarial expert. The BWC did not object to or move to exclude any of his testimony as unreliable under *Evid.R. 702(C)*. Indeed, the **[***78]** BWC specifically stated, when arguing its *Civ.R. 41(B)(2)* motion, that it was not seeking to strike Schwartz's testimony.

[*P122] The methodology Schwartz applied in this case was similar to the approach he used when calculating the restitution due the plaintiff class in *San Allen*. In that case, this court held that the BWC's arguments regarding the claimed deficiencies in Schwartz's opinions and calculations did not preclude the trial court from relying on that testimony in determining the amount of restitution to be awarded. *San Allen, 2014-Ohio-2071, 11 N.E.3d 739, at ¶ 143-145*. We reach the same conclusion here.

[*P123] At trial, Schwartz and Josephson offered two competing methodologies for determining the amount of restitution, if any, to be awarded the city on its unjust enrichment claim. Each expert's opinions **[**122]** and calculations (and alleged deficiencies in those opinions and calculations) were explored at length by the parties on direct and cross-examination.

[*P124] As detailed above, the BWC criticized Schwartz's approach because Schwartz used a single off-balance factor of 1.01 for all years and failed to take into account the BWC's implementation of the group break-even factor and reduction of the maximum credibility when calculating the impact of group rating on **[***79]** the city's premiums. Schwartz testified that he selected a single value of 1.01 — the off-balance factor used by the BWC in 2010 — for all years when calculating premium overcharges because 2010 was the year closest to the historical period at issue and "actuaries often rely on the data closest to what you're trying to estimate." He testified that if he had used the uniform off-balance factor used by the BWC in 2011 or 2012 (or an average of the uniform off-balance factors used in 2010 to 2012), the amount of the overcharge would have been higher. He testified that the average of the uniform off-balance factors for all six years after rate reform was put into effect (i.e., from 2010 to 2015) was 1.018, supporting his opinion that 1.01 is "a pretty good actuarial value."

[*P125] Schwartz testified that he did not include a "break-even factor" or a credibility limit of 77 percent in his calculations because the break-even factor and limit on maximum credibility were meant to increase the premiums paid by group employers and were not intended to impact the premiums paid by nongroup-rated employers "in any material way." He claimed that because neither a break-even factor nor a credibility limit **[***80]** of 77 percent was used at any point during 1997-2009, such elements would not have an effect on the experience modifiers used during that time period.

[*P126] The city, in turn, criticized Josephson's inclusion of a group break-even factor and a 77 percent limit on credibility in his calculations of the impact of group rating on the city's premiums because they did not exist prior to 2010. The city also criticized the assumptions Josephson used in calculating his recalculated off-balance factors. The city pointed out that the average of Josephson's recalculated off-balance factors for 1997 to 2009 was 1.023, higher than both the uniform off-balance factor the BWC adopted in 2010 and the 1.018 average of the uniform off-balance factors the BWC had adopted for the six years since 2010. The city also pointed out that Josephson's recalculated off-balance factors exceeded the 1.01 off-balance factor for 9 of the 13 years for which he calculated an off-balance factor. Further, due to missing data, Josephson used a different method to recalculate the uniform off-balance factors for years 1997 to 2002 than he did for 2003 to 2009. To recalculate off-balance

factors for 1997 to 2003, Josephson used **[***81]** an average of data from 2006 and 2009 to create a single "selected factor" that was used to recalculate off-balance factors for 1997 to 2002. If Josephson had used an average of the data from all of the years for which data was available (2003 to 2009) when calculating the off-balances for 1997 to 2002, the recalculated off-balance factors would have been lower and the premium impact for those years would have been higher than what Josephson calculated. Josephson testified that his assumptions were actuarially sound and that he used the data from 2006 and 2009 to recalculate off-balance factors for 1997 to 2002 because he believed they would be "a better measure" for the years he was trying to project than data from other years.

[*P127] As the foregoing demonstrates, Schwartz and Josephson disagreed both as to the assumptions and methodology to be **[**123]** used in calculating the effect of group rating on the city's premiums. Nevertheless, each expert was deemed to be qualified to opine upon the actuarial issues in this case. Each party presented a case for why its expert's approach was the better approach. The trial court was in the best position to determine the credibility of the witnesses and the **[***82]** weight to be given their testimony, including their proposed calculation of the restitution amount. *Kalain v. Smith, 25 Ohio St.3d 157, 162, 25 Ohio B. 201, 495 N.E.2d 572 (1986)*.

[*P128] The BWC also contends the trial court's restitution award was against the manifest weight of the evidence because it "ignores" the fact that the city's premiums were "too low" during the years it was retrospectively rated.

[*P129] In *San Allen*, the trial court was ordered to modify its restitution award to account for subsidy benefits class members who were group rated during part of the class period received during the years in which they were group rated. The court held that because it was "the group-rated employers (including, for the years in which they were group rated, class members who participated in the BWC's group rating plan) who truly benefitted under the BWC's group rating plan," i.e., "receiving a windfall in the form of substantially reduced premiums subsidized by nongroup-rated employers," "[c]onsideration of the 'totality of the circumstances' and 'sum of the equities'" required the trial court to account for those subsidy benefits when determining the amount of restitution to be awarded to the plaintiff class. *San Allen at ¶ 135-136*. In *San Allen*, unlike in this case, certain **[***83]** of the plaintiffs had directly benefitted from the very unlawful group-rating system from which they sought equitable restitution. The court held that those benefits had to accounted for when determining the amount of restitution to be awarded the plaintiff class.

[*P130] This case is different. As Carlson testified, the "shortcomings" in the BWC's retrospective-rating plan "had nothing to do with group rating." The fact that, for a period of time, the BWC did a poor job of estimating costs under its retrospective- rating plan and, in hindsight, allegedly charged the city lower minimum premiums than it should have been charged was a factor the trial court could have considered in determining an appropriate restitution award. However, on the record before us, we cannot say that the trial court, when considering the "totality of the circumstances" and equities in this case, was required to account for those alleged "undercharges" when determining the amount of restitution to award the city.

[*P131] After reviewing the entire record, we find that the trial court's $4,524,392 restitution award was supported by substantial competent, credible evidence and was not against the manifest weight of the evidence. **[***84]** This is not a case in which the trial court's judgment created "such a manifest miscarriage of justice" that it must be reversed. Accordingly, the BWC's fourth and fifth assignments of error are overruled.

[*P132] Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.*

EILEEN A. GALLAGHER, ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, J., and ANITA LASTER MAYS, J., CONCUR

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EXHIBIT - 6

City of Cleveland v. Ohio Bureau of Workers' Comp.

Supreme Court of Ohio

September 10, 2019, Submitted; February 5, 2020, Decided

No. 2018-0572

Reporter
159 Ohio St. 3d 459 *; 2020-Ohio-337 **; 152 N.E.3d 172 ***; 2020 Ohio LEXIS 323 ****; 2020 WL 557311

THE CITY OF CLEVELAND, APPELLEE v. OHIO BUREAU OF WORKERS' COMPENSATION, APPELLANT.

Prior History: APPEAL from the Court of Appeals for Cuyahoga County, No. 105604, 2018-Ohio-846, 109 N.E.3d 84. **[****1]**

City of Cleveland v. Ohio Bureau of Workers' Comp., 2018-Ohio-846, 2018 Ohio App. LEXIS 897, 109 N.E.3d 84, 2018 WL 1217430 (Ohio Ct. App., Cuyahoga County, Mar. 8, 2018)

Disposition: Judgment reversed, trial-court orders vacated, and cause remanded.

Core Terms

BWC, premiums, restitution, common pleas, funds, workers' compensation, equitable, group-rated, remedies, majority opinion, equitable claim, legal claim, immunity, particular fund, collected, traced, rated

Case Summary

Overview

HOLDINGS: [1]-A public employer's claim against the Ohio Bureau of Workers' Compensation (BWC) for the reimbursement of alleged excessive premiums was a legal one, not an equitable one, and should have been filed in the Court of Claims because under R.C. 4123.30, the premiums went into a general insurance fund and became commingled with the premiums from other employers; furthermore, as the money had been paid out as compensation to injured workers or refunds to covered employers, the money allegedly overpaid was no longer in the BWC's possession and could not be recovered by a suit in equity.

Outcome

The court reversed the decision of the court of appeals, vacated all orders by the trial court in the matter, and remanded the case to the trial court with instructions to dismiss the cause for lack of subject-matter jurisdiction.

LexisNexis® Headnotes

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements for Adequate Coverage

HN1 **Actions Against Employers, Statutory Requirements for Adequate Coverage**

Ohio requires public employers that are not self-insured employers to contribute to the public insurance fund the amount of money determined by the administrator of workers' compensation. R.C. 4123.38. Employers can choose from a selection of plans. The Ohio Bureau of Workers' Compensation offers both individual-and group-rated plans.

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements for Adequate Coverage

HN2 **Actions Against Employers, Statutory Requirements for Adequate Coverage**

Pursuant to R.C. 4123.29(A), the administrator of the Ohio Bureau of Workers' Compensation (BWC), with the approval of the board of directors, classifies occupations

or industries with respect to degree of hazard and risks and sets the premiums that employers must pay into the state insurance fund for workers' compensation coverage each year. The BWC deposits these premiums into a single state insurance fund (it does not maintain a separate account for each employer), and it pays compensation benefits associated with work-related accidents from that fund. With the exception of a required surplus to maintain solvency, R.C. 4123.321 requires the BWC to establish a procedure for returning excess premiums to participating employers in order to maintain a revenue-neutral fund.

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements for Adequate Coverage

HN3[] Actions Against Employers, Statutory Requirements for Adequate Coverage

In 1989, the General Assembly amended R.C. 4123.29 to require the Ohio Bureau of Workers' Compensation to develop and implement a plan that groups, for rating purposes, employers, and pools the risk of the employers within the group.

Civil Procedure > Preliminary Considerations > Equity > Relief

Governments > State & Territorial
Governments > Claims By & Against

HN4[] Equity, Relief

Traditionally, the doctrine of sovereign immunity prevented claims against agents of the state for wrongs committed in the course of official duties. However, sovereign immunity does not bar claims for equitable relief, only for legal relief.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

Governments > State & Territorial
Governments > Claims By & Against

Civil Procedure > Preliminary Considerations > Equity > Relief

HN5[] Subject Matter Jurisdiction, Jurisdiction Over Actions

In 1975, the General Assembly waived the state's sovereign immunity in most instances, R.C. 2743.02, and simultaneously created the Court of Claims, which has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in R.C. 2743.02, R.C. 2743.03(A)(1). Accordingly, the state is now subject to being sued for legal claims in the Court of Claims. However, because the doctrine of sovereign immunity never barred equitable claims, which have always been cognizable against the state, courts of common pleas continue to have original jurisdiction over them pursuant to *Ohio Const. art. I, § 16*, and *Ohio Const. art. IV, § 4(B)* and R.C. 2305.01.

Civil Procedure > Preliminary Considerations > Equity > Relief

Civil Procedure > Remedies

HN6[] Equity, Relief

Restitution can be either legal or equitable relief, depending on the basis for the plaintiff's claim and the nature of the underlying remedies sought. Historically, a legal claim for restitution was one in which the plaintiff could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him. An equitable claim for restitution was one in which money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. The United States Supreme Court has recognized that most claims are legal: Almost invariably suits seeking to compel the defendant to pay a sum of money to the plaintiff are suits for money damages, as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty. However, in a few cases, the Ohio Supreme Court has found suits for the recovery of funds to be claims in equity.

Civil Procedure > Remedies > Damages

Civil Procedure > Remedies

HN7[] **Remedies, Damages**

Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.

Civil Procedure > Preliminary Considerations > Equity > Relief

Civil Procedure > Remedies

HN8[] **Equity, Relief**

The United States Supreme Court has provided clear guidance regarding what constitutes equitable relief. In 2016, the Court explained that a claim sounded in law if it sought to recover from a defendant's general assets rather than specifically identified funds that remain in the defendant's possession. The Court further explained that equitable remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing rather than a right to recover a sum of money generally out of the defendant's assets. The Court stated that if there is not a specifically identifiable fund, or traceable items on which the money from the fund was spent, to seize, the plaintiff could not attach the defendant's general assets instead. In such a case, the plaintiff had merely a personal claim against the wrongdoer—a quintessential action at law.

Headnotes/Summary

Headnotes

R.C. 2743.03(A)—Employer's claim against Bureau of Workers' Compensation is a legal claim, not an equitable claim, and thus, it should have been filed in the Court of Claims.

Counsel: Barbara A. Langhenry, Cleveland Director of Law, and Lisa A. Mack, Assistant Director of Law; and Calfee, Halter & Griswold, L.L.C., Maura L. Hughes, Mitchell G. Blair, and Alexander B. Reich, for appellee.

Dave Yost, Attorney General, Benjamin M. Flowers, Deputy Solicitor, Michael J. Hendershot, Chief Deputy Solicitor, and Stephen P. Carney, Deputy Solicitor; and Taft, Stettinius & Hollister, L.L.P., James D. Abrams, and Michael J. Zbiegien Jr., for appellant.

Garry E. Hunter, urging affirmance for amicus curiae, the Ohio Municipal League.

Judges: O'CONNOR, C.J. KENNEDY, FRENCH, FISCHER, DEWINE, and STEWART, JJ., concur. DONNELLY, J., dissents, with an opinion.

Opinion by: O'CONNOR

Opinion

[*459] [*172] O'CONNOR, C.J.**

[P1]** In this appeal, we consider which court has jurisdiction over an employer's claim against the Ohio Bureau of Workers' Compensation ("BWC") for the reimbursement of alleged excessive premiums paid by the employer. Specifically, **[***173]** appellee, the city of Cleveland, alleges that appellant, **[****2]** the BWC, charged the city inflated premiums for workers' compensation insurance in order to make up for discounts the BWC provided other employers. Cleveland raised this claim in a complaint it filed in the Cuyahoga County Court of Common Pleas. We hold that this is a legal claim, not an equitable one, and therefore the Court of Claims has exclusive jurisdiction over this case. Accordingly, we reverse the judgment of the Eighth District Court of Appeals, vacate all orders of the Cuyahoga County Court of Common Pleas in this case, and remand the cause to the common pleas court for an order of dismissal.

I. FACTS AND PROCEDURAL BACKGROUND

[P2]** Cleveland, as an employer, pays the BWC premiums for workers' compensation insurance. The BWC is then responsible for the distribution of workers' compensation benefits to city employees who suffer workplace injuries. In this case, Cleveland challenges the legality of premiums that the BWC charged over several years. According to Cleveland, the BWC undercharged the group-rated employers and then overcharged the individually rated employers, such as Cleveland, to make up the difference. The narrow issue before us is whether the case was properly filed **[****3]** in the court of common pleas or whether it should have been filed in the Court of Claims, which has exclusive jurisdiction over certain claims against state entities such as the BWC. *R.C. 2743.03(A)*.

[*460] A. The Ohio workers' compensation system

[P3]** *HN1*[↑] Ohio requires public employers that are not self-insured employers to contribute to the public insurance fund "the amount of money determined by the administrator of workers' compensation." *R.C. 4123.38*. Employers can choose from a range of plans. The BWC offers both individual-and group-rated plans.

[P4]** *HN2*[↑] Pursuant to *R.C. 4123.29(A)*, the administrator of the BWC, with the approval of the board of directors, classifies occupations or industries with respect to degree of hazard and risks and sets the premiums that employers must pay into the state insurance fund for workers' compensation coverage each year. The BWC deposits these premiums into a single state insurance fund (it does not maintain a separate account for each employer), and it pays compensation benefits associated with work-related accidents from that fund. With the exception of a required surplus to maintain solvency, *R.C. 4123.321* requires the BWC to establish a procedure for returning excess premiums to participating employers in order to **[****4]** maintain a revenue-neutral fund.

[P5]** Cleveland alleges that it was overcharged by the BWC for more than ten years because the BWC's method for determining premiums was flawed. *HN3*[↑] In 1989, the General Assembly amended *R.C. 4123.29* to require the BWC to develop and implement a plan that "groups, for rating purposes, employers, and pools the risk of the employers within the group." Am.Sub.H.B. No. 222, 143 Ohio Laws, Part II, 3197, 3315-3316. In response to this amendment, the BWC developed group-rated plans. Provided they met certain conditions, employers could elect to join a group-rated plan in which their collective risk was pooled in order to garner better premiums. The employers that chose not to participate in a group-rated plan or that did not meet the required conditions continued to be assessed premiums based upon their individual claim history and risks.

[P6]** The BWC acknowledges that during the years at issue, the discounted premiums **[***174]** it charged employers under the group-rated plan were insufficient to cover the losses attributable to those employers. Because the BWC must maintain a revenue-neutral fund, it had to find a way to recoup that difference. It did so by increasing the "off-balance factor," **[****5]** a factor used in calculating the employers' base rates. Cleveland alleges that this increase resulted in its unjustly being charged excessive premiums.

B. Cleveland files suit

[P7]** In 2013, Cleveland sued the BWC in the Cuyahoga County Court of Common Pleas, asserting a claim of unjust enrichment on the ground that the discounts provided to group-rated employers resulted in the individually rated employers, such as Cleveland, paying excessive premiums. Cleveland sought an order requiring the BWC to disgorge the amount of overpayment along with **[*461]** prejudgment and postjudgment interest. The BWC moved to dismiss the case, arguing that the common pleas court lacked subject-matter jurisdiction over the lawsuit because the city was seeking legal, rather than equitable, remedies, and thus, the Court of Claims had exclusive jurisdiction. The trial court denied the motion to dismiss and eventually granted summary judgment, in part, to Cleveland and ordered a bench trial on the amount of restitution owed to Cleveland due to its payment of inflated premiums.

[P8]** Following the bench trial, the trial court ordered the BWC to pay Cleveland $4,524,392 in restitution, along with postjudgment interest at the statutory **[****6]** rate. The Eighth District Court of Appeals affirmed the judgment on appeal.

[P9]** The BWC sought this court's discretionary review, raising three propositions of law. We accepted jurisdiction over all three, *153 Ohio St.3d 1432, 2018-Ohio-2639, 101 N.E.3d 464*, but because we resolve this case on the first proposition of law, we need not address the other two. The first proposition of law states:

> A claim for overpayment of an amount owed to the State, under a statute that undisputedly requires some payment, and where the amount of alleged overpayment is derived from an estimated damages model rather than a known sum, is a legal claim that must be brought in the Court of Claims.

II. ANALYSIS

[P10]** To determine whether the Court of Claims or the court of common pleas has jurisdiction over Cleveland's claim, we must decide whether the claim is legal or equitable. *Measles v. Indus. Comm., 128 Ohio St.3d 458, 2011-Ohio-1523, 946 N.E.2d 204, ¶ 7*. *HN4*[↑] Traditionally, the doctrine of sovereign immunity prevented claims against agents of the state, such as the BWC, for wrongs committed in the course of official duties. *Scot Lad Foods, Inc. v. Secy. of State, 66 Ohio St.2d 1, 6, 418 N.E.2d 1368 (1981)*. However, sovereign immunity does not bar claims for equitable relief, only

for legal relief. *Ohio Hosp. Assn. v. Ohio Dept. of Human Servs., 62 Ohio St.3d 97, 105, 579 N.E.2d 695 (1991)*. ***HN5***[⬆] In 1975, the General Assembly waived the state's sovereign immunity in most instances, *R.C. 2743.02*, Am.Sub.H.B. No. 800, 135 Ohio Laws, Part **[****7]** II, 869, 883, and simultaneously created the Court of Claims, which has "exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in **[*462]** *section 2743.02*," *R.C. 2743.03(A)(1)*. Accordingly, the state is now subject to being sued for legal claims in the Court of Claims. However, because the doctrine of sovereign immunity never barred equitable claims, which have always **[***175]** been cognizable against the state, courts of common pleas continue to have original jurisdiction over them pursuant to *Article I, Section 16*, and *Article IV, Section 4(B) of the Ohio Constitution* and *R.C. 2305.01*.

[P11]** ***HN6***[⬆] Restitution can be either legal or equitable relief, depending on the basis for the plaintiff's claim and the "nature of the underlying remedies sought." *Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212-213, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002)*. Historically, a *legal claim* for restitution was one in which the plaintiff "'could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him.'" (Emphasis deleted.) *Great-West at 213*, quoting 1 Dobbs, *Law of Remedies*, Section 4.2(1), at 571 (2d Ed.1993). An *equitable claim* for restitution was one in which "money or property identified as belonging in good conscience to the plaintiff could **[****8]** clearly be traced to particular funds or property in the defendant's possession." *Id.*

[P12]** The United States Supreme Court has recognized that most claims are legal: "'Almost invariably * * * suits seeking * * * to compel the defendant to pay a sum of money to the plaintiff are suits for "money damages," as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.'" (First ellipsis sic.) *Id. at 210*, quoting *Bowen v. Massachusetts, 487 U.S. 879, 918-919, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988)* (Scalia, J., dissenting). However, in a few cases, we have found suits for the recovery of funds to be claims in equity.

[P13]** In *Santos v. Ohio Bur. of Workers' Comp.*, injured employees sought to recover money that had been collected from them by the BWC pursuant to a subrogation statute that was subsequently determined to be unconstitutional. *101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441*. We determined that because the subrogation statute was unconstitutional, any collection or retention of moneys was unlawful and therefore the action seeking restitution was "an action to correct the unjust enrichment of the BWC [and sought] the return of specific funds wrongfully collected." *Id. at ¶ 17*. Thus, we concluded that the employees' claim was an equitable claim. **[****9]**

[P14]** In another case, we held that a claim by Medicaid providers seeking monetary relief from the Ohio Department of Human Services, following its implementation of an unlawful administrative rule that reduced reimbursement rates, was an equitable claim. *Ohio Hosp. Assn., 62 Ohio St.3d 97, 579 N.E.2d 695*. **[*463]** In reaching this conclusion, we relied on the following analysis by the United States Supreme Court in *Bowen*:

> ***HN7***[⬆] "Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' D. Dobbs, *Handbook on the Law of Remedies* 135 (1973). * * *
> "* * * Maryland [the plaintiff] is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be."

(Emphasis deleted and ellipses and brackets added.) *Id. at 895*, quoting *Maryland Dept. of Human Resources **[***176]** v. Dept. of Health & Human Servs., 763 F.2d 1441, 1446, 246 U.S. App. D.C. 180 (D.C.Cir.1985)*.

[P15]** In the present case, even if the premiums charged by the BWC violated *R.C. 4123.34(C)*'s mandate that the BWC develop equitable rules for a rating system, as the trial court and the Eighth District determined, rendering its collection of a portion of the money unlawful, Cleveland's claim does not sound in equity.

[P16]** Since we decided *Santos* and *Ohio Hosp. Assn.* ***[****10]***, ***HN8***[⬆] the United States Supreme Court has provided clear guidance regarding what constitutes equitable relief, and that guidance further supports our determination that the claim here is a legal claim. In 2016, the court explained that a claim sounded in law if it sought to recover from a defendant's general assets rather than "specifically identified funds that

remain in the defendant's possession." *Montanile v. Natl. Elevator Industry Health Benefit Plan Bd. of Trustees, 577 U.S. 136, 144-145, 136 S.Ct. 651, 193 L.Ed.2d 556 (2016)*. The court further explained that "[e]quitable remedies 'are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing * * * rather than a right to recover a sum of money generally out of the defendant's assets.' 4 S. Symons, Pomeroy's Equity Jurisprudence § 1234, p. 694 (5th ed. 1941) (Pomeroy)." (Ellipsis sic.) *Id.* at 145. The court stated that if there is not a specifically identifiable fund—or traceable items on which the money from the fund was spent—to seize, "the plaintiff could not attach the defendant's general assets instead." *Id. at 659* In such a case, "[t]he plaintiff had 'merely a personal claim against the wrongdoer'—a quintessential action at law." *Id.* at 146, quoting *Restatement of the Law, Restitution, Section 215(1)*, at 866 (1936).

[P17]** Although the BWC kept track of the amount of Cleveland's premium **[****11]** payments, *R.C. 4123.34(A)*, Cleveland's premiums went into a general insurance **[*464]** fund, *R.C. 4123.30*, i.e., they were not kept separate from payments made by other public employers. Once Cleveland's premium payment was deposited into the fund, it became commingled with the premium payments from other employers. And even if we considered the state insurance fund itself to be a specific fund, Cleveland paid the last funds it seeks to recover in 2009. It is inconceivable how money belonging to Cleveland could "clearly be traced to particular funds or property" in the BWC's possession, *see Great-West, 534 U.S. at 213, 122 S.Ct. 708, 151 L.Ed.2d 635* (Historically, an equitable claim for restitution was one in which "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession"). The BWC has paid that money out as compensation to injured workers or refunds to covered employers. The money allegedly overpaid is no longer in the BWC's possession and cannot be recovered by a suit in equity. Thus, Cleveland's claim sounds in law and must proceed through the Court of Claims, which has exclusive jurisdiction over legal claims against the BWC.

III. CONCLUSION

[P18]** For the foregoing reasons, **[****12]** we reverse the decision of the court of appeals, vacate all orders by the trial court in this matter, and remand the cause to the Cuyahoga County Common Pleas Court with instructions to dismiss the cause for lack of subject-matter jurisdiction.

Judgment reversed, trial-court orders vacated, and cause remanded.

[*177]** KENNEDY, FRENCH, FISCHER, DEWINE, and STEWART, JJ., concur.

DONNELLY, J., dissents, with an opinion.

Dissent by: DONNELLY

Dissent

DONNELLY, J., dissenting.

[P19]** In *Santos v. Ohio Bur. of Workers' Comp., 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, ¶ 17*, this court determined that when the Bureau of Workers' Compensation ("BWC") unlawfully retains funds to which it is not entitled, "an action to correct the unjust enrichment of the BWC" is an equitable claim for restitution. *Santos* remains good law. *See Cirino v. Ohio Bur. of Workers' Comp., 153 Ohio St.3d 333, 2018-Ohio-2665, 106 N.E.3d 41, ¶ 28* (lead opinion citing *Santos* with approval). Yet the majority opinion today determines that an action seeking restitution of funds that the BWC unlawfully collected from the city of Cleveland is not an equitable action. In this case, the majority opinion brushes aside *Santos*, without overruling it, by linking its view of restitution to the view espoused by the United States Supreme Court. *See* majority opinion at ¶ 16, **[*465]** relying on *Montanile v. Natl. Elevator Industry Health Benefit Plan Bd. of Trustees, 577 U.S. 136, 136 S.Ct. 651, 658, 193 L.Ed.2d 556 (2016)*. In doing so, it has essentially determined that a court can never **[****13]** order restitution of money.

[P20]** The majority opinion states, "It is inconceivable how money belonging to Cleveland could 'clearly be traced to particular funds or property' in the BWC's possession * * *." Majority opinion at ¶ 17, quoting *Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002)*. I agree with the statement, but I disagree with the import the majority gives it. If a party can avoid a claim for restitution of money simply by commingling funds, then there will never be a successful claim for restitution of money. The majority opinion doesn't state this position,

but that is the logical extension of its statement. The problem is that in the modern age, most money is not a physical thing but is simply represented by numbers on a page, whether paper or electronic.

[P21]** There is no reason to adopt the untenable position that when money that was unlawfully received cannot be traced to particular funds, restitution is not available. Money is not like most assets—it is intrinsically fungible. When a person seeks the return of $100, he or she never insists that the $100 be the exact same bills possessed previously; any $100 will do just fine—for that matter, so will a check or an electronic transfer. Other assets are different: when a person **[****14]** seeks restitution of a ring, he or she is seeking a specific ring; rings have specific differentiating characteristics, both good and bad. Whereas one hundred dollars is one hundred dollars.

[P22]** The BWC has assets in excess of $28 billion. *See Fiscal Year 2018 Annual Report of the Ohio Bureau of Workers' Compensation*, https://www.ic.ohio.gov/news/annualreport_pdfs/bwc_ic_annual_2018.pdf (accessed Jan. 21, 2020), at 3 [https://perma.cc/2KKQ-DG82]. It does not keep those funds in discernible stacks of bills and coins. That should not render it immune from a claim for restitution of money. The BWC was found to have overcharged Cleveland by $4,524,392, and it has ample funds available from which to make restitution.

[P23]** Cleveland is not seeking damages or any other legal remedy. Cleveland is not seeking one penny more than the $4,524,392 that it was unlawfully overcharged. Based on *Santos, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441*, I conclude that Cleveland's claim is in equity. I **[***178]** would affirm the sound judgment of the court of appeals. Accordingly, I dissent.

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