

STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY EISENBERG and ALL OTHERS  
SIMILARLY SITUATED,

Plaintiff-Appellee/Cross-Appellant,

Docket No. 369632

v

Oakland County Circuit Court

Case No. 2023-200422-CZ

Hon. David M. Cohen

GEORGE W. KUHN DRAINAGE DISTRICT,

Defendant-Appellant/Cross-Appellee,

and

CITY OF ROYAL OAK,

Defendant.

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**DEFENDANT-APPELLANT/CROSS-APPELLEE GEORGE W. KUHN DRAINAGE  
DISTRICT'S COMBINED REPLY AND CROSS-APPELLEE BRIEF**

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**STATEMENT OF CROSS-APPEAL JURISDICTION**

Defendant-Appellant/Cross-Appellee George W. Kuhn Drainage District (“Drainage District”) agrees that the Court has jurisdiction over Plaintiff’s cross-appeal.

**STATEMENT OF QUESTION PRESENTED ON CROSS-APPEAL**

Did the trial court properly dismiss Plaintiff’s claim for “assumpsit,” when Michigan law does not recognize assumpsit as a cause of action, but rather as a remedy available only upon a showing of unjust enrichment?

The Drainage District answers:       Yes.

The trial court would answer:       Yes.

## I. INTRODUCTION

Plaintiff failed to allege facts to show that the Drainage District retained a benefit by how the Drainage District interprets the Great Lakes Water Authority's ("GLWA") bills and then distributes them to the Drainage District's member communities (e.g. Royal Oak, Troy) for payment. The trial court properly dismissed Plaintiff's abolished assumpsit "claim," but erred in denying summary disposition to the Drainage District on Plaintiff's unjust enrichment claim.

As the Drainage District explained in its opening brief, a plaintiff claiming unjust enrichment must allege facts demonstrating that the defendant has been "allowed to profit or enrich [itself] inequitably at [the plaintiff's] expense." *Wright v Genesee Co*, 504 Mich 410, 418; 934 NW2d 805 (2019). Thus, the focus is on whether the defendant has "retain[ed] money or benefits which in justice and equity belong to another." *AFT Michigan v Michigan*, 303 Mich App 651, 677; 846 NW2d 583 (2014).

Here, Plaintiff alleges that "[b]y paying the Stormwater Disposal Overcharges, Plaintiff and the Class have conferred a benefit upon the Drainage District," and that "it would be unfair for the Drainage District to retain the Stormwater Disposal Overcharges under the circumstances." (Appendix 4, Compl, ¶¶ 60-61 (App00060a)). But Plaintiff concedes that the Drainage District has not "retain[ed]" funds paid by its customer communities (e.g. Royal Oak, Troy) toward the GLWA bills, and that it simply remits those funds to GLWA. (See, e.g., Pl's Appellee Br at 14) ("The allegation in this case is not that the GWKDD [the Drainage District] 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.") (citations omitted). Plaintiff claims that the portion of GLWA's bills that the Drainage District allocates to Royal Oak is "excessive" and "unreasonable," but that does not demonstrate the retention of any benefit by *the Drainage District*. On the contrary, Plaintiff does not dispute that when the Drainage District collects money from its member communities to

pay GLWA’s bills, the money goes to GLWA. Thus, by definition, the Drainage District is not unjustly enriched by how GLWA’s bills are addressed by the Drainage District and its member communities.

The cases that Plaintiff cites involving alleged excessive utility charges are distinguishable because in those cases the municipality itself retained the funds at issue. See *Youmans v Bloomfield Township*, 336 Mich App 161, 219; 969 NW2d 570 (2021); *Trahey v City of Inkster*, 311 Mich App 582, 595; 876 NW2d 582 (2015). That is not the case here. Because there are no allegations that the Drainage District has been unjustly enriched by the way it allocates GLWA’s bills, the trial court should have dismissed that claim.

Turning to Plaintiff’s cross-appeal, Plaintiff argues that assumpsit provides an entirely separate remedy for an “unlawful government exaction.” (Pl’s Cross-Appeal Br at 9). But, assumpsit is no longer recognized as a cause of action in Michigan. See *Midwest Valve & Fitting Co v City of Detroit*, 347 Mich App 237; \_\_\_ NW2d \_\_\_ (2023), *aff’d on other grounds* \_\_\_ Mich \_\_\_; 2024 WL 5227579 (2024). As this Court just recently confirmed, “[a]ssumpsit has been abolished as a cause of action, and assumpsit claims are simply a subset of unjust-enrichment claims.” *Allen v Michigan State Univ*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_; 2024 WL 4982523, \*14 (2024); accord *Nofar v City of Novi*, unpublished opinion of the Court of Appeals, issued December 17, 2024 (Docket No. 363356), 2024 WL 5148061, \*8, \*13 (in a putative class action challenging city’s water and sewer rates, opining “plaintiff’s assumpsit claims cannot stand on their own” and affirming dismissal of all three assumpsit counts, while also affirming dismissal of plaintiff’s unjust enrichment claim because “plaintiff failed to overcome the presumption of

reasonableness with regard to the water and sewer rates”).<sup>1</sup> As a result, Plaintiff’s cross-appeal must be rejected. The trial court’s dismissal of that claim should be affirmed.

## **II. COUNTER-STATEMENT OF FACTS ON CROSS-APPEAL**

### **A. Plaintiff’s class action complaint seeks millions of dollars in damages based on an alleged stormwater overcharge theory.**

Plaintiff acknowledges in his appellee brief that “[t]he Drainage District accurately describes Plaintiff’s factual allegations in the Complaint.” (Pl’s Appellee Br at 16). Plaintiff’s class action complaint alleges that GLWA “charges the Drainage District” to dispose of sewage flows “based on a formula” that includes a percentage allocated “to the costs to treat stormwater flows” from the Drainage District’s service area, and that the Drainage District, “in turn, allocates” those costs “among all of the municipalities in the district,” including the city of Royal Oak. (Appendix 4, Compl, ¶¶ 16-17, ¶ 20 (App00051a, 00052a)).<sup>2</sup> Royal Oak then “passes on that cost” to its ratepayers to “recover” the costs for GLWA’s bills. (*Id.*, ¶ 19 (App00052a)).

Plaintiff alleges that the Drainage District improperly reallocates a portion of GLWA’s bills to stormwater flows, causing Royal Oak to pay a larger portion of GLWA’s bills because Royal Oak’s stormwater contribution percentage is higher than its sanitary contribution percentage. (*Id.*, ¶¶ 25-26, ¶ 28 (App00053a-App00055a)). At the same time, Plaintiff alleges that other communities, such as the city of Troy, are undercharged as to their contribution to GLWA’s bills because, for example, Troy’s stormwater contribution percentage is lower than its sanitary contribution percentage. (*Id.*, ¶¶ 25-32 (App00053a-App00055a); see also Exhibit 6 to Plaintiff’s complaint (App00096a)).

In short, according to Plaintiff’s complaint, Drainage District communities like Royal Oak

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<sup>1</sup> Unpublished opinions are attached as Exhibit 1 to this brief.

<sup>2</sup> Unless otherwise noted, appendix references are to the Drainage District’s principal appendix.

whose stormwater contribution percentage is greater than their sanitary contribution percentage pay too much toward GLWA's bills, which benefits Drainage District communities like Troy whose stormwater contribution percentage is less than their sanitary contribution percentage thus such communities, in turn, pay too little toward GLWA's bills.

But what Plaintiff's complaint does *not* allege is that *the Drainage District* itself retains any benefit by how it interprets GLWA's bills and distributes them among its customer communities so that GLWA's bills are paid. On the contrary, Plaintiff's own allegations show that the Drainage District simply remits the funds it receives for the GLWA bills *to GLWA*. Yet, Plaintiff's complaint seeks damages from the Drainage District in excess of \$7 million on a theory of "unjust enrichment," consisting of the amount he claims the Drainage District "overcharged" Royal Oak dating back to May 18, 2017, and that Royal Oak subsequently chose to "overcharge" its individual ratepayers. (Compl, ¶ 33, ¶ 37 (App00056a)).

**B. The trial court dismissed Plaintiff's claim for "assumpsit," but permitted his unjust enrichment claim to proceed.**

Plaintiff's complaint included two counts against the Drainage District: (1) assumpsit (Count I); and (2) unjust enrichment (Count II). On July 25, 2023, the Drainage District filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). (Appendix 5, App00112a). In seeking dismissal of Plaintiff's assumpsit claim, the Drainage District argued that Michigan no longer recognizes "an independent cause of action for assumpsit." (*Id.* at 13-14 (App00129a), citing *Midwest Valve & Fitting Co v City of Detroit*, 347 Mich App 237, 251; \_\_\_ NW2d \_\_\_ (2023), *aff'd* on other grounds \_\_\_ Mich \_\_\_; 2024 WL 5227579 (2024)). As for Plaintiff's "unjust enrichment" claim, the Drainage District argued that Plaintiff failed to "allege the Drainage District retained a benefit as to the Alleged Stormwater Overcharge." (*Id.* at 14-15 (App00130a)).

Plaintiff responded to the Drainage District’s motion on January 9, 2024. (Appendix 6, App00413a). In his response, Plaintiff argued that he could maintain a claim for assumpsit, but did not address the Drainage District’s unjust enrichment argument.

On January 17, 2024, the Drainage District filed a reply brief (Appendix 7, App00508a), in which it reiterated that assumpsit is not a cause of action, and that Plaintiff’s unjust enrichment claim must be dismissed under MCR 2.116(C)(8) because “there is no allegation that the Drainage District retains a benefit by how the Drainage District interprets GLWA’s bills and then distributes GLWA’s bills to the Drainage District’s customer communities so that the Drainage District’s GLWA bills may be paid.” (*Id.* at 2 (App00512a)).

After a hearing on January 24, 2024 (Appendix 3, App00011a), the trial court agreed with the Drainage District that assumpsit has been abolished as a cause of action under Michigan law, and so it dismissed that count. (*Id.* at 33 (App00043a)). But the court allowed the unjust enrichment claim to proceed, despite acknowledging that the Drainage District remits the funds it receives for the GLWA bills to GLWA. (*Id.* at 31-32 (App00041a-00042a)) (“The Drainage Commission [sic] 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.”).

The trial court entered its order on January 24, 2024 (Appendix 1 (App00001a)). On July 10, 2024, this Court granted the Drainage District’s application for leave to appeal challenging the trial court’s unjust enrichment ruling, and Plaintiff filed a cross-appeal challenging the trial court’s dismissal of his assumpsit count.

### **III. REPLY ARGUMENT**

Plaintiff’s brief confirms that he is not claiming that the Drainage District retains funds based on how it allocates GLWA’s bills among its member communities so that GLWA’s bills are paid. Rather, Plaintiff’s claim is that the Drainage District’s method of allocation results in some

communities, like Royal Oak, paying too much toward GLWA's bills, while others pay too little. As Plaintiff puts it, the Drainage District "accurately describes Plaintiff's factual allegations" when it says that "[t]he 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.") (Pl's Appellee Br at 15-16, quoting 1/24/24 Hrg Tr at 9, Appendix 3 (00019a)).

Under established case law, that does not give rise to a claim for unjust enrichment. As this Court has repeatedly recognized, a claim for unjust enrichment fails if there is no "retention of [a] benefit" received from the plaintiff. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003); *AFT Michigan*, 303 Mich App at 677 ("Unjust enrichment of a person occurs when he has and *retains money or benefits which in justice and equity belong to another.*") (emphasis added).<sup>3</sup>

Plaintiff nevertheless argues that "unjust enrichment does not require a showing that the defendant retained the benefit if its initial 'receipt' was wrongful" (Pl's Appellee Br at 15), but none of the cases Plaintiff cites supports that assertion. On the contrary, Plaintiff's own authorities (some of which the Drainage District cites) confirm that unjust enrichment requires the "retention" of a benefit belonging to another. See *Wright*, 504 Mich at 419 ("Unjust enrichment . . . doesn't

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<sup>3</sup> To the extent Plaintiff vaguely suggests that the Drainage District only remits "some," but "not all," of the funds it collects (see Pl's Appellee Br at 18 (citing Paragraph 32 of Plaintiff's complaint)), Plaintiff is not referring to the Water Authority Charge (GLWA bills) at issue in this case. Rather, Plaintiff is referring to "non-Water Authority expenses." As to the non-Water Authority expenses, paragraph 32 of Plaintiff's complaint merely states, in ambiguous and conclusory fashion, that "[t]he actual Overcharge is even higher because the Drainage District similarly overallocated its own non-Water Authority expenses [non-GLWA bills] to stormwater disposal." Plaintiff's complaint fails to allege any facts about so-called "non-Water Authority expenses," and Plaintiff made no mention of them in his response to the Drainage District's motion in the trial court. Plaintiff's unjust enrichment claim, as alleged (and as confirmed throughout Plaintiff's brief), only concerns the method that the Drainage District uses to allocate GLWA's bills among its member communities so that GLWA's bills may be paid. That claim must be dismissed.

seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense."); *Tkachik v Mandeville*, 487 Mich 38, 47–48; 790 NW2d 260 (2010) ("Unjust enrichment is defined as the unjust retention of 'money or benefits which in justice and equity belong to another.'") (citation and some internal quotations omitted); *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 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*, 260 Mich App at 137 ("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.").

As a result, the cases Plaintiff cites involving challenges to the reasonableness of municipality utility charges miss the mark because in those cases the municipality itself imposed and *retained* the charges. For example, in *Trahey v City of Inkster*, 311 Mich App 582; 876 NW2d 582 (2015), the water and sewer charges were imposed by the city of Inkster and retained for its own use. The Court ultimately held that the city's rates were not unreasonable, but recognized that unjust enrichment principles might have otherwise come into play. See *id.* at 598-600 (reversing the trial court's unjust enrichment judgment due to the court's "erroneous evaluation of the water and sewer rates"). Similarly, in *Youmans*, 336 Mich App 161, the Court recognized that an unjust enrichment claim for excessive utility charges could lie if there was evidence that the municipality was "enriched . . . by collecting and *retaining* the disputed utility charges." *Id.* at 219 (emphasis added).<sup>4</sup>

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<sup>4</sup> Ultimately, the *Youmans* Court reversed the trial court's judgment awarding over \$9 Million in monetary and equitable relief to plaintiff and plaintiff class, and remanded for entry of a judgment of no cause of action in favor of the Township.

Here, by contrast, there are **no** allegations that the Drainage District itself retains any of the GLWA bill funds for its own personal enrichment. Plaintiff repeatedly asserts in his brief that it would be inequitable for the Drainage District to “retain the overcharges,” but as Plaintiff’s complaint itself shows, the Drainage District does not “retain” them.<sup>5</sup> Put simply, the allegations in Plaintiff’s complaint do not show that the Drainage District *retained* a benefit such that it was unjustly enriched at Plaintiff’s expense. Despite Plaintiff’s assertion, there are no facts to even suggest that the Drainage District has “simply spen[t] its ill-gotten gains.” (Pl’s Appellee Br at 17). While Plaintiff alleges that the Drainage District made a “unilateral decision to apportion the costs of its payments to [the GLWA] among the ratepayers in the Drainage District’s member communities . . . in a certain way” (*id.* at 19), there are no allegations that the Drainage District retains any of those funds, i.e., that there are any “ill-gotten gains.”<sup>6</sup>

Plaintiff also vaguely asserts that this Court “already effectively found” the Drainage District to have been unjustly enriched under the facts as alleged by Plaintiff by referencing previously dismissed cases, but that is incorrect. (Pl’s Appellee Br at 14; see also *id.* at 19). To be sure, in *Kickham Hanley PLLC v George W Kuhn Drainage Dist*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2021 (Docket No. 351317), 2021 WL 137773,

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<sup>5</sup> It is not clear what Plaintiff means when he says that “[t]he inquiry is only ‘as between the two persons’ in the lawsuit, not as between the plaintiff and the world” (Pl’s Appellee Br at 14-15), but there is no dispute that, in this case, the question is whether the Drainage District has *retained* a benefit belonging to Plaintiff and the class.

<sup>6</sup> This is also what distinguishes this case from *City of Cleveland v Ohio Bureau of Workers’ Comp*, 109 NE3d 84 (Ohio Ct App, 2018), *rev’d and remanded on other grounds* 152 NE3d 172 (Ohio, 2020). There, the Ohio Bureau of Workers’ Compensation collected and retained premiums from employers and put them to its own use in operating Ohio’s workers’ compensation system. Here, by contrast, the Drainage District simply interprets GLWA’s bills and distributes GLWA’s bills to the communities in the Drainage District (e.g. Royal Oak, Troy) so that GLWA’s bills may be paid.

the Court recognized that the “the money at issue belonged to Oak Park’s ratepayers as opposed to Oak Park itself,” but the Court did not purport to address whether the Drainage District had been unjustly enriched. Nor did it do so in *Kickham Hanley PLLC v Oakland Co*, unpublished per curiam opinion of the Court of Appeals, issued May 2, 2019 (Docket No. 341076), 2019 WL 1965891, a case relating to Royal Oak. While the Court suggested, in dicta, that “retention of the alleged overcharges collected by the GWKDD *may* have resulted in an inequity to the [Royal Oak] ratepayers,” *id.* at \*8 (emphasis added), that issue was not raised there and so the Court did not have occasion even to address it, let alone resolve it.

Equally unavailing is Plaintiff’s attempt to avoid the rationale underlying both *Ganson v Detroit Pub Sch*, unpublished per curiam opinion of the Court of Appeals, issued Jan 21, 2021 (Docket No. 351276), 2021 WL 219225, and *Corey v Wayne Co*, unpublished per curiam opinion of the Court of Appeals, issued March 15, 2016 (Docket No. 325465), 2016 WL 1039955. Far from being “inapposite” (Pl’s Appellee Br at 17-19), and notwithstanding Plaintiff’s effort to distinguish them on factual grounds, *Ganson* and *Corey* demonstrate precisely how a defendant who does not “retain” the plaintiff’s funds has not been unjustly enriched. See *Ganson*, 2021 WL 219225, \*3 (“[P]laintiff 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.”); *Corey*, 2016 WL 1039955, \*5 (affirming summary disposition of the plaintiff’s unjust enrichment claim because the fees at issue were not “retained by the [defendants]”).

The Drainage District is in no different position than the defendants in *Ganson* and *Corey* because, as Plaintiff concedes, it does not *retain* any of the GLWA bills for its own benefit. That is a fatal defect in Plaintiff’s unjust enrichment claim, and it should be dismissed.<sup>7</sup>

#### IV. RESPONSE TO PLAINTIFF’S CROSS-APPEAL

Plaintiff’s cross-appeal must be rejected. In *Midwest Valve*, 347 Mich App 237, this Court held, in a case involving Plaintiff’s Counsel, that the trial court properly dismissed the plaintiff’s count labeled “assumpsit” because “Michigan no longer recognizes an independent cause of action for assumpsit.” *Id.* at 251; accord *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013) (“With the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished.”). Due to its abolition as a form of action, assumpsit “is modernly treated as a claim arising under ‘quasi-contractual’ principles, which represent ‘a subset of the law

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<sup>7</sup> Notably, there are other defects in Plaintiff’s unjust enrichment claim. For example, “Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable.” *Trahey*, 311 Mich App at 594. This presumption exists because “[c]ourts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making.” *City of Novi v Detroit*, 433 Mich 414, 430; 446 NW2d 118 (1989). Michigan courts have therefore declined to second-guess governmental agencies’ municipal utility rates and ratemaking practices, and have consistently highlighted the import of judicial non-interference in ratemaking. To that end, Michigan courts require plaintiffs challenging municipal utility rates and ratemaking practices to “(1) present[] clear evidence of illegal or improper expenses included in a municipal utility’s rates and (2) demonstrate[e] that the rates, viewed as a *whole*, are unreasonable[.]” *Youmans*, 336 Mich App at 217-18. Accord *Greenfield v City of Farmington Hills*, unpublished opinion per curiam of the Court of Appeals, issued Jan 12, 2023 (Docket No. 357579), 2023 WL 174810 (affirming summary disposition of class action styled-complaint challenging certain municipal utility rates and ratemaking practices, where, among other things, plaintiff failed to rebut the presumption regarding reasonableness of the rates); *Brunet v City of Rochester Hills*, unpublished opinion per curiam of the Court of Appeals, issued Dec 2, 2021 (Docket No. 354110), 2021 WL 5750616 (same); *Shaw v City of Dearborn*, 329 Mich App 640; 944 NW2d 153 (2019) (same); *Bohn v City of Taylor*, unpublished opinion per curiam of the Court of Appeals, issued Jan 29, 2019 (Docket No. 339306), 2019 WL 360730 (same); *Deerhurst Condo Owners Ass’n Inc v City of Westland*, unpublished opinion per curiam of the Court of Appeals, issued Jan 29, 2019 (Docket No. 339143), 2019 WL 360725 (same); *Nofar v City of Novi*, unpublished opinion of the Court of Appeals, issued December 17, 2024 (Docket No. 363356), 2024 WL 5148061 (same).

of unjust enrichment.”” *Youmans*, 336 Mich App at 213 (citation omitted). See also *Wright*, 504 Mich at 421 (explaining that an “action for assumpsit” at law was based on “principles of unjust enrichment”) (citation and quotation marks omitted).

The Court reached the same conclusion recently in *Allen v Michigan State Univ*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_; 2024 WL 4982523 (2024). There, the plaintiff students sued Michigan State University alleging in part that it was unjustly enriched during the COVID-19 pandemic when students were required to continue paying full tuition despite classes going online. They also brought a claim for money had and received. In affirming the dismissal of the plaintiffs’ claim for “money had and received,” this Court, citing *Youmans*, found it to be an “action of assumpsit” and reiterated that “[a]ssumpsit has been abolished as a cause of action, and assumpsit claims are simply a subset of unjust-enrichment claims.” *Id.*, 2024 WL 4982523, \*14.

Even more recently, in *Nofar v City of Novi*, unpublished opinion of the Court of Appeals, issued December 17, 2024 (Docket No. 363356), 2024 WL 5148061, \*8, a putative class action challenging Novi’s water and sewer rates, this Court, citing *Youmans*, held that the “plaintiff’s assumpsit claims cannot stand on their own” and affirmed dismissal of all three assumpsit counts, while noting the Court would “focus [its] attention solely on the unjust-enrichment claims for the remainder of this opinion.” Notably, the *Nofar* Court also affirmed dismissal of the plaintiff’s unjust enrichment claim because the “plaintiff failed to overcome the presumption of reasonableness with regard to the water and sewer rates[.]” *Id.*, 2024 WL 5148061,\*13.

Here, Plaintiff’s assumpsit “claim,” like his unjust enrichment claim, is premised on Plaintiff’s attempt to improperly and unreasonably second-guess how GLWA’s bills are addressed by the Drainage District and its member communities. Plaintiff failed to allege facts to show that the Drainage District retained a benefit by how the Drainage District interprets the GLWA bills

and then distributes them to the Drainage District’s member communities (e.g. Royal Oak, Troy) so that GLWA’s bills may be paid. Plaintiff does not have a viable cause of action for unjust enrichment. And Plaintiff’s abolished assumpsit “claim” cannot be used as a substitute “claim” in an effort to improperly and unreasonably second-guess ratemaking decisions.

Given the foregoing, it is eyebrow-raising for Plaintiff to continue to argue that assumpsit somehow provides a separate basis for relief. The trial court did not “misconstru[e]” anything. As *Midwest Valve* and *Allen* explain, and as confirmed in *Nofar*, assumpsit is abolished and cannot be asserted as an independent cause of action, and a plaintiff cannot recover without a showing that the defendant was unjustly enriched.

Plaintiff seems to think that the Supreme Court’s decision in *Bond v Ann Arbor Sch Dist*, 383 Mich 693; 178 NW2d 484 (1970), allows for recovery of any government exaction that is alleged to be excessive or unreasonable, without having to meet the elements of an unjust enrichment claim. But that is incorrect. As this Court explained in *Youmans*, an action under *Bond* ““will not lie against one who has not been personally *enriched* by the transaction[.]”” *Youmans*, 336 Mich App at 213 (citation omitted; emphasis in original).

Thus, despite Plaintiff’s assertion, neither *Bond* nor *Youmans* support the idea that assumpsit exists as an independent cause of action under Michigan law. Plaintiff’s abolished assumpsit “claim” was properly dismissed.<sup>8</sup>

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<sup>8</sup> In arguing otherwise, Plaintiff cites *Woodland Condominiums Homeowners Ass’n, Inc v Fed Natl Mortgage Ass’n*, unpublished per curiam opinion of the Court of Appeals, issued February 28, 2019 (Docket No. 339850), 2019 WL 982924, and *Isaac v Future Holdings, LLC*, unpublished per curiam opinion of the Court of Appeals, issued June 27, 2024 (Docket No. 365303), 2024 WL 3216378, as well as various circuit court opinions, including, for example, *Nofar v City of Novi*, Oakland County Circuit Court Case No 20-183155-CZ. (See Pl’s Cross-Appeal Br at 13-16). Aside from lacking precedential value, none of those decisions suggest that a claim for assumpsit can be maintained independent of, or in addition to, an unjust enrichment claim. This Court has

V. **CONCLUSION AND RELIEF REQUESTED**

For all of these reasons, the Drainage District requests that the Court reverse the trial court's decision only to the extent that it denied the Drainage District's request for summary disposition on Plaintiff's unjust enrichment claim. It should otherwise reject Plaintiff's cross-appeal and affirm the trial court's dismissal of Plaintiff's assumpsit claim.

Respectfully submitted,

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*George W. Kuhn Drainage District*

Dated: February 13, 2025

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consistently confirmed that assumpsit is not a viable cause of action, and has affirmed dismissal of assumpsit claims.

**CERTIFICATE OF COMPLIANCE**

I certify that this combined reply/cross-appellee brief complies with the word limitation of MCR 7.212(B)(1) and IOP 7.212(E). The brief contains 4,239 words, excluding the parts of the brief exempted by MCR 7.212(B)(2).

/s/Peter H. Webster  
Peter H. Webster (P48783)

Dated: February 13, 2025

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# Exhibit 1

2019 WL 360730

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UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

UNPUBLISHED  
Court of Appeals of Michigan.

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

No. 339306

|  
January 29, 2019

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

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

**Opinion**

Per Curiam.

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

<sup>1</sup> A trial court's decision whether to grant summary disposition is reviewed de novo. [Pace v. Edel-Harrelson](#), 499 Mich. 1, 5; 878 N.W.2d 784 (2016). In reviewing a motion under [MCR 2.116\(C\)\(10\)](#), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of

reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [[Bank of America, NA v. Fidelity Nat'l Title Ins Co](#), 316 Mich. App. 480, 488; 892 N.W.2d 467 (2016) (quotation marks and citations omitted).]

I. BACKGROUND

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

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

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

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

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

## II. ANALYSIS

### A. REASONABLENESS OF SEWER RATES

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

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

operation, maintenance and equipment replacement expenses.

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

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

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

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

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

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

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

the City's sewer fund. Heid testified that he does not know what work needs to be done to the City's sewer system and does not know how much the City needs in reserves for sewer replacements. Accordingly, plaintiffs have not shown that the amount of the City's sewer reserve fund is unreasonable per se.

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

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

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

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

#### B. THE HEADLEE AMENDMENT

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

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

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

“There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment.” *Bolt*, 459 Mich. at 160. In general, “a fee is exchanged for a service rendered or a benefit conferred, and some reasonable

relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue.” *Id.* at 161 (quotation marks and citations omitted). In *Bolt*, our Supreme Court identified three key criteria to use in distinguishing between a user fee and a tax: (1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service. *Id.* at 161-162. “These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee.” *Wheeler v. Shelby Charter Twp*, 265 Mich. App. 657, 665; 697 N.W.2d 180 (2005) (brackets, quotation marks, and citations omitted).

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

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

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

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

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

will likewise be responsible to pay for asserts renewals and replacements.

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

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

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

<sup>2</sup> MCL 141.91 provides:

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

### C. FIRE PROTECTION

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

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

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

It is undisputed that the City no longer pays \$ 44,000 a year in rental fees for all of the fire hydrants on public property as it did until 2010. However, plaintiffs have not provided any evidence that public fire protection costs are improperly passed on to plaintiffs through the City's water rates. Tellingly, Heid testified that “there is nothing to suggest that the customers are actually paying any amount for those public fire protection services.” Nor could Heid determine the amount of such a charge in the absence of a rate study. Further, Heid agreed that, at the end of the day, residents will

pay for public fire protection either on their water bills or on their tax bills. Given this testimony, plaintiffs have failed to produce evidence demonstrating a genuine issue of material fact concerning whether the costs for public fire protection are improperly included in defendant's water rates or the amount of any such charge. For the same reasons, plaintiffs fail to establish that the City is receiving “free service” from the water and sewer department in contravention of [MCL 141.118\(1\)](#)<sup>3</sup> by not paying for public fire protection costs.

<sup>3</sup> [MCL 141.118\(1\)](#) provides:

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

\*7 Affirmed.

#### All Citations

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

2021 WL 5750616

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

UNPUBLISHED  
Court of Appeals of Michigan.

[Daniel BRUNET](#), Individually and as  
Representative of a Class of Similarly Situated  
Persons and Entities, Plaintiff-Appellant,

v.

CITY OF ROCHESTER HILLS, Defendant-Appellee.

No. 354110

|

December 2, 2021

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

Before: [Murray](#), C.J., and [Jansen](#) and [Riordan](#), JJ.

## Opinion

Per Curiam.

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

### I. FACTS AND PROCEEDINGS

Defendant operates a municipal water supply system, of which plaintiff is a customer.<sup>1</sup> The water system has two central purposes: (a) supply treated or “potable” water to municipal water customers, and (b) provide excess capacity for public fire protection. In March 2018, plaintiff filed a 10-count complaint against defendant, generally alleging that the water charges imposed by defendant on its customers since 2012 have been unlawful for the following two principal reasons. First, defendant accumulated surplus funds

to allegedly pay for future capital improvements to its water system, and these surplus funds are unnecessary to provide service to the *present* water customers. According to plaintiff, defendant may only charge its water customers for the present costs of supplying water. Second, defendant charges its water customers for the fire protection component of its water system. However, because fire protection operates for the benefit of the general public, not only the water customers themselves, the general public should be charged for the fire protection.<sup>2</sup> Plaintiff also noted that defendant had an ordinance providing that the fire protection component would be paid by defendant itself from its general fund. Plaintiff requested that the trial court certify the instant action as a class action with plaintiff himself as the class representative of all persons or entities who paid the water charges at any time in the preceding six years. He further requested that defendant disgorge the excess funds that it had received to the putative class in equity and that the trial court declare that the water charges are unlawfully excessive to the extent outlined in the complaint.

<sup>1</sup> To be precise, this case involves the water and sewer system, water and sewer customers, and water and sewer charges. For ease of discussion, we simply refer to the “water system,” “water customers,” and “water charges,” respectively.

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

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

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

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(b) Fire Service Fee. As a fire service fee for providing a water system with extra capacity available for fighting fires and protecting property in the city, the city shall be charged based on a base-extra capacity approach attributing to fire protection the difference between total system capacity and capacity required by other customer classes. The fire service fee shall be required and adjusted annually to reflect actual versus budgeted revenue requirement for the water fund for the previous year.

(c) Quarterly billing. Charges against the City shall be payable in quarterly installments from the current city's fire fund or from the proceeds of taxes which the city, within constitutional limitations, is authorized and required to levy in an amount sufficient for this purpose. [Rochester Hills Ordinance, § 102-124.]

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

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

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

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

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

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

## II. MCL 141.91

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

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

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

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

<sup>6</sup> Plaintiff also sought declaratory relief in his “Prayer for Relief.”

MCL 141.91 provides as follows:

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

MCL 141.121 provides, in relevant part, as follows:

(1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates shall be sufficient to provide for all the following:

(a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement as may be necessary to preserve the public improvement in good repair and working order.

\* \* \*

(d) Other expenditures and funds for the public improvement as the ordinance may require.

(2) The rates shall be fixed and revised by the governing body of the borrower so as to produce the amount described in subsection (1)....<sup>7</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### III. REASONABLENESS

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

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

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

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

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

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

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

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

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

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

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

making contexts, must remain operable, in order to provide a meaningful and manageable standard of review.

\* \* \*

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

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

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

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

\*8 Here, plaintiff argues that the water charges imposed by defendant are unreasonable for the following reasons: (1) “the

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

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

<sup>9</sup> Although the statute did not expressly include the word “reasonable,” our Supreme Court explained that the concept must nonetheless be imposed within the statute. See *id.* at 433, 446 N.W.2d 118.

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

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

Regardless, most of plaintiff’s arguments in regard to his understanding of reasonableness are meritless and we dispose of them quite briefly. First, plaintiff argues that the mere fact that defendant accumulated a reserve of about \$50 million shows that the water charges were unreasonable.<sup>10</sup> However, as explained previously, our Supreme Court in *Highland Park* approved of such accumulated reserves to pay cash for future capital improvements. Second, plaintiff argues that his experts’ opinion created a genuine issue of material fact as to whether the water charges were unreasonable, given that they opined that defendant “collected more than \$24 million in excess of the amounts it was entitled to collect.” However, one of those experts acknowledged during his deposition that he was unaware of the particular depreciating nature of defendant’s water system, the critical justification offered by defendant in support of its reserve.<sup>11</sup> Such a lack of knowledge fundamentally undermines the opinion of plaintiff’s experts. A plaintiff cannot proceed to trial simply because his or her expert was unaware of the pertinent facts. Compare *Pete v. Iron Co.*, 192 Mich.App. 687, 689, 481 N.W.2d 731 (1991) (concluding that summary disposition was properly granted to the defendant in a slip-and-fall case because, in relevant part, “[p]laintiff’s expert testified during deposition that he did not know what caused plaintiff’s fall, but opined that she may have ‘misstepped’ ”). In other words, where defendant argues that it accumulated its reserve to pay for substantial capital improvements in the upcoming five to 10 years and that its water charges are therefore reasonable, plaintiff’s experts cannot ignore that fact but nonetheless conclude that the water charges are unreasonable. Third, plaintiff argues that there is a question of fact as to whether defendant had a specific plan to use its reserve to fund future capital improvements before the instant action was filed. However, notwithstanding the testimony of defendant’s officers that defendant did have a specific plan for its reserve, and notwithstanding that plaintiff does not dispute that the reserve will actually be used to fund future capital improvements, plaintiff provides no authority for the proposition that defendant was obligated to have a specific plan for its reserve before the instant action was filed. See

*Bohn v City of Taylor*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2019 (Docket No. 339306, 2019 WL 360730) (“Instead, plaintiffs contend that the City must have a specific plan for capital improvements equivalent to the amount in the reserve fund and that without such a plan, the fund’s existence is evidence that the rates are excessive. Plaintiffs do not provide any authority (legal or otherwise) to support this contention.”).<sup>12</sup>

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

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

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

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

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

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

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

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

[FN 14]: See Exhibit 23 hereto (City's Objections and Responses to Plaintiff's Fourth Interrogatories and Fourth Requests for Production of Documents).

[FN 15]: See Exhibit 24 hereto (excerpts from City's annual financial statements showing principal debt expense for the assets listed below). See also Budget documents (Exhibit 20 hereto).

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

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

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

#### IV. VIOLATION OF ORDINANCE

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

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

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

\*10 “This Court must presume the amount of the [municipal utility] fee to be reasonable, unless the contrary appears

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

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

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

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

4. One benefit of the water system's capacity is that it ensures that the City will have sufficient water flow to fight fires. The system's capacity also provides numerous benefits to ratepayers who purchase and use City water, including meeting customers' minimum needs for average daily water flow.

5. The system's capacity also allows the City to provide service under emergency conditions, maintain service during an event that causes failure, and quickly recover from these events.

6. In addition, extra water system capacity allows system users to access sufficient water flow to irrigate their lawns. Many of the City's water ratepayers take advantage of this benefit and use sprinkler systems to irrigate their lawns in summer months.

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

\*11 It is impossible to disentwine the “fire protection” aspect of excess capacity with the “potable water” aspect of excess capacity. As noted, excess capacity is necessary to provide potable water during times of heightened demand or emergencies.<sup>14</sup> Moreover, even when excess capacity is used to provide fire protection, i.e., the water supply is used to fight a fire, that excess capacity still benefits water customers because those customers are (typically) able to maintain ordinary water use. If the water system had no excess

capacity, then fighting a fire would result in water customers not having access to the ordinary water supply. Essentially, “fire protection” is but one example of heightened demand or emergency. If water customers may properly be charged for excess capacity to protect against heightened demand during a hot summer day—as plaintiff does not seem to dispute—it follows that they may also be charged for excess capacity to protect against fighting a large fire.

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

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

## V. CONCLUSION

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

Jansen, J. (concurring).

I concur in the result only.

### All Citations

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2016 WL 1039955

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED Court of Appeals of Michigan.

James Robert COREY, Plaintiff–Appellant,

v.

WAYNE COUNTY and Cathy M.

Garrett, Defendants–Appellees.

Docket No. 325465.

I

March 15, 2016.

Wayne Circuit Court; LC No. 14–010111–NZ.

Before: SAAD, P.J., and SAWYER and HOExSTRA, JJ.

Opinion

PER CURIAM.

\*1 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.<sup>1</sup>

<sup>1</sup> MCL 600.2529(1)(d) was amended by Pub Acts 2014, No. 532, effective April 14, 2015.

In August 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 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 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.

\*2 After plaintiff filed his complaint, defendants brought a motion for summary disposition under MCR 2.116(C)(7)

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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 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 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 NW2d 468 (2003).

## III. TORT CLAIMS AND GOVERNMENTAL IMMUNITY

Plaintiff's complaint includes three tort claims subject to the GTLA: common law conversion, statutory conversion,<sup>2</sup> 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.<sup>3</sup> We disagree.

<sup>2</sup> Although the trial court did not dismiss plaintiff's statutory conversion claim on governmental immunity grounds, 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.

<sup>3</sup> 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 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.

\*<sup>3</sup> 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 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 NW2d 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). 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 nn 7 & 8; 433 NW2d 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 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.

\*4 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 of the court's ministerial duties. 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.<sup>4</sup> 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 NW2d 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. Thus, summary disposition was properly granted under [MCR 2.116\(C\)\(7\)](#) with respect to plaintiff's tort claims.

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.

#### 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 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.*

\*5 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, 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 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. 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.<sup>5</sup> 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).

<sup>5</sup> 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 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.

#### V. DUE PROCESS VIOLATIONS

\*<sup>6</sup> 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 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 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.<sup>6</sup> 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.

<sup>6</sup> 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.

With regard to plaintiff's claim of procedural due 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 U.S. 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, 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).

\*7 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 erroneously charged fee. Because there was an adequate remedy available, the trial court properly dismissed plaintiff's due process claim.<sup>7</sup>

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 (2002). See also *Serv Coal Co v. Mich. Unemployment Comp Comm*, 333 Mich. 526, 531; 53 NW2d 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.

Affirmed.

#### All Citations

Not Reported in N.W.2d, 2016 WL 1039955

2019 WL 360725

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UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

UNPUBLISHED  
Court of Appeals of Michigan.

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

No. 339143

January 29, 2019

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

Before: [Murray](#), C.J., and [Servitto](#) and [Shapiro](#), JJ.

**Opinion**

Per Curiam.

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

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

In reviewing a motion under [MCR 2.116\(C\)\(10\)](#), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a

trial. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [[Bank of America, NA v. Fidelity Nat'l Title Ins. Co.](#), 316 Mich. App. 480, 488; 892 N.W.2d 467 (2016) (quotation marks and citations omitted).]

II. BACKGROUND

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

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

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

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

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

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

In the trial court, the parties filed competing motions for summary disposition. The City filed a response to plaintiffs' motion for summary disposition in which the City first disclosed Mark Beauchamp, president of Utility Financial Solutions, as an expert witness. In an affidavit, Beauchamp echoed Olson's conclusion that a full cost allocation study was necessary to verify the reasonableness of the administrative costs the City allocated to water and sewer department. He further averred that he reviewed and approved a revised cost allocation study performed by Deborah Peck, the City's budget director, which concluded that the department's actual administrative costs were always within 10% of the budgeted

administrative costs. Plaintiffs then filed a motion in limine to exclude Beauchamp's and Peck's proposed testimony arguing that the City failed to timely disclose Beauchamp as an expert witness and that Peck's testimony was inadmissible because her revised allocation study was not in the record.

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

### III. ANALYSIS

#### A. REASONABLENESS OF RATES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

cash reserves to fund future improvements to the water and sewer system is a reasonable ratemaking practice.

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

## B. THE HEADLEE AMENDMENT

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

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

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

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

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

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

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

Water and sewer rates are not always considered user fees, however, because they must be proportionate to the cost of the service. See *Bolt*, 338 Mich. at 162 n. 12. That said, plaintiffs have presented no evidence that the rates themselves are unreasonable given the deficiencies in their proofs discussed above, particularly Olson's concession that he had not performed a rate study and that he held no opinion concerning the reasonableness of the rates. Considering that

plaintiffs fail to overcome the presumption that the City's rates are reasonable, we find no basis from which to conclude that the rates are not proportionate to the cost of service. Instead, the rates constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. See Westland Ordinances, § 102-61.<sup>6</sup> The trial court aptly noted: “Those who use water and sewer services derive a benefit from paying the rates imposed. Moreover, the rates correlate directly with the amount and frequency of use by each particular user.”

<sup>6</sup> Westland Ordinances, § 102-61 provides, in relevant part:

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

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

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

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

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

As for the third *Bolt* factor, plaintiffs contend that the City's water and sewer services are not voluntary under statute and the City's ordinances. Even assuming that the water or sewer charges were deemed effectively compulsory in this case, “the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a

user fee and not a tax.” *Wheeler*, 265 Mich. App. at 666. We are unconvinced, in the absence of showing that the water and sewer rates are unreasonable, that those rates should be considered a tax as opposed to a user fee. Considering the *Bolt* criteria in totality, we conclude that plaintiffs have not established that the City has imposed an unconstitutional tax.

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

<sup>7</sup> MCL 141.91 provides:

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

\*7 Affirmed.

#### All Citations

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

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UNPUBLISHED OPINION. CHECK  
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UNPUBLISHED  
Court of Appeals of Michigan.

Wesley GANSON, Plaintiff-Appellant,

v.

DETROIT PUBLIC SCHOOLS, Defendant-Appellee.

No. 351276

|

January 21, 2021

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

Before: [K. F. Kelly](#), P.J., and [Stephens](#) and [Cameron](#), JJ.

### Opinion

Per Curiam.

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

### I. BACKGROUND

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

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

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

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

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

## II. STANDARD OF REVIEW

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

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

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

## III. ANALYSIS

Plaintiff first argues that defendant: 1) misled the court into believing that the accrual date for plaintiff's breach of contract claim was when the contract was signed, and 2) that the trial court erred in agreeing with defendant. The record does not

support either assertion. To the contrary, in its brief in support of its motion to dismiss, defendant argued that the period of limitations for breach of contract claims “accrue at the time of the wrong upon which the claim is based was done regardless of the time when damage results” and that the statute of limitations began to run in this case in 2010 when plaintiff received a decision from the ORS. Defendant maintains that same theory on appeal.

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

*Defendant:* The second basis, Your Honor, is even assuming that the entire contract had been filed, one, the defendant Detroit Public Schools is not a party to it.

And even if it was filed again in its entirety. The statute of limitations would bar the complaint.

*The court:* So do we even need to address it when we know it wasn't filed completely?

*Defendant:* I was just giving all of the arguments.

*The Court:* I appreciate that. Yeah. And then you also have the issue of res judicata.

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

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

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

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

Plaintiff's claim of unjust enrichment fails for multiple reasons. The claim would first be barred by the statute of limitations. Absent a date from plaintiff as to when the breach occurred, the ALJ's findings established that plaintiff knew as early as 2010 and as late as 2011 that he was being denied incentivized retirement benefits, however, he did not file the complaint in the instant matter until over six years later in 2018. MCL 600.5813; MCL 600.5815. Second, plaintiff's reliance on the continuing wrongs doctrine to extend the statute of limitations for his unjust enrichment claim is of no avail where the doctrine is no longer recognized in Michigan. *Marilyn Froling Revocable Living T. v. Bloomfield Hills Country Club*, 283 Mich. App. 264, 288, 769 N.W.2d 234 (2009). Third, plaintiff cannot prove the second element of an

unjust enrichment claim — that defendant retained a benefit — when defendant was not the holder of plaintiff's retirement funds. While it is true that defendant received the benefit of plaintiff's labor and length of employment, defendant is not the entity responsible to pay plaintiff's retirement benefits. According to the ALJ's proposal for decision, the ORS, acting on behalf of the Public School Employees' Retirement System denied plaintiff an incentivized retirement. Thus, plaintiff's retirement benefits were retained by the Public School Employees' Retirement System, which is in turn, maintained by the state of Michigan, not the defendant. See *AFT Michigan v. State of Michigan*, 497 Mich. 197, 202, 866 N.W.2d 782 (2015) (“the Public School Employees Retirement Act (Retirement Act), MCL 38.1301 *et seq.*, ... governs the Michigan Public School Employees' Retirement System (MPSERS).”).

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

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

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

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

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

Even if the trial court erred and the plaintiff either included the entire contract or supplemented his complaint with the additional page alleged to have been omitted, his breach of contract complaint would not have survived legal scrutiny and defeat. The second page contained subsections 1.11 through 1.17 and was signed by a school board representative, interim superintendent, plaintiff, two witnesses, and a notary. While the additional page stated that "The relationship of the Executive Director to the School District is that of an employee", it said nothing about the incentivized benefits plaintiff claims he was promised which would form the basis of the alleged breach. Plaintiff has failed to provide proof of the promises upon which his contractual claim was based: entitlement to an early buyout and a multiplier for six(6) years post retirement. if he worked for Detroit Public Schools for

one day between the period of time between November 1, 2009 and May 1, 2010. While plaintiff claims this information was conveyed to him, he offers no basis upon which to legally augment, supplement, or modify a written contract. Thus, even if the trial court erred in finding that the entire contract was not filed with the complaint and erred in affording him the opportunity to amend, the court reached the correct conclusion that the contract claim was fatally flawed.

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

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

Affirmed.

#### All Citations

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UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

UNPUBLISHED  
Court of Appeals of Michigan.

Joan GREENFIELD, Plaintiff-Appellant,

v.

CITY OF FARMINGTON HILLS, Defendant-Appellee.

No. 357579

|

January 12, 2023

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

Before: M. J. Kelly, P.J., and [Boonstra](#) and [Swartzle](#), JJ.

### Opinion

Per Curiam.

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

#### I. PERTINENT FACTS AND PROCEDURAL HISTORY

In November 2018, plaintiff filed a class action complaint against defendant, challenging the reasonableness of the rates defendant charged for water and sewer services. Defendant charges property owners in the city of Farmington Hills for water and sewer services based on their metered use of water. Plaintiff alleged that, from 2012 to 2018, defendant's water/sewer rates were set far in excess of the amount needed to pay for the actual cost of those services. Plaintiff noted that defendant's water and sewer rates included a component charge labeled "Reserves," and that defendant had accumulated a cash reserve from such billings of approximately \$79 million as of July 1, 2018. Plaintiff alleged that the reserve rate charges had resulted in defendant accumulating funds far in excess of the amount necessary to be held in reserve for repair and maintenance of the water and sewer system. Plaintiff's complaint challenged the reserve rate

charges in six counts: three counts alleging unjust enrichment and three counts alleging assumpsit. Of those six counts, one count of unjust enrichment and one count of assumpsit asserted that defendant's rates were arbitrary, capricious, and unreasonable under the common law; two corresponding counts asserted that defendant had violated [MCL 141.91](#); and two other corresponding counts asserted that defendant had violated its own ordinances.

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

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

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

Class certification must be denied  
because plaintiff has failed to satisfy

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the five factors required pursuant to MCR 3.50(A)(I). Plaintiff has not shown that the proposed class members have suffered any actual injury. In addition, the court finds that under the facts presented, it is not probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action.

Plaintiff moved for reconsideration, which the trial court denied. Plaintiff applied for leave to appeal in this Court, which this Court denied.<sup>1</sup>

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

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

[a]s of April 22, 2019, the estimated capital expenditure for horizontal

assets, alone, required to maintain the desired level of service for the City's water and sewer systems over the five year time period of 2019-2023 is more than \$38 Million, over the ten year time period of 2019-2028 is more than \$65 Million, and over the twenty year time period of 2018-2037 is more than \$134 Million.

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

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

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

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

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

3 Farnkopf and Simonson were also deposed during discovery.

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

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

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

II. PLAINTIFF'S COMMON-LAW UNJUST ENRICHMENT AND ASSUMPSIT CLAIMS<sup>4</sup>

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

\*4 Plaintiff argues that the trial court erred by holding that plaintiff had failed to establish at least a genuine issue of material fact regarding the unreasonableness of defendant's water and sewer rates. Specifically, plaintiff argues that she presented evidence that defendant's water and sewer rates during the relevant time period were in excess of the amounts necessary to finance the actual costs of providing those services, and that the cash reserves accumulated by defendant were far in excess of the amount necessary to support the city's water and sewer system, even accounting for necessary capital improvements. Plaintiff also argues that

the reasonableness of utility rates is generally a question of fact and that she met her burden of providing "clear evidence of illegal or improper expenses" included in defendant's rates. We disagree.

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

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

"Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another." *Wright*, 504 Mich at 417. In order to sustain a claim for unjust enrichment, "a plaintiff must establish (1) the receipt

of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.” *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006). The remedy for unjust enrichment is restitution, i.e. the return of the excessive or unjust benefits retained by defendant. *Wright*, 504 Mich at 419.

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

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

In *Youmans*, this Court noted that “without a comprehensive rate study—or some similar evidence demonstrating that the disputed rates excessively compensated the Township for the related utility services—one can at best speculate about whether the disputed rates were proportional to the underlying costs.” *Youmans*, 336 Mich App at 220. This Court

also noted that several experts had reviewed the defendant's financial statements and determined that its “cash inflows and outflows over the disputed period were proportional.” *Id.* Although plaintiff argues that her experts provided evidence that the disputed rates excessively compensated defendant by analyzing the growth of the reserve fund, her experts specifically noted that they did not perform “a comprehensive review of the City's rate-making process.” The HF & H report only notes the actual costs incurred by defendant in operating its water and sewer system for one year, the fiscal year 2017-2018, and does not analyze cash inflows for any of the years in question. Further, the report does not analyze defendant's overall cash flow related to the water and sewer system; rather, plaintiff's expert's analysis is limited to the growth of defendant's reserve funds.

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

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

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

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

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

In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to

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

### III. VIOLATION OF MCL 141.91

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

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

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

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

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

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

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

rate bears the burden of establishing that it is a tax and not a user fee. *Id.* at 225. The presumption of reasonableness is a “pertinent” consideration when considering whether a user fee is proportionate to the necessary costs of the service. *Id.* at 227-228 (citation omitted).

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

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

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

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

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

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

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

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

**All Citations**

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

2024 WL 3216378

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UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

UNPUBLISHED  
Court of Appeals of Michigan.

Iyad ISAAC and Isaac Investments,  
Inc., Plaintiffs-Appellants,  
v.  
FUTURE HOLDINGS, LLC, Defendant-Appellee.

No. 365303

|  
June 27, 2024

Genesee Circuit Court, LC No. 2021-116290-CK

Before: O'Brien, P.J., and M. J. Kelly and Feeney, JJ.

### Opinion

Per Curiam.

\*1 Plaintiffs, Iyad Isaac (“Iyad”) and Isaac Investments, Inc. (“Isaac Investments”), appeal as of right the trial court’s order granting summary disposition to defendant, Future Holdings, LLC (Future Holdings), under [MCR 2.116\(C\)\(7\)](#) (res judicata) and (8) (failure to state a claim for relief) in this action for repayment of a loan. For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand for further proceedings.

#### I. BACKGROUND

This case arises from a series of business dealings between Iyad Isaac, his business, Isaac Investments, his deceased brother, Imad Isaac (“Imad”), and Imad’s business, Future Holdings. Plaintiffs allege that Iyad was occasionally asked to provide cash infusions to defendant Future Holdings, which were made through a series of loans made from May 2017 to April 2019. Isaac Investments initially loaned \$75,000 to Future Holdings on May 31, 2017, and loaned another \$15,000 to Future Holdings on August 30, 2017. These alleged loans were documented by copies of checks drawn from the account of Isaac Investments, made payable to Future Holdings, with the term “loan” written on the memo

line. On April 25, 2019, Imad executed a promissory note in which he agreed to pay \$190,000 to Iyad. The promissory note stated that it “supersedes and replaces any previous notes for loans given on 05/17/2017 for \$75,000.00, 08/30/2017 for \$15,000.00, and includes \$100,000.00 received today 04/25/2019.” Like the previous checks, the April 25, 2019 check for \$100,000 was issued by Isaac Investments and made payable to Future Holdings. The promissory note provided that it was payable within 180 days of demand.

Plaintiffs allege that they demanded repayment of the promissory note in January 2021, but neither Imad nor Future Holdings timely tendered payment. In October 2021, Iyad brought this action against Imad for breach of contract. In an amended complaint filed in April 2022, Isaac Investments was added as a plaintiff and Future Holdings was added as a defendant. The parties filed cross-motions for summary disposition. As relevant to this appeal, Future Holdings argued that it could not be liable for breach of contract because it was not a party to the April 25, 2019, promissory note, which was signed only by Imad in his individual capacity. Future Holdings had also raised the affirmative defense of recoupment, which was based on an allegation that Iyad failed to obtain investors to fund three housing projects, and instead used Future Holdings’ money to fund the projects, resulting in a loss of approximately \$140,000 to Future Holdings. Plaintiffs filed a motion for summary disposition of the Future Holdings’ asserted recoupment defense under [MCR 2.116\(C\)\(9\)](#). The trial court agreed that plaintiffs’ first amended complaint failed to state a claim against Future Holdings because it was not a party to the April 25, 2019 promissory note, and therefore, it was not necessary to address the validity of the defense of recoupment. However, the court allowed plaintiffs to file a second amended complaint to given them the opportunity to plead a valid contract claim or some other theory of relief against Future Holdings.

\*2 In the meantime, Imad died in July 2022 and he was later dismissed as a defendant. In accordance with the trial court’s previous order, plaintiffs filed a second amended complaint in October 2022, against Future Holdings only. The complaint asserted claims for breach of contract (Count I), monies had and received (Count II), and unjust enrichment (Count III). In lieu of filing an answer, Future Holdings filed a motion for summary disposition under [MCR 2.116\(C\)\(7\) and \(8\)](#). Future Holdings argued that plaintiffs’ claims were based on the alleged indebtedness reflected by the April 25, 2019 promissory note, it was undisputed that it was not a party to that promissory note, and plaintiffs had

not alleged the existence of any other documentation to support its liability for that indebtedness, and therefore, it was entitled to summary disposition under MCR 2.116(C)(8) because plaintiff failed to state claims on which relief could be granted. Future Holdings further argued that it was entitled to summary disposition of the breach-of-contract claim under MCR 2.116(C)(7) on the basis of the doctrine of res judicata because the trial court had already dismissed the contract claim when it granted in part Future Holdings' first motion for summary disposition. The trial court agreed with Future Holdings' arguments and granted its motion pursuant to MCR 2.116(C)(7) and (8). Plaintiffs now appeal.

## II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Soave v Dep't of Treasury*, — Mich App —, —; — NW2d — (2024) (Docket No. 364415); slip op. at 3. Future Holdings moved for summary disposition under MCR 2.116(C)(7) and (C)(8). Summary disposition may be granted under MCR 2.116(C)(7) if a claim is barred by res judicata. *Jackson v Southfield Neighborhood Revitalization Initiative*, — Mich App —, —; — NW2d — (2023) (Docket No. 361397), slip op. at 24, app held in abeyance — Mich — (2024) (Docket No. 361397). As observed in *Soave*, — Mich App at —; slip op. at 3:

When addressing such a motion, a trial court must accept as true the allegations of the complaint unless contradicted by the parties' documentary submissions. *Patterson v Kleiman*, 447 Mich 429, 434 n 6, 526 NW2d 879 (1994). Although not required to do so, a party moving for summary disposition under Subrule (C)(7) may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). [Citation omitted.]

A trial court's application of a common-law doctrine is also reviewed de novo. *Mecosta Co Med Ctr v Metro Group Prop & Cas Ins Co*, 509 Mich 276, 282; 983 NW2d 401 (2022).

As explained in *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019):

A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); MCR 2.116(G) (5). 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. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).

## III. BREACH OF CONTRACT

Although we agree that the trial court erred by ruling that dismissal of plaintiffs' breach-of-contract claim was justified under MCR 2.116(C)(7) on the basis of res judicata, the court did not err by dismissing that claim under MCR 2.116(C)(8).

Res judicata will preclude a second action on the same claim if (1) the first action was decided on the merits, (2) the same parties, or their privies, are involved in both actions, and (3) the matter at issue in the second case was resolved, or could have been resolved, in the first case. *Mecosta Co Med Ctr*, 509 Mich at 282. The underlying purpose of the doctrine is to "prevent multiple suits litigating the same cause of action." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004).

Res judicata does not apply to the circumstances here. Initially, this case does not involve a prior action and a subsequent, second action. At issue is whether the trial court

previously dismissed any breach-of-contract claim against Future Holdings when it decided Future Holdings' earlier motion for summary disposition in the same proceeding. The record discloses that the trial court did not fully resolve the availability of a breach-of-contract claim against Future Holdings when it decided the first motion for summary disposition. Although the court determined that the first amended complaint did not state a claim for breach of contract against Future Holdings because the claim was based on the April 25, 2019 promissory note and the documentation attached to the complaint demonstrated that Future Holdings was not a party to that agreement, it gave plaintiffs an opportunity to amend their complaint and provide supplemental materials to demonstrate a legal basis for pursuing a breach-of-contract claim against Future Holdings or allege additional theories of relief. Further, the court's August 8, 2022 written order provided that dismissal of the contract claim under [MCR 2.116\(C\)\(8\)](#) would occur only if plaintiffs failed to file a second amended complaint. Plaintiffs did file a second amended complaint, which attempted to modify and clarify plaintiffs' theory under which Future Holdings could be liable for breach of contract.

\*3 Under these circumstances, where the trial court's prior order did not fully resolve whether plaintiffs could plead or prove a breach-of-contract claim against Future Holdings and the breach-of-contract claim asserted in the second amended complaint was authorized by the trial court's prior order, the trial court erred to the extent that it dismissed plaintiffs' breach-of-contract claim in the second amended complaint on the basis of *res judicata*.

We agree with Future Holdings, however, that dismissal of plaintiffs' breach-of-contract claim was appropriate under [MCR 2.116\(C\)\(8\)](#). To plead a legal claim for breach of contract, plaintiffs were required to demonstrate the following elements: (1) parties that are competent to enter into the contract, (2) an appropriate subject matter, (3) legal consideration supporting the contract, (4) mutuality of agreement, and (5) mutuality of obligation. *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015).

Although plaintiffs' second amended complaint alleges facts related to the two 2017 loans and the April 25, 2019 loan provided by Isaac Investments to Future Holdings, and alleges that Future Holdings agreed to repay the loans, it also alleges that the parties reached an amended agreement on April 25, 2019, which resulted in the April 25, 2019 promissory note that plaintiffs attached as Exhibit D to their complaint.

Only Imad and Iyad were parties to that agreement, which, by its terms, stated that it "supersedes and replaces any previous notes for loans given on 5/17/2017 for \$75,000, and 8/20/2017 for \$15,000, and includes \$100,000 received today 04/25/2019."<sup>1</sup> The factual basis for plaintiffs' breach-of-contract claim was Future Holdings' failure to pay the alleged debt as required by the April 25, 2019 promissory note. Plaintiffs alleged in their second amended complaint that "Future's failure to pay on the April '19 loan as required constitutes a breach of contract." It is undisputed that Future Holdings was not a party to the promissory note that is the basis for plaintiffs' breach-of-contract claim. Further, to the extent that plaintiffs' alleged that Future Holdings also promised to pay the debt evidenced by Imad's promissory note, such a promise is unenforceable under the statute of frauds, [MCL 566.132\(1\)\(b\)](#), unless it is in writing and signed by the party charged with the promise. Plaintiffs did not allege the existence of any such writing signed by Future Holdings. Additionally, even though an oral promise to pay one's own debt is not within the statute of frauds, *Barbour v Thomas*, 7 F Supp 271, 279 (ED Mich, 1933), any previous promises Future Holdings had made regarding repayment were superseded by the promissory note Iyad accepted.

<sup>1</sup> Although review of a motion under [MCR 2.116\(C\)\(8\)](#) is limited to the pleadings, [MCR 2.116\(G\)\(5\)](#), the trial court properly could consider the contents of the promissory note when reviewing Future Holdings' motion for summary disposition because plaintiffs attached the promissory note to their amended complaint, and therefore, it is considered part of the pleadings for all purposes. [MCR 2.113\(C\)\(1\) and \(2\)](#); *Abdelmaguid v Dimensions Ins Group, LLC*, — Mich App —, —; — NW2d — (2024) (Docket No. 361674); slip op. at 5.

Accordingly, the trial court did not err by holding that plaintiffs failed to state a claim for breach of contract against Future Holdings and dismissing that claim under [MCR 2.116\(C\)\(8\)](#).

#### IV. MONIES HAD AND RECEIVED AND UNJUST ENRICHMENT

\*4 Plaintiffs also argue that the trial court erred by dismissing their claims for monies had and received and unjust enrichment under [MCR 2.116\(C\)\(8\)](#). We agree.

## A. MONIES HAD AND RECEIVED

Michigan recognizes the quasi-contractual claim of monies had and received, which is based on the common-law claim of “assumpsit for money had and received,” an equitable action grounded in the equitable principle that if a defendant holds money that is actually the plaintiff’s, the plaintiff should be able to recover those funds. In *Youmans v Charter Twp of Bloomfield*, 336 Mich App 161, 213; 969 NW2d 570 (2021), this Court, quoting *Moore v Mandlebaum*, 8 Mich 433, 448 (1860), observed:

[A]s 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.

In *Youmans*, this Court acknowledged that when the General Court Rules were adopted in 1963, assumpsit as a cause of action was abolished, but the substantive remedies underlying the claim remained available. *Youmans*, 336 Mich App at 213. This Court stated that “[a]n assumpsit claim is generally regarded as a claim that arises under ‘quasi-contractual’ principles which represent ‘a subset of the law of unjust enrichment.’ ” *Id.* at 213-214, quoting *Genesee Co Drain Comm’r v Genesee Co*, 504 Mich 410, 421; 934 NW2d 805 (2019).

The factual allegations in plaintiffs’ second amended complaint, accepted as true, indicate that Isaac Holdings loaned Future Holdings \$75,000 and \$15,000 in May 2017 and August 2017, respectively, and another \$100,000 in April 2019, and that Future Holdings received the loan proceeds and deposited the funds into its bank account. Although only Imad signed a promissory note agreeing to repay the combined balance of \$190,000, plaintiffs alleged that Imad did not pay back the money when payment was demanded and subsequently died in 2022, apparently without any assets. Despite that only Imad promised to repay the money, plaintiffs’ allegations indicate that the funds from Isaac Investments were actually transferred to

Imad’s business, Future Holdings, and deposited into Future Holdings’ bank account. These facts, accepted as true, are such that equity may be able to intervene to allow plaintiffs to recover their funds from Future Holdings, the party actually in possession of the \$190,000 loaned by Isaac Investments with the expectation of repayment. Accordingly, we reverse the trial court’s dismissal of plaintiffs’ claim for monies had and received under [MCR 2.116\(C\)\(8\)](#).

## B. UNJUST ENRICHMENT

In *Meisner Law Group v Weston Downs Condo Ass’n*, 321 Mich App 702, 721; 909 NW2d 890 (2017), this Court set forth the elements of a claim for unjust enrichment as follows: “(1) receipt of a benefit by the defendant from the plaintiff, and (2) which benefit it is inequitable that the defendant retain.” [Citation and quotation marks omitted.]

Plaintiffs’ allegations of unjust enrichment are not “so clearly unenforceable that no factual development could possibly justify recovery.” *El-Khalil*, 504 Mich at 160 (citation and quotation marks omitted). The factual allegations in support of this claim are that Isaac Investments loaned Future Holdings a combined total of \$190,000, which Future Holdings deposited in its bank account. In addition to these allegations, plaintiffs attached as exhibits to their second amended complaint copies of checks from Isaac Investments and payable to Future Holdings, in the amounts of \$15,000, \$75,000, and \$100,000, respectively, all of which are marked “loan” on the memo line, consistent with the allegations in plaintiffs’ complaint. Because these checks were attached to the complaint, they are part of the pleadings. Only Imad signed a promissory note for the consolidated loan amount of \$190,000, and the note indicates that it superseded and replaced any notes given for previous loans; plaintiffs’ allegations, if accepted as true, demonstrate that the funds were actually received by Future Holdings and deposited into its bank account, which supports that Future Holdings received a substantial monetary benefit from Isaac Investments. It is unclear why only Imad signed the promissory note for repayment of the debt, and plaintiffs are unable to demonstrate that Future Holdings is contractually obligated to repay the loan proceeds because it was not a party to the promissory note. Nevertheless, plaintiffs’ allegations that it would be inequitable to allow Future Holdings to keep \$190,000 received from plaintiffs, which plaintiffs understood would be repaid, are not so clearly unenforceable as a matter of law that no factual development

could possibly allow recovery. Accordingly, the trial court erred by dismissing the unjust-enrichment claim under [MCR 2.116\(C\)\(8\)](#).

### C. UNCLEAN HANDS AND RECOUPMENT

\*5 Plaintiffs argue that the trial court should have ruled that Future Holdings' defense of unclean hands is without merit. Also, Future Holdings argues that if this Court reverses the trial court's dismissal of any of plaintiffs' claims, it should consider the validity of Future Holding's equitable affirmative defense of recoupment. These arguments are related. In its brief in support of its motion for summary disposition, Future Holdings asserted that "Iyad's hands are unclean herein, as he owes Future \$140,000 for his ill-advised efforts to build three new houses as a newly licensed contractor builder." Future Holdings' request for recoupment is based on these same allegations. Specifically, in its motion for summary disposition, Future Holdings asserted:

Without formally pleading the Affirmative Defense of Recoupment at this point, since the instant motion is being filed in lieu of an answer to Plaintiffs' Second Amended Complaint, Defendant, Future Holdings, L.L.C. hereby places Plaintiff, Iyad Isaac, on notice that should this Court deny the instant Motion for Summary Disposition under [MCR 2.116\(C\)\(8\)](#) Recoupment will be sought by Future Holdings, L.L.C. from Iyad Isaac in the amount of One Hundred Forty Thousand Dollars (\$140,000.00).

"The unclean-hands doctrine is 'a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the [opposing party].'" *New Prods Corp v Harbor Shores BHB Land Dev, LLC*, 331 Mich App 614, 627; 953 NW2d 476 (2019) (citation and emphasis omitted). "Any willful act that transgresses equitable standards of conduct is sufficient to allow a court to deny a party equitable relief." *Id.*

This Court has described recoupment as a crossclaim or counterclaim for damages, but it is also an affirmative defense that must be pleaded in a proper manner. *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012). Recoupment is grounded in equitable principles, and is based on the rationale that the plaintiff's claim against the defendant, based on equitable reasons and good conscience, should be reduced. *Id.* at 695. In its motion for summary disposition, Future Holdings explained, without any factual development, that to the extent that it is found liable for the unpaid loan amounts, it is entitled to reduce its liability by the amount of its loss from Iyad's prior failed building project. We decline to consider the merits of these defenses because they are not properly before this Court.

Future Holdings asserted the affirmative defense of recoupment in response to plaintiffs' first amended complaint and plaintiffs moved to dismiss that defense under [MCR 2.116\(C\)\(9\)](#). The trial court found that the validity of the defense was moot because the only claim against Future Holdings was for breach of contract and Future Holdings was not established as a party to a contract with plaintiffs. However, the trial court also permitted plaintiffs to file a second amended complaint. After plaintiffs filed their second amended complaint, Future Holdings filed its motion for summary disposition in lieu of filing an answer or affirmative defenses. Thus, when the trial court decided Future Holdings' second motion for summary disposition, Future Holdings had not yet filed an answer or any affirmative defense to plaintiffs' second amended complaint. Although Future Holdings addressed the defense of recoupment in its motion for summary disposition, it did so only in the context of expressing its intent to affirmatively assert the defense in answer to plaintiffs' second amended complaint should the trial court deny its motion for summary disposition.

\*6 Furthermore, in addition to requesting summary disposition of plaintiffs' contract claim under [MCR 2.116\(C\)\(7\)](#) on the basis of res judicata, Future Holdings only sought summary disposition of plaintiffs' remaining claims under [MCR 2.116\(C\)\(8\)](#), where the court's review is limited to the pleadings alone. Although Future Holdings discussed the potential applicability of the unclean hands doctrine and the defense of recoupment in its motion for summary disposition, the factual bases for those defenses is not apparent from the pleadings. Indeed, as mentioned, Future Holdings had not yet filed an answer or affirmative defenses to plaintiffs' second amended complaint. Clearly, whether Future Holdings

can properly rely on the defenses of unclean hands and recoupment is dependent upon allegations and evidence that are not a matter of record. Therefore, it would be inappropriate and premature for this Court to address the potential availability of these defenses in this appeal.

Accordingly, we decline to consider the defenses of unclean hands and recoupment, without prejudice to Future Holdings properly asserting the defenses in answer to plaintiffs' second amended complaint and the parties' opportunity to raise and

address the validity of any asserted defense in an appropriate motion.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs.

**All Citations**

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UNPUBLISHED OPINION. CHECK  
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UNPUBLISHED  
Court of Appeals of Michigan.

KICKHAM HANLEY PLLC, as Trustee for  
a Certified Class of Persons and All Others  
Similarly Situated, Plaintiff-Appellant,

v.

GEORGE W. KUHN DRAINAGE  
DISTRICT, Defendant-Appellee.

No. 351317

|

January 14, 2021

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

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

### Opinion

Per Curiam.

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

#### I. BACKGROUND FACTS

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

<sup>1</sup> See MCL 280.5.

<sup>2</sup> See MCL 280.464.

Oak Park has a combined sewer system that collects both sanitary sewage and stormwater. That sewer system flows

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

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

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

In February 2019, in Lower Court No. 2015-149951-CZ, the trial court entered a final judgment and order approving a class settlement between the plaintiffs, two persons acting as individuals and as representatives of a class of similarly situated persons (the class action plaintiffs), and the defendant, Oak Park.<sup>3</sup> 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."

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Additionally, plaintiff was appointed trustee of a litigation trust to pursue the claims against defendant on behalf of the plaintiffs, and was also appointed counsel for the litigation trust.

<sup>3</sup> These class action plaintiffs were legally represented by plaintiff.

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

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

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

## II. ANALYSIS

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

### A. STANDARD OF REVIEW

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

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

### B. BREACH OF CONTRACT

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

“A party claiming a breach of contract must establish (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract

suffered damages as a result of the breach.” *Dunn v. Bennett*, 303 Mich. App. 767, 774; 846 N.W.2d 75 (2013) (quotation marks and citation omitted). “The party seeking to enforce a contract bears the burden of proving that the contract exists.” *AFT Mich. v. Michigan*, 497 Mich. 197, 235; 866 N.W.2d 782 (2015). “Michigan courts will not lightly presume the existence of an enforceable contract because, regardless of the equities in a case, the courts cannot make a contract for the parties when none exists.” *Huntington Nat'l Bank v. Daniel J. Aronoff Living Trust*, 305 Mich. App. 496, 508; 853 N.W.2d 481 (2014) (quotation marks and citation omitted). There is a “strong presumption that statutes do not create contractual rights.” *Studier v. Mich. Pub. Sch. Employees' Retirement Bd.*, 472 Mich. 642, 661; 698 N.W.2d 350 (2005). Thus, “absent an adequate expression of an actual intent of the State to bind itself, courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party.” *Id.* at 662 (quotation marks and citations omitted).

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

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

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

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

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

Regardless, even if plaintiff had properly argued that the April 2005 resolution and the Final Order of Apportionment satisfied the elements of contract formation, a brief review of the relevant portions of the Drain Code reveals that such an

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

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

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

### C. ASSUMPSIT & UNJUST ENRICHMENT

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

The Michigan Supreme Court explained actions of assumpsit as follows:

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

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

Unjust enrichment is “the equitable counterpart of a legal claim for breach of contract.” [AFT Mich. v. Michigan](#), 303 Mich. App. 651, 677; 846 N.W.2d 583 (2014). A party may raise a claim of unjust enrichment “only if there is no express contract covering the same subject matter.” [Local Emergency Fin. Assistance Loan Bd. v. Blackwell](#), 299

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

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

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

<sup>4</sup> “Under general contract law, rights can be assigned unless the assignment is clearly restricted,” and an “assignee stands in the position of the assignor, possessing the same rights and being subject to

the same defenses.” *Burkhardt v. Bailey*, 260 Mich. App. 636, 653; 680 N.W.2d 453 (2004).

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

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

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

\*7 The earliest decision upon which plaintiff relies, *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-535; 38 S. Ct. 186; 62 L. Ed. 451 (1918), arose from a judgment obtained against a number of railroad defendants (i.e., common carriers) after the Interstate Commerce Commission found that the rate they charged for transporting hardwood lumber was excessive, and where the United States Supreme Court held that the plaintiffs were

permitted to collect a judgment against the defendants even if the plaintiffs may have passed on the excessive charge to their own customers. The Court explained that a common “carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum,” because “of the endlessness and futility of the effort to follow every transaction to its ultimate result.” *Id.* Thus, that holding pertained to proceedings involving a decision by the Interstate Commerce Commission, and commercial transactions where it would be difficult to ascertain how the excessive rate affected the prices paid by customers of the affected businesses. Given that plaintiff readily alleged in its complaint that Oak Park passed the overcharges on to its ratepayers, and has not shown that there would be any particular complexity in determining how the overcharge directly affected the fees paid by Oak Park’s ratepayers, plaintiff’s reliance on *Southern Pacific Co.* is inapt.

Plaintiff also relies on decisions with similar holdings that pertain to claims based on federal antitrust violations: *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488-489, 493-494; 88 S. Ct. 2224; 20 L. Ed. 2d 1231 (1968) (rejecting a “passing-on” defense while recognizing that a buyer who was charged an illegally high price for materials used for the buyer’s business had established a prima facie case under federal antitrust law); *Oakland Co. v. Detroit*, 866 F.2d 839, 844-846 (C.A. 6, 1989)<sup>5</sup> (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.

<sup>5</sup> “Opinions of the lower federal courts and foreign jurisdictions are not binding but may be considered

persuasive.” *People v. Patton*, 325 Mich. App. 425, 435 n. 1; 925 N.W.2d 901 (2018).

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

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

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

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

Nonetheless, plaintiff fails to show that defendant was under some general duty of reasonableness in connection with its stormwater disposal charges. Plaintiff relies on *Mapleview Estates, Inc. v. City of Brown City*, 258 Mich. App. 412; 671 N.W.2d 572 (2003). The discussion of reasonableness in that decision was limited to whether a “tap-in fee” for connecting to a municipal water system was reasonable under the Revenue Bond Act of 1933, *MCL 141.101 et seq.*, where a municipality is permitted to set the rates for services falling

under that act provided that those rates are reasonable. *Id.* at 417-418.<sup>6</sup> But plaintiff provides no argument or explanation regarding how the RBA might be applicable in this situation.

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

And plaintiff did not raise an independent claim in its complaint that defendant charged unreasonable rates; rather,

its allegation that the rates were unreasonable merely supported a claim in assumpsit and a claim of unjust enrichment. Given that plaintiff has failed to cite legal authorities that establish defendant was required to charge a reasonable rate, or otherwise adequately brief how the trial court erred, plaintiff has abandoned this argument on appeal. See *MOSES, Inc.*, 270 Mich. App. at 417; *Wolfe*, 267 Mich. App. at 139.

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

Affirmed.

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UNPUBLISHED OPINION. CHECK  
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UNPUBLISHED  
Court of Appeals of Michigan.

KICKHAM HANLEY PLLC, Plaintiff-Appellant,

v.

OAKLAND COUNTY MICHIGAN, Defendant,

and

[George W. Kuhn Drainage District](#), Defendant-Appellee.

No. 341076

|

May 2, 2019

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

Before: [Murray](#), C.J., and [Sawyer](#) and [Redford](#), JJ.

## Opinion

Per Curiam.

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

### I. BACKGROUND

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

<sup>1</sup> The trial court dismissed Oakland County based upon a stipulation of the parties.

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

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

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\*2 Royal Oak, in turn, passed through the charges imposed by the GWKDD to its ratepayers by incorporating the charges into its water and sewer rates to recover the entire amount of the GWKDD's charge. The Drainage Board's Final Order of Apportionment provided that the charges to the municipalities, including Royal Oak, were comprised of two components: (1) the DWSD's charges to the George W. Kuhn Drain to treat the total stormwater flow and (2) the administrative costs of operating and maintaining the balance of the George W. Kuhn Drain System.

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

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

## II. SUMMARY DISPOSITION UNDER [MCR 2.116\(C\)\(8\)](#)

### A. STANDARD OF REVIEW

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

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

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

## B. BREACH OF CONTRACT

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

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

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

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

In this case, plaintiff alleged one count of breach of contract based on the resolution adopted by the Drainage Board. It argued to the trial court that the resolution coupled with the Drainage Board's Final Order of Apportionment constituted an express contract that the GWKDD breached. The record reflects that plaintiff attached the resolution and the Final Order of Apportionment to its complaint as exhibits making

them part of its pleadings and relied on those documents to allege the existence of a contract between the GWKDD and Royal Oak. Therefore, the trial court could properly consider those documents for determination of defendant's summary disposition motion under [MCR 2.116\(C\)\(8\)](#). *Liggett*, 260 Mich. App. at 133.

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

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

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

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

The resolution and Final Order of Apportionment at issue in this case, therefore, constituted a statutorily required determination that apportioned the costs of stormwater disposal and treatment by the DWSD, and allocated to the municipalities in the GWKDD their proportionate share. Neither the resolution nor the Final Order of Apportionment, nor those documents combined constituted contracts on which Royal Oak could base a breach of contract claim. Plaintiff, therefore, failed and could not meet its burden of establishing the existence of a contract. Accordingly, the trial court properly granted summary disposition of plaintiff’s breach of contract claim under MCR 2.116(C)(8).<sup>3</sup>

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

### C. ASSUMPSIT

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

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

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

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

In this case, plaintiff alleged a claim in assumpsit for money had and received on the ground that the GWKDD improperly overcharged Royal Oak contrary to the Drainage Board’s resolution. Plaintiff based that alternative claim on its position as Royal Oak’s assignee. Plaintiff did not dispute that Royal

Oak passed through the alleged overcharges to its water and sewer ratepayers. The trial court ruled that plaintiff, as Royal Oak's assignee, could not maintain the assumpsit claim because Royal Oak suffered no recoverable loss. The trial court did not err in this regard.

Under Michigan law, an assignee stands in the shoes of the assignor and acquires only the same rights as the assignor and remains subject to the same defenses as the assignor. *Coventry Parkhomes Condo Ass'n. v. Fed. Nat'l. Mortg. Ass'n.*, 298 Mich. App. 252, 256-257; 827 N.W.2d 379 (2012). Therefore, as Royal Oak's assignee, plaintiff acquired no more rights than Royal Oak had at the time of the assignment and it remained subject to the same defenses as Royal Oak. In this case, plaintiff sought a refund of the alleged overcharges as Royal Oak's assignee. Royal Oak, however, passed through to its water and sewer ratepayers the GWKDD's charges by incorporating them into the water and sewer rates. Royal Oak suffered no loss because the funds it paid to the GWKDD were recovered from its ratepayers who paid their water and sewer bills. The record reflects that plaintiff conceded at the hearing that Royal Oak did nothing wrong and had authority to charge its ratepayers whatever amount the GWKDD charged Royal Oak, including the alleged overcharges, because Royal Oak was "purely a pass-through." Thus, if the GWKDD overcharged and collected fees from Royal Oak for stormwater disposal, plaintiff can claim no right to recover from the GWKDD because Royal Oak suffered no loss from its payment of the alleged overcharges. Royal Oak passed on the charges and passed on the ratepayers' payments. Royal Oak recouped any excess payments from its water and sewer ratepayers. Royal Oak had no claim against the GWKDD that it had in its possession money which in equity and good conscience belonged to Royal Oak. Royal Oak, therefore, occasioned no compensable loss. *Trevor*, 338 Mich. at 224-225; *Hoyt*, 158 Mich. at 626. The trial court correctly discerned that Royal Oak had no claim in assumpsit. Consequently, plaintiff failed and could not state a claim in assumpsit.

Plaintiff argues that federal antitrust law principles articulated in the United States Court of Appeals for the Sixth Circuit's decision in *Oakland Co. v. Detroit*, 866 F.2d 839 (CA 6, 1989) and the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720; 97 S.Ct. 2061; 52 L.Ed. 2d 707 (1977) should be considered and applied in this case. Both of those cases, however, are distinguishable because in *Oakland Co.*, the Sixth Circuit addressed whether counties had standing to bring a federal antitrust action and seek treble damages under

the Racketeering Influence and Corrupt Organizations Act (RICO), and in *Illinois Brick*, the Supreme Court addressed who could seek recovery under the Clayton Act in an antitrust action. The courts considered who constituted an injured party within the meanings of RICO and the Clayton Act for federal antitrust violation claim purposes. The courts based their decisions on concerns that holding otherwise would lead to the filing of numerous antitrust actions and unmanageable antitrust class actions that presented enormous evidentiary complexities and uncertainties. We do not find the rationale for the courts' decisions applicable in this case. Further, neither case involved an equitable action in assumpsit. Accordingly, we decline to apply federal antitrust law principles in this case.

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

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

<sup>5</sup> 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.

### III. GOVERNMENTAL IMMUNITY

Defendant argues that, in the absence of a contract, plaintiff's claims constituted negligence claims subject to government immunity under the Governmental Tort Liability

Act (GTLA), [MCL 691.1401 et seq.](#) Plaintiff counters by asserting that the trial court correctly decided that government immunity did not apply in this case. We agree that the trial court correctly determined this issue.

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

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

#### IV. AMENDED COMPLAINT

\*7 Plaintiff also argues that the trial court erred by granting defendant's motion to strike its first amended complaint

and by denying its motion for leave to amend under [MCR 2.118\(A\)\(2\)](#) based on futility. We disagree.

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

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

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

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

(1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.

(2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

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

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

Ordinarily, a motion to amend a complaint should be granted, and should be denied only for the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously

allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment.

\* \* \*

An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim. [*Id.* at 697 (citations omitted).]

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

The equitable right of restitution exists when a person has been unjustly enriched at another person's expense. *Morris Pumps*, 273 Mich. App. at 193. The law will imply a contract “to prevent unjust enrichment when one party inequitably receives and retains a benefit from another.” *Id.* at 194; see also *Belle Isle Grill*, 256 Mich. App. at 478. To sustain a claim of unjust enrichment, “a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.” *Morris Pumps*, 273 Mich. App. at 195. “In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense.” *Id.*

In this case, plaintiff stood in the shoes of Royal Oak as its assignee. It alleged in its proposed amended complaint that the GWKDD was unjustly enriched by overcharging Royal Oak for the costs of stormwater disposal. Although plaintiff alleged that the GWKDD received a benefit and asserted that it would be unjust for the GWKDD to retain the alleged overcharges, plaintiff cannot establish any inequity resulting to Royal Oak from the GWKDD's retention of the overcharges because Royal Oak passed through to ratepayers the alleged overcharges and recouped from them the amount it allegedly overpaid. While the retention of the alleged overcharges collected by the GWKDD may have resulted in an inequity to the ratepayers, Royal Oak suffered no loss. The record reflects that plaintiff did not specifically allege in its proposed amended complaint that any inequity resulted to Royal Oak. Royal Oak could not state a claim for unjust enrichment under the circumstances presented in

this case. Therefore, plaintiff, as Royal Oak's assignee, could not state a claim for unjust enrichment. Because Royal Oak admittedly passed through the charges to its water and sewer ratepayers, the GWKDD was not unjustly enriched at the expense of Royal Oak. *Id.* at 195. Accordingly, plaintiff's proposed unjust enrichment claim suffered from the same defect as its assumpsit claim and the trial court could properly deny plaintiff's motion to amend on the ground of futility.

Therefore, the trial court did not abuse its discretion by denying plaintiff's motion for leave to amend its complaint.

\*9 Affirmed.

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UNPUBLISHED OPINION. CHECK  
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Court of Appeals of Michigan.William NOFAR, on Behalf of Himself and All Others  
Similarly Situated, Plaintiff-Appellant/Cross-Appellee,  
v.

CITY OF NOVI, Defendant-Appellee/Cross-Appellant.

No. 363356

|

December 17, 2024, 2:45 PM

Oakland Circuit Court, LC No. 2020-183155-CZ

Before: Markey, P.J., and Borrello and Garrett, JJ.

**Opinion**

Per Curiam.

\*1 Plaintiff, William Nofar, on behalf of himself and the certified class, appeals by right the trial court's order granting summary disposition in favor of defendant, City of Novi (the city), under [MCR 2.116\(C\)\(10\)](#). Plaintiff also appeals the trial court's ruling denying his motion for partial summary disposition. The trial court concluded that plaintiff failed to establish a genuine issue of material fact with respect to plaintiff's unjust-enrichment and assumpsit claims that were premised on his general contention that the city's water and sewer usage rates were unreasonable and excessive. Plaintiff's two causes of action were grounded on common-law, city-charter, and statutory theories. Plaintiff's equitable claims in relation to his statutory theory of recovery were based on his assertion that the water and sewer rates included, in part, a tax—as opposed to a user fee, implicating by analogy principles attendant to the Headlee Amendment, [Const. 1963, art. 9, § 31](#). The trial court found that the city did not impose a tax through its water and sewer charges. The city cross appeals, maintaining that the trial court erred by granting class certification and that summary disposition should also have been granted to the city under [MCR 2.116\(C\) \(7\)](#) (statute of limitations) and (8). We conclude as a matter of law that plaintiff failed to overcome the presumption of reasonableness with regard to the water and sewer rates

and that the lawsuit was otherwise subject to summary dismissal because the tax-based claims were time-barred. Accordingly, we affirm the trial court's order summarily dismissing plaintiff's complaint.

## I. HISTORY

## A. GENERAL BACKGROUND

The infrastructure of the city's water and sanitary-sewer systems dates back to the 1950s. The city currently has an above-ground water storage tank that can hold 1.5 million gallons of water. The city also has an underground sanitary-sewage retention basin that can hold 1 million gallons of sewage.<sup>1</sup> The city asserted that the water and sewer systems are nearing the end of their useful lives and that the cost to replace the associated infrastructure will be about \$900 million. The city's water is supplied by the Great Lakes Water Authority (GLWA). The city pays the GLWA for the water. Two-thirds of the city's sanitary sewage is discharged to Wayne County's Rouge Valley Sewage Disposal System, with the remaining one-third being serviced through the Oakland County Water Resource Commission. The city has contracts with and pays Wayne County and Oakland County with regard to the discharge of the city's sewage.

<sup>1</sup> The retention facility plays a primary role in regard to plaintiff's statutory, Headlee-related argument. The retention facility was built in 2019-2020 at a cost of approximately \$10 million.

The city charges user and connection fees to fund the cost of maintaining the water and sewer systems. The rates are based on the metered use of water. The city sets its rates on an annual basis in an effort to generate enough revenue to maintain the water and sewer systems, including the cost of paying the GLWA and Oakland and Wayne Counties, as well as the cost of anticipated expenses related to the maintenance, repair, rehabilitation, and replacement of system components. Information regarding the prospective costs are compiled every year by the city's finance department, after which the finance director and city manager make a joint recommendation to the city council with respect to rates. The city council then sets the water and sewer rates, as guided by various legal parameters. In recent years, the city has paid cash for expenses related to maintaining, repairing, rehabilitating, improving, and replacing system

infrastructure. Bonds have not been issued to secure water and sewer improvements since 1998.

\*2 The city's water and sewer fund had cash reserves in the amount of \$56 million in 2015, \$63.9 million in 2017, \$66.5 million in 2018, and \$69 million in 2019, dipping down to \$44 million at the time of summary disposition. These cash reserves are at the forefront of plaintiff's broad contention that the water and sewer rates paid by the city's citizens have been unjust and unreasonable.

## B. PLAINTIFF'S COMPLAINT

The nature and gist of plaintiff's case against the city was spelled out in the introductory paragraphs of his complaint, wherein he alleged as follows:

1. The Michigan courts have long recognized that a "municipally-owned utility is built and operated, not for a corporate profit, but for the purpose of providing utility services at a reasonable cost to the citizens of the municipality, who are generally identical with the customers." *Wolgamood v Village of Constantine*, 302 Mich 384, 404-405; 4 NW2d 697 (1942). The City has disregarded this fundamental principle for many years, to the detriment of its citizens and inhabitants.

2. This is an action challenging the reasonableness of the City's water and sewer rates, collectively the "Rates", imposed by the City on citizens who draw water from the City's water supply system and who dispose of their sanitary sewage through the City's sewer system.

3. Since at least 2015, the City has set its Rates at a level far in excess of the rates that were necessary to finance the actual costs of providing water and sewage disposal services (the "Rate Overcharge"). The Rates during this period were established in contravention of established water and sewer rate-setting methodologies, and resulted in the accumulation of cash reserves far in excess of those necessary to support the City's water and sewer function. Indeed, between June 30, 2015 and June 30, 2019, the City increased its cash and investments in the Water and Sewer Fund from an already excessive \$56 million to over \$69 million through its continuing imposition of the Rate Overcharge.

4. The Water and Sewer Fund accumulated so much excess and unnecessary cash that, in June 2017, the City

authorized the Water and Sewer Fund to advance up to \$17 million to other City funds to finance capital improvements unrelated to the City's water and sewer system. In the fiscal year ending June 30, 2019, the Water and Sewer Fund advanced \$3,000,000 of the authorized \$17 million to the City's Capital Improvement Fund to finance capital improvements in the City. This fact alone proves that the City's Water and Sewer Rates have been unreasonable because they were designed to generate, and actually did generate, revenues far in excess of those necessary to supply water and sewer services to the City's inhabitants. As the Michigan Supreme Court recently observed, "[i]f the fees for a particular service consistently generate revenue exceeding the costs for the service, the reasonableness of the fee for that service would be suspect." *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 220; 934 NW2d 713 (2019) ....

5. The Rate Overcharges are unlawful because (a) they are arbitrary, capricious and/or unreasonable under common law; (b) they violate the Prohibited Taxes by Cities and Villages Act, MCL 141.91; and (c) they violate the City's own Charter, Sec. 13.3, which requires the City to establish "just and reasonable" Water and Sewer Rates. [Citations reformatted.]

\*3 Plaintiff alleged six counts or causes of action in the complaint. There were three counts of unjust enrichment and three counts of assumpsit. One count alleged unjust enrichment on the theory that the city imposed unreasonable, arbitrary, and capricious water and sewer rates. Plaintiff cited *Mapleview Estates, Inc v Brown City*, 258 Mich App 412; 671 NW2d 572 (2003), for the proposition that water and sewer rates must be reasonable. This count has been referred to as plaintiff's common-law claim. Another count alleged unjust enrichment on the basis of a violation of MCL 141.91, which states that "[e]xcept as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964." Plaintiff maintained that the city violated the statute "by imposing and collecting the Rate Overcharges, which [were] disguised taxes that [were] not ad valorem property taxes, and were first imposed after January 1, 1964." Plaintiff additionally claimed that "[t]he Rate Overcharges [were] motivated by a revenue-raising purpose, the Rate Overcharges render[ed] the Rates disproportionate to the City's actual costs of providing water and sewer service, and

payment of the Rate Overcharges [was] not voluntary.”<sup>2</sup> The third count of unjust enrichment was premised on an alleged violation of the Novi City Charter (NCC), § 13.3, which provided that “[t]he Council shall have the power to fix from time to time such just and reasonable rates as may be deemed advisable for supplying inhabitants of the City and others with such public-utility services as the City may provide.” Plaintiff asserted that the water and sewer rates were not just and reasonable.

<sup>2</sup> This is the statutory provision giving rise to the Headlee-related arguments, i.e., was revenue produced through a user fee or a tax.

Plaintiff next alleged a claim of assumpsit on the theory that the city imposed unreasonable, arbitrary, and capricious water and sewer rates. Plaintiff again cited *Mapleview Estates*, 258 Mich App 412, for the common-law proposition that water and sewer rates must be reasonable. Plaintiff further posited that “[a] claim to recover amounts paid to a governmental unit in excess of the amount allowed under law is properly filed as an equitable action in assumpsit for money had and received.”<sup>3</sup> In the second assumpsit count, plaintiff again alleged a violation of MCL 141.91. The count mimicked the allegations in the unjust-enrichment count associated with MCL 141.91. With respect to the third and final count of assumpsit, plaintiff again alleged a violation of NCC, § 13.3, with plaintiff asserting that the water and sewer rates were not just and reasonable.<sup>4</sup>

<sup>3</sup> Plaintiff made this same allegation in all three assumpsit counts.

<sup>4</sup> Plaintiff also included in the complaint the following allegations in support of class certification:

A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. The prosecution of separate actions would create a risk of inconsistent or varying adjudications. Furthermore, the prosecution of separate actions would substantially impair and impede the ability of individual class members to protect their interests. On the other hand, it is probable that the amount which will be recovered by individual class members will be large enough in relation to the expense and effort

of administering the action to justify a class action. Plaintiff anticipates no difficulty in the management of this action as a class action.

### C. COMPETING DOCUMENTARY EVIDENCE AND CLAIMED INFERENCES ARISING FROM THE EVIDENCE

On appeal, the parties rely on certain documentary evidence that was presented below, along with alleged inferences arising from the evidence. With respect to plaintiff, he asserts that the city began accumulating excessive amounts of cash in its water and sewer fund in July 2015, that the city concluded in June 2016 that it had more than enough cash in the fund, that consistent with a plan reflected in the city's budget, the city needlessly continued to accumulate cash in the fund for the three years following June 2016, and that in 2017, the city decided to advance \$17 million in excessive cash found in the fund to other city funds. Moreover, plaintiff maintains that as late as 2019, the city continued to assure its citizens that it did not need to use cash reserves to finance future capital improvements, that the massive cash reserves were unnecessary because the water and sewer systems are relatively new, are in fabulous condition, and have no looming infrastructure replacement needs, and that the city started spending down the cash reserves when this suit was filed to create the misperception that the reserves were needed for imminent capital improvements. Finally, plaintiff contends that his expert, John Damico, opined that the water and sewer rates were unreasonable because of the excessive cash reserves, that the city's cash reserves dwarfed the reserves of comparable municipalities, and that the city funded the entire \$10 million cost of the retention facility—a major infrastructure improvement—with cash from its reserves.

\*4 On the other hand, the city points to evidence or inferences showing that its water and sewer systems are sprawling, complex, expensive, and in constant need of maintenance, repairs, and the replacement of components, that the city charges usage fees or rates based on metered consumption, along with connection fees, all of which go into the water and sewer fund, and that the city sets relatively low usage fees annually so as to generate just enough revenue to provide drinking water and sanitary-sewer disposal and to cover the costs of maintaining, repairing, and replacing system infrastructure. The city additionally asserts that in setting the usage fees there is an assumption that some amount will be collected beyond that needed to purchase water and sanitary-sewer capacity, that the

additional amount is intended to be spent on improvements or deposited into the water and sewer fund's cash and investment reserves to await later use for system improvements, and that, contrary to plaintiff's contention, the increase in cash reserves between 2015 and 2020 was not the result of any planned surplus but was instead caused by the collection of unrelated and uncontested connection fees and delays in executing improvement projects. The city further contends that since 2015 it had spent and will continue to spend millions of dollars on long-planned maintenance, repair, and rehabilitation projects and that the monies to pay for almost all of these projects came or will come from accumulated cash reserves. The city also maintains that the transfer of money from the water and sewer fund to a different city fund was not illegal or improper and that the transfer was not evidence of excess cash reserves. Finally, the city claims that the retention facility was built to remedy unlawful overflows from existing customers and to address the envisioned future size of the system, that it was thus proper to pay for the facility using cash reserves accumulated through the collection of usage fees and connection charges, and that the affidavit and testimony by plaintiff's expert was fully rebutted by the city's expert and did not create a genuine issue of material fact.

#### D. MOTIONS FOR SUMMARY DISPOSITION

There were multiple motions for summary disposition. The city initially moved for summary disposition under [MCR 2.116\(C\)\(8\)](#); the trial court denied the motion, concluding that plaintiff had adequately pleaded recognizable causes of action. Plaintiff then moved for partial summary disposition with respect to his common-law and statutory claims of unjust enrichment to the extent that they concerned the retention facility and other future capital improvements and whether the associated funding mechanism constituted a tax as opposed to a user fee. Before that motion was decided, the city filed a second motion for summary disposition, presenting several arguments under [MCR 2.116\(C\)\(7\)](#), [\(8\)](#), and [\(10\)](#), including its contention that there was no evidence that the usage fees or rates were unreasonable. A hearing was conducted on plaintiff's and the city's summary disposition motions, and the court took the matters under advisement.

Subsequently, in a written opinion and order, the trial court denied plaintiff's motion for partial summary disposition and summarily dismissed all six counts of plaintiff's complaint in relation to the city's motion for summary disposition. In its opinion and order, the trial court set forth a broad

overview of the case, the legal authorities authorizing the city to collect utility fees, the basic facts concerning the nature and structure of the water and sewer systems, the circumstances surrounding the construction of the retention facility, the cash-reserve amounts from year to year, and its analysis of the issues raised in the motions for summary disposition.

With respect to plaintiff's motion for partial summary disposition, the trial court cited the three factors enunciated in *Bolt v Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998), used to evaluate whether a charge constitutes a user fee or a tax. Recall that [MCL 141.91](#) prohibits a city, except as otherwise provided by law, from imposing a tax, other than an ad valorem property tax, unless the tax had been one imposed by the city on January 1, 1964. There is no dispute that a tax to pay for a water and sewer project such as the sanitary-sewage retention facility was not a tax being imposed or recognized in the city in January 1964. The trial court discussed at some length the factual circumstances addressed by the *Bolt* Court and the various legal principles expressed in *Bolt* in regard to determining whether a ratepayer is being saddled with a user fee or a tax.

The trial court acknowledged the city's argument that it was unnecessary to engage in the *Bolt* analysis because plaintiff failed to first address the question whether the water and sewer rates were reasonable. The court noted that plaintiff's motion for partial summary disposition concerned two of the unjust-enrichment counts (common-law and statutory bases), that these were equitable claims and not Headlee claims, which fact plaintiff completely ignored, and that plaintiff's brief was "devoid of any legal argument related to unjust enrichment." The trial court indicated that whether a charge is a tax for purposes of Headlee or [MCL 141.91](#) is a completely different question from whether a municipality's water and sewer rates are reasonable. The court stated that Michigan has long recognized a common-law presumption of reasonableness relative to municipal utility rates, thereby placing the onus or burden on a plaintiff to prove with clear evidence that a rate is unreasonable. The trial court concluded that the caselaw required plaintiff to first show that the city's water and sewer rates were unreasonable, which he failed to do; therefore, it was unnecessary for the court "to reach the *Bolt* analysis."

\*5 Nevertheless, the trial court proceeded to rule that even if the *Bolt* analysis were applicable, it would still deny plaintiff's motion for partial summary disposition. The court reasoned as follows:

The factual situation in *Bolt* is distinguishable from the case at bar. The fee that the City of Lansing had imposed in *Bolt* was an annual fee to implement a stormwater separation program for the 25% of the city that did not already have it[s] storm sewers separated from its sanitary sewers. This separation program was to cost \$176 million over a 30-year period of implementation. The charge in *Bolt* was therefore primarily intended as a capital charge. The *Bolt* Court held, “A major portion of this cost (approximately sixty-three percent) constitutes capital expenditures. This constitutes an investment in infrastructure as opposed to a fee designed simply to defray the cost of a regulatory activity.” Here, the City has only had approximately 4%-12% in “net revenue” i.e., revenue left over after usage cost, in any given year during the class period. This is a fraction of the 63% at issue in *Bolt*.

In *Bolt*, the city was funding a specific capital improvement, using a delineated charge, and was doing so for a specific period of 30 years. Here, Plaintiff complains that the City used its “net revenue” ... to fund the Retention Facility. Plaintiff’s argument that there is a “charge” specifically for the Retention Facility “embedded” in the City’s usage fees fails. In *Shaw [v Dearborn, 329 Mich App 640; 944 NW2d 153 (2019)]*, “[p]laintiff claims that these purported charges are embedded in the city’s water and sewer rates, but cites no pertinent authority suggesting that it is appropriate for the purpose of a Headlee Amendment claim to analyze a purported charge that is not separately or distinctly assessed by the governmental agency.” [Alteration in original.]

The trial court concluded that plaintiff failed to make the requisite showing that the city’s water and sewer rates were unreasonable, that plaintiff did not bring a Headlee claim, and that the instant case was factually distinguishable from *Bolt*. Accordingly, the trial court denied plaintiff’s motion for partial summary disposition.

With respect to the city’s motion for summary disposition, the trial court focused its attention on plaintiff’s alleged failure to demonstrate that the water and sewer rates were unreasonable. The trial court reiterated its earlier recitation of the law that municipal utility rates are presumed to be reasonable, that a plaintiff has the burden to show that a given rate or ratemaking practice is unreasonable, and that absent clear evidence of illegal or improper utility rates, a court lacks the authority to disregard the reasonableness presumption. The trial court stated that plaintiff never identified in his complaint the actual

rates the city charged for water and sewer services. The court further observed that plaintiff did “not support how the rates themselves are objectively unreasonable, choosing instead to point to the size of the City’s cash reserves alone.” The trial court also noted that during oral argument on the motions, plaintiff’s counsel “was unable to articulate how the City’s rates are unreasonable.”

\*6 The trial court next posited that, under the existing caselaw, because plaintiff’s claims sounded in unjust enrichment and assumpsit, he was required to first establish that the rates themselves were unreasonable so as to overcome the presumption of reasonableness, regardless of the size or excessiveness of any cash reserves. The trial court noted that it had previously denied the city’s original motion for summary disposition under [MCR 2.116\(C\)\(8\)](#) because the court could only take into consideration the pleadings, and plaintiff had alleged that the water and sewer rates were unreasonable. But now [MCR 2.116\(C\)\(10\)](#) came into play, and plaintiff was obligated to present some documentary evidence showing that the rates were unreasonable. The court addressed and rejected the view of plaintiff’s expert Damico, who opined that the city’s cash reserves were too high and thus the rates were unreasonable. According to the court, Damico had no opinion regarding whether the usage rates in and of themselves (without reference to the cash reserves) were excessive and conceded that he did not even know what the usage rates were when he produced his report. The court asserted that plaintiff’s logic was circular—the rates were unreasonable because the city’s cash reserves were too large, but plaintiff failed to provide evidence suggesting that having a cash reserve is unreasonable or unlawful. The trial court maintained that five recent decisions by this Court had rejected the exact same argument plaintiff poses here. The court explained that these cases emphasized that it was completely proper for a municipality to carry cash reserves in order to provide financial stability, cover the costs of future capital or infrastructure improvements, and avoid incurring bond indebtedness.

In granting the city’s motion for summary disposition, the trial court additionally provided the following reasoning:

The first element of an unjust enrichment claim requires a showing that the defendant obtained a “benefit” from the plaintiff. Plaintiff has not demonstrated that the City reaps a

benefit from the temporary period during which it possesses a cash reserve while it undertakes the process of identifying, evaluating, planning for, engineering, designing, bidding, and completing improvements. Apart from the \$17 million line of credit loaned in 2017, Plaintiff does not provide one shred of evidence that the City used the funds for something which benefitted itself over Plaintiff. The City's cash reserve fluctuates between \$44-69 million. The reserve was used for sewer improvement projects. Finally, Plaintiff has not provided any evidence that the \$17 million line of credit to the Capital Improvement Fund was improper or unlawful. [Citation omitted.<sup>5</sup>]

<sup>5</sup> The trial court also ruled that the city had the authority under statute and treasury rules to make the \$17 million transfer.

In sum, with respect to the city's motion for summary disposition, the trial court concluded that plaintiff failed to present evidence that the water and sewer rates were unreasonable, that plaintiff failed to demonstrate that the city was unjustly enriched by the surplus funds, and that plaintiff failed to show that the city's accumulation of funds to maintain the water and sewage systems was unlawful in any way. The trial court therefore granted the city's motion for summary disposition under [MCR 2.116\(C\)\(10\)](#).

Plaintiff appeals by right, and the city has filed a cross-appeal.<sup>6</sup>

<sup>6</sup> The city had argued that it was also entitled to summary disposition under [MCR 2.116\(C\)\(8\)](#) because plaintiff had failed to plead sufficient facts to overcome the presumption of reasonableness, that the court should have additionally granted it summary disposition on the basis that neither [MCL 141.91](#) nor NCC, § 13.3 provide for a private cause of action, that plaintiff's statutory, tax-related claims should have been summarily dismissed under the one-year statute of limitations applicable

to Headlee suits, and that class certification should not have been granted. In its cross-appeal, the city again raises all of these arguments. We only find it necessary to address the city's contention that plaintiff's claims that a tax was embedded in the usage fees were time-barred.

## II. ANALYSIS

### A. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. [El-Khalil v Oakwood Healthcare, Inc](#), 504 Mich 152, 159; 934 NW2d 665 (2019). We also review de novo questions with respect to the interpretation and application of a statute. [Estes v Titus](#), 481 Mich 573, 578-579; 751 NW2d 493 (2008). The construction of municipal ordinances is likewise subject to de novo review. [Great Lakes Society v Georgetown Charter Twp](#), 281 Mich App 396, 407; 761 NW2d 371 (2008). A trial court's application of equitable doctrines, such as unjust enrichment, is similarly reviewed de novo. [Trahey v Inkster](#), 311 Mich App 582, 593-594; 876 NW2d 582 (2015). And “[t]he question whether a cause of action is barred by the applicable statute of limitations is one of law, which this Court reviews de novo.” [Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi](#), 483 Mich 345, 354; 771 NW2d 411 (2009). “De novo review means that we do not extend any deference to the trial court.” [In re Ott](#), 344 Mich App 723, 735; 2 NW3d 120 (2022).<sup>7</sup>

<sup>7</sup> We interpret and review statutes and municipal ordinances in the same manner. [Grand Rapids v Brookstone Capital, LLC](#), 334 Mich App 452, 457; 965 NW2d 232 (2020). And in [Slis v Michigan](#), 332 Mich App 312, 335-336; 956 NW2d 569 (2020), this Court recited the well-established principles regarding statutory interpretation, stating as follows:

This Court's role in construing statutory language is to discern and ascertain the intent of the Legislature, which may reasonably be inferred from the words in the statute. We must focus our analysis on the express language of the statute because it offers the most reliable evidence of legislative intent. When statutory language is clear and unambiguous, we must apply the statute as written. A court is not permitted to read anything into an unambiguous

statute that is not within the manifest intent of the Legislature. Furthermore, this Court may not rewrite the plain statutory language or substitute its own policy decisions for those decisions already made by the Legislature. [Citations omitted.]

B. PRINCIPLES OF SUMMARY  
DISPOSITION – MCR 2.116(C)(7) and (10)

\*7 Summary dismissal is proper under MCR 2.116(C)(7) when an action is barred because of the “statute of limitations.” In *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008), this Court recited the principles governing a motion for summary disposition brought pursuant to MCR 2.116(C)(7):

Under MCR 2.116(C)(7) ..., this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.]

In *Anderson v Transdev Servs, Inc*, 341 Mich App 501, 506-507; 991 NW2d 230 (2022), this Court set forth the guiding principles in analyzing a motion brought pursuant to MCR 2.116(C)(10):

MCR 2.116(C)(10) provides that summary disposition is appropriate when, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” A motion brought pursuant to MCR

2.116(C)(10) tests the factual support for a party's action. “Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required ... when judgment is sought based on subrule (C)(10),” MCR 2.116(G)(3)(b), and such evidence, along with the pleadings, must be considered by the court when ruling on the (C)(10) motion, MCR 2.116(G)(5). “When a motion under subrule (C)(10) is made and supported ..., an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G)(4).

A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. 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. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party. Speculation is insufficient to create an issue of fact. A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. [Quotation marks, citations, and alteration brackets omitted; ellipses in original.]

C. UNJUST ENRICHMENT AND  
ASSUMPSIT – GENERAL PRINCIPLES

\*8 “Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, [a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.” *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006). To prove 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). An implied contract prevents unjust enrichment but only in the absence of an “express contract covering the same subject matter.” *Id.*

In *Youmans v Bloomfield Charter Twp*, 336 Mich App 161, 213; 969 NW2d 570 (2021), this Court quoted *Moore v Mandelbaum*, 8 Mich 433, 448 (1860), regarding the historical equitable action of assumpsit:

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

“Michigan no longer recognizes an independent cause of action for assumpsit.” *Midwest Valve & Fitting Co v Detroit*, — Mich App —, —; — NW3d — (2024); slip op. at 6-7. “Although no independent cause of action for assumpsit exists, ‘the substantive remedies traditionally available under assumpsit were preserved.’ ” *Id.* at —; slip op. at 7 n 6 (citation omitted). “Hence, an ‘assumpsit’ claim is modernly treated as a claim arising under ‘quasi-contractual’ principles, which represent ‘a subset of the law of unjust enrichment.’ ” *Youmans*, 336 Mich App at 213-214 (citation omitted). Therefore, plaintiff’s assumpsit claims cannot stand on their own and are redundant of his unjust-enrichment claims. Accordingly, we affirm the dismissal of the assumpsit claims and shall focus our attention solely on the unjust-enrichment claims for the remainder of this opinion.

## D. DISCUSSION AND RESOLUTION

### 1. BOLT ANALYSIS AND REASONABLENESS REVIEW

On appeal, plaintiff initially argues that the trial court erred by determining that it could only reach the tax-versus-fee analysis under *Bolt* if it first concluded that the water and sewer rates were unreasonable. Plaintiff contends that the inquiry into whether an unlawful tax was imposed differs from the inquiry into the reasonableness of utility rates. The city maintains that the trial court properly determined that plaintiff was required to first establish that the water and sewer rates were unreasonable even in relation to plaintiff’s tax claim because that tax claim was framed as an equitable unjust-enrichment cause of action.

Plaintiff’s assertion that the retention facility and other capital improvements were financed through a tax embedded in the usage rates and not true user fees was made in the context of his allegation that MCL 141.91 was violated, although the claim was couched in the framework of the unjust-enrichment and assumpsit counts. We decline to resolve this issue and will proceed on the assumption that the trial court erred by requiring proof of unreasonableness in relation to plaintiff’s embedded-tax claims.

### 2. PLAINTIFF’S UNLAWFUL TAX CLAIM – STATUTE OF LIMITATIONS

\*9 Although the trial court indicated that plaintiff had to demonstrate unreasonableness before an analysis under *Bolt* had to be undertaken and that plaintiff as a matter of law had not shown that the water and sewer rates were unreasonable, the court nevertheless proceeded to engage in reviewing the *Bolt* criteria. On appeal, plaintiff argues that the trial court erred in its analysis under *Bolt*, contending that there is authority for applying the analysis outside the context of a Headlee suit, that the court incorrectly distinguished the instant case from *Bolt* on the basis of the percentage of net revenue used to pay for the retention facility, and that the court improperly required plaintiff to show “line item charges” with respect to the retention facility.

We again decline to address the substance of plaintiff’s argument because we agree with the city that plaintiff’s tax-

related claims are time-barred. We conclude that plaintiff's unjust-enrichment, tax-based claims under [MCL 141.91](#) are analogous to a Headlee claim; therefore, his tax claims were subject to a one-year statute of limitations. In his complaint, plaintiff contended that the city had embedded a tax in the water and sewer rates, focusing on the period from June 30, 2015, to June 30, 2019, but his complaint was not filed until August 27, 2020. Accordingly, the embedded-tax claims are barred by the one-year statute of limitations, and the city is entitled to summary disposition on those claims under [MCR 2.116\(C\)\(7\)](#).

The statute of limitations is generally six years for a claim of unjust enrichment, which is a cause of action not expressly addressed in Chapter 58 of the Revised Judicature Act, [MCL 600.5801 et seq.](#) See [MCL 600.5813](#) (providing that “[a]ll 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”) and [MCL 600.5815](#) (stating that “[t]he prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought”). On the other hand, “[a] taxpayer shall not bring or maintain [a Headlee action] ... unless the action is commenced within 1 year after the cause of action accrued.” [MCL 600.308a\(3\)](#). “[T]his Court has long recognized that statutes of limitation may apply by analogy to equitable claims.” *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 127 n 9; 537 NW2d 596 (1995). Our Supreme Court noted that the one-year period of limitations for a Headlee action “is a reasonable restriction designed to protect the fiscal integrity of governmental units who might otherwise face the prospect of losing several years’ revenue from a tax that had previously been thought to comply with Headlee restrictions.” *Id.* at 126. We believe that the same reasoning should apply to a suit brought in reliance on [MCL 141.91](#).

In *Heos v East Lansing*, unpublished per curiam opinion of the Court of Appeals, issued April 13, 2023 (Docket Nos. 361105 and 361138); slip op. at 6,<sup>8</sup> this Court ruled:

Both parties agree on appeal that plaintiff's claims premised on [MCL 141.91](#) are equitable in nature, and so we accept that as true for purposes of this opinion. Plaintiff's claims premised on [MCL 141.91](#) rely on the same arguments and proofs as plaintiff's Headlee claim; plaintiff did not even present distinct arguments for his Headlee claim and his [MCL 141.91](#)-related claims when arguing that he was entitled to summary disposition. For all three claims,

plaintiff argued that the franchise fee was a tax because plaintiff and the class bore the “legal incidence” of the fee, and then argued that the *Bolt* criteria should be applied to the fee to determine whether it was a tax or a user fee. According to plaintiff, applying the *Bolt* criteria made clear that the fee was actually a tax, which entitled plaintiff to summary disposition on both his Headlee claim and his [MCL 141.91](#)-related claims.

**\*10** It is apparent both from the pleadings and from plaintiff's arguments that plaintiff's claims premised on [MCL 141.91](#) are identical to his Headlee claim. As the statute of limitations may apply by analogy to equitable claims, we conclude that plaintiff's unjust enrichment and assumpsit claims premised on [MCL 141.91](#) are barred by analogy.

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

8 “Although unpublished opinions of this Court are not binding precedent, they may ... be considered instructive or persuasive.” *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010) (citations omitted); see [MCR 7.215\(C\)\(1\)](#).

We find *Heos* persuasive on the issue of the statute of limitations.<sup>9</sup> The one-year limitations period for Headlee claims would be rendered meaningless if claimants could evade it by citing [MCL 141.91](#) rather than the Headlee Amendment as the basis for seeking restitution in relation to invalid taxes imposed by a municipality. In this case, plaintiff argues that his claims were not brought under the Headlee Amendment and are not analogous to a Headlee action. Although plaintiff did not cite the Headlee Amendment as authority for the claims in his complaint, he relied on Headlee-related principles in his motion for partial summary disposition relative to his argument that taxation produced the cash reserves used to pay for the retention facility.

And the substance of plaintiff's equitable claims under [MCL 141.91](#) concerning whether a user fee or a tax was employed to generate revenue necessarily triggered a *Bolt* analysis typically associated with the Headlee Amendment. Indeed, even on appeal, plaintiff continues to rely on *Bolt*—a Headlee suit—to support his case. Plaintiff's tax-related claims under [MCL 141.91](#) are thus analogous to Headlee claims. Accordingly, we hold that the city is entitled to summary disposition on plaintiff's unjust-enrichment claims premised on alleged embedded taxes because those claims are time-barred.

9 We do note that our Supreme Court ordered oral argument on the application for leave in *Heos*. *Heos v East Lansing*, 4 NW3d 744 (2024). In part, the Court directed the parties to address “what authority provides the plaintiff with standing to pursue recovery of an improper tax under [MCL 141.91](#)[ ] and ... whether there is case law supporting the plaintiff's argument that the six-year period in [MCL 600.5813](#) applies to his [MCL 141.91](#) claims, and if there is any case law supporting a different period of limitations.” *Id.* Oral argument was scheduled for and heard on October 9, 2024. At this time, a ruling in *Heos* is pending in the Supreme Court. Here, we shall assume that plaintiff had standing to raise equitable claims grounded on [MCL 141.91](#).

### 3. THE REBUTTABLE PRESUMPTION OF REASONABLENESS

\*11 Finally, plaintiff argues that the trial court erred by ruling that the accumulation of excessive cash reserves cannot by itself support a determination that a utility rate is unreasonable. Plaintiff asserts that under *Youmans*, excessive reserves are both necessary and sufficient to prove that the underlying utility rates are unreasonable. Plaintiff contends that his expert, Damico, opined that the amount of cash reserves alone can demonstrate that water and sewer rates are unreasonable. Plaintiff maintains that the trial court erred by relying on *Youmans* to support its ruling because *Youmans* did not involve a *gross* overcharge.

We conclude that the trial court properly granted the city's motion for summary disposition under [MCR 2.116\(C\)\(10\)](#). Plaintiff failed to present documentary evidence sufficient to establish a genuine issue of material fact with respect to

rebutting the presumption that the city's water and sewer rates were reasonable.

Plaintiff sought relief on the theory that the city unjustly enriched itself by charging excessive and unreasonable utility fees for water and sewer services. There is a presumption that the utility rates charged by a municipality are reasonable. *Youmans*, 336 Mich App at 214, 216. A resident ratepayer challenging a utility rate bears the burden of rebutting the presumption of reasonableness. *Id.* at 216. “[C]ourts have stressed a policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates.” *Id.* at 214-215. “Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable.” *Id.* at 216-217 (quotation marks, citations, and emphasis omitted). “[W]hile a utility fee must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged, mathematic precision is not required.” *Trahey*, 311 Mich App at 597. A utility charge is permissible when it reflects the actual costs of use, metered with relative precision in accordance with available technology, including some component of capital investment. *Jackson Co v City of Jackson*, 302 Mich App 90, 110; 836 NW2d 903 (2013). “[M]aintaining a capital reserve is a common practice amongst rate-based public utilities that provides a degree of fiscal stability to utilities[.]” *Id.* at 111.

“In contemporary municipal utility ratemaking cases, a ... focus on principles of ‘unjust enrichment’ is encapsulated within the rebuttable presumption that a municipality's utility rates are reasonable.” *Youmans*, 336 Mich App at 214. Whether a municipality would receive an unjust benefit from retaining disputed rate charges depends on whether water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were excessive, not on whether some aspect of the municipality's ratemaking methodology was improper. *Id.* at 219. The *Youmans* panel emphasized that the remedy of restitution does not concern compensating a party for losses or damages; rather, it restores a party who yielded excessive and unjust benefits to his or her rightful position. *Id.* Applying the various principles set forth above, this Court in *Youmans* held:

The application of these principles in this case is straightforward. On several occasions, the trial court explicitly found that plaintiff had failed to rebut the presumption of reasonableness or demonstrate that the disputed rates were excessive in comparison to the associated costs of providing the related water and

sewer services. On this record, we perceive no basis to disturb those factual findings. On the contrary, without a comprehensive rate study—or some similar evidence demonstrating that the disputed rates excessively compensated the Township for the related utility services—one can at best speculate about whether the disputed rates were proportional to the underlying costs. And several of the testifying experts at trial specifically indicated, having reviewed the Township's audited financial statements, that its cash inflows and outflows over the disputed period were proportional. Therefore, we are not definitely and firmly convinced that the trial court made a mistake when it found that plaintiff had failed to demonstrate disproportionality in the rates.

\*12 In light of that finding, the trial court erred by nevertheless ordering defendants to refund more than \$9 million to plaintiff and the plaintiff class. Given that plaintiff failed to demonstrate that the Township would be excessively (and thus unjustly) enriched by the retention of those funds, the trial court should not have ordered the refund that it did. [*Id.* at 220.]

In the instant case, plaintiff acknowledges that the city spent cash-reserve funds on projects related to the maintenance of infrastructure. And the city demonstrated that the cost of providing water and sewer services includes more than simply the cost of daily operations—it also includes expenses related to maintaining the water and sewer systems and infrastructure. Jeffrey Herczeg, the city's director of public works, listed in his affidavit thirteen projects that he anticipated would proceed in FY 2021-2022 and FY 2022-2023. These were as follows:

- replacement of asbestos cement water mains, at estimated costs of \$680,630 and \$5,488,833;
- improvement of a water main that frequently experienced breaks, at a cost of \$2,944,480;
- sanitary-sewer pipe upgrades, \$2,351,949;
- booster-station improvements, \$153,720;
- sanitary-sewer main replacement, \$1,065,178;
- improvement of a water main transmission redundancy route, \$816,273;
- elimination of an unnecessary pump station, \$974,727;

- water main repairs to protect “a critical asset for the entire water system,” \$942,820;
- replacement of aging water meters, \$613,478;
- valve maintenance, \$1,125,923;
- rehabilitation of a water main that experienced frequent breaks, \$933,380;
- addition of a water main loop, \$251,315.

Plaintiff concedes that “some” portion of revenues can be set aside for these purposes, but he vaguely suggests that there must be some unspecified limit with respect to how much monies can be placed in reserve to cover projects necessary to maintain the water and sewer systems. Plaintiff indicates that some projects are simply too big to pay for out of revenues, such as improvements that will last for more than a few years. But plaintiff does not cite any legal authority for differentiating between improvements that can be paid for out of revenues generated by water and sewer rates and those improvements that require some another form of financing. Most significantly, plaintiff does not cite any evidence related to the rates that the city actually charged its residents.

Plaintiff argues that Damico's expert opinion precluded the trial court from granting the city's motion for summary disposition. Damico, however, failed to establish a factual basis for his opinion that the city overcharged utility ratepayers. He did not perform a rate study or compare the city's rates to the rates in similar municipalities. Damico merely opined that the city overcharged its ratepayers or made them pay an excessive rate as established by the fact that the rates enabled the city to accumulate purportedly-unnecessary cash reserves. Damico cited “industry standards” that an infrastructure reserve is impermissible because “growth pays for itself.” He claimed that the fact that the city was able to loan \$17 million from the water and sewer fund to other city departments constituted unambiguous evidence that ratepayers were excessively overcharged. Damico believed that the loan was not consistent with accepted accounting principles or rate-setting methodologies as set by various trade associations. According to Damico, had the city conducted annual reviews as required by Novi Ordinance, § 34-612, its leaders would have determined that the reserve funds were inappropriate, unnecessary, and excessive. But ultimately Damico's opinion did not supply a sound factual basis for a conclusion that the rates were unreasonable or excessive. Instead, Damico effectively and indirectly

proffered a legal theory or proposition that a municipality is not permitted to accumulate reserves over an unspecified threshold and that the accumulation of reserves above this threshold is sufficient evidence in and of itself to show that utility rates are excessive.

\*13 [MRE 702](#) authorizes the admission of expert testimony upon satisfaction of certain criteria. [MRE 702](#) provided:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>10</sup>

<sup>10</sup> The Michigan Rules of Evidence underwent sweeping stylistic changes by amendment on September 20, 2023, effective January 1, 2024. See ADM File No. 2021-10; 512 Mich lxiii (2023). We are quoting the version of [MRE 702](#) in effect at the time the trial court decided the city's summary disposition motion.

The only aspect of Damico's report that pertained to specialized knowledge outside the trier of fact's common purview, [Woodard v Custer](#), 473 Mich 1, 6; 702 NW2d 522 (2005), were his statements regarding industry standards. But the city's compliance with industry standards does not speak to whether the water and sewer rates were unreasonable. Essentially, Damico's report boils down to an assertion that the city's rates were excessive because they resulted in a temporary accumulation of reserve monies that were used to pay for infrastructure improvements in a shorter time period than the improvements were made. The report did not state the amount of the water and sewer rates, and it did not offer a comparison of rates in similar municipalities. Without

numerical data of how much the city was actually charging its water and sewer customers, it is not possible to test plaintiff's contention that the rates were unreasonable or excessive.

We acknowledge that theoretically there could be a situation in which the amount of cash reserves held by a municipality in a utility fund is so outrageously excessive that it *may* not be necessary to submit evidence of actual utility rates to demonstrate that the rates are unreasonable. But this is not such a case; rather, it appears to us that the city has been exercising fiscal accountability in an effort to create financial stability with respect to its water and sewer systems. We cannot find that the city has been unjustly enriched at the expense of its residents. There is no indication that the cash reserves in the water and sewer fund are ultimately being used in a manner that does not benefit those enjoying the water and sewer services.

### III. CONCLUSION

We conclude as a matter of law that plaintiff failed to overcome the presumption of reasonableness with regard to the water and sewer rates; therefore, the trial court did not err by summarily dismissing plaintiff's unjust-enrichment claims premised on common-law principles and NCC, § 13.3.<sup>11</sup> Furthermore, we conclude that plaintiff's unjust-enrichment, embedded-tax claim that relied on [MCL 141.91](#) was time-barred. Accordingly, although we affirm the ruling on a different ground, the trial court did not err by dismissing that claim. See [Lavey II v Mills](#), 248 Mich App 244, 250; 639 NW2d 261 (2001) (when this Court concludes that a trial court has reached the correct result, we can affirm the result even if done so under alternative reasoning).

<sup>11</sup> Again, the assumpsit claims fail because assumpsit is not a recognized cause of action.

\*14 We affirm. Having fully prevailed on appeal, the city may tax costs under [MCR 7.219](#).

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

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UNPUBLISHED OPINION. CHECK  
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UNPUBLISHED  
Court of Appeals of Michigan.

WOODLAND CONDOMINIUMS  
HOMEOWNERS ASSOCIATION, INC.,  
Plaintiff/Counterdefendant-Appellee,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,  
also known as Fannie Mae, Defendant-Appellant,  
and  
Ditech Financial, LLC, Defendant/  
Counterplaintiff/Cross-Plaintiff-Appellant,  
and  
Future Holdings, LLC, Defendant/Cross-Defendant,  
and  
Mary Ann Wujciak, Defendant.

No. 339850

|

February 28, 2019

Genesee Circuit Court, LC No. 16-107570-CH

Before: [Tukel](#), P.J., and [Shapiro](#) and [Gadola](#), JJ.

### Opinion

Per Curiam.

\*1 Defendants Federal National Mortgage Association (“Fannie Mae”) and Ditech Financial, LLC (“Ditech”), formerly known as Green Tree Servicing, LLC, appeal by leave granted the trial court’s order denying their motion for summary disposition pursuant to [MCR 2.116\(C\)\(10\)](#) (no genuine issue of material fact). We reverse and remand for entry of summary disposition in favor of defendants.

### I. FACTS AND PROCEEDINGS

Plaintiff is the homeowners association for the Woodland condominium development. Mary Ann Wujciak owned a condominium unit in the development. At all times relevant

to these proceedings, Ditech was the servicer of a mortgage owned by Fannie Mae that secured a purchase money loan for the unit. The development was insured by a master policy issued by Farm Bureau General Insurance Company to plaintiff covering the standard condominium unit for fire and other damage. The Farm Bureau master policy identified plaintiff and Ditech as parties with an insurable interest in Wujciak’s unit.

The mortgage contract between Ditech and Wujciak contained the following provision addressing insurance proceeds:

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. *Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender’s security is not lessened.* During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender’s satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation

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of Borrower. *If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.* Such insurance proceeds shall be applied in the order provided for in Section 2. [Emphasis added.]

Plaintiff's bylaws, Article V, Sections 4, 5, and 8, state:

Section 4. ASSOCIATION RESPONSIBILITY FOR REPAIR. Except as otherwise provided in the Master Deed and in Section 3 hereof, the Association shall be responsible for the reconstruction, repair and maintenance of the Common Elements. Immediately after a casualty causing damage to property for which the Association has the responsibility of maintenance, repair and reconstruction, the Association shall obtain reliable and detailed estimates of the cost to replace the damaged property in a condition as good as that existing before the damage. *If the proceeds of insurance are not sufficient to defray the estimated costs of reconstruction or repair required to be performed by the Association, or if at any time during such reconstruction or repair, or upon completion of such reconstruction or repair, the funds for the payment of the costs thereof are insufficient, assessment shall be made against all Co-owners for the cost of reconstruction or repair of the damaged property in sufficient amounts to provide funds to pay the estimated or actual cost of repair.* [Emphasis added.]

\*2 Section 5. TIMELY RECONSTRUCTION AND REPAIR. If damage to Common Elements or a Unit adversely affects the appearance of the Project, the Association or Co-owner responsible for the reconstruction, repair and maintenance thereof shall proceed with replacement of the damaged property without delay, and shall complete such replacement within 6 months after the date of occurrence which caused damage to the property.

\* \* \*

Section 8. PRIORITY OF MORTGAGEE INTERESTS. Nothing contained in the Condominium Documents shall be construed to give a Condominium Unit Owner, or any

other party, *priority over any rights of first mortgagees of Condominium Units pursuant to their mortgages in the case of a distribution to Condominium Unit Owners of insurance proceeds or condemnation awards for losses to or a taking of Condominium Units ....* [Emphasis added.]

On December 7, 2014, the subject unit was destroyed by a fire. Plaintiff obtained from J.C. Chappell Construction ("Chappell") a quote of \$141,000 for the cost of restoring the property. Plaintiff submitted to Farm Bureau a proof of claim. Plaintiff entered into a restoration agreement with Chappell. On April 14, 2015, Farm Bureau issued a check for \$87,900, jointly payable to Ditech and plaintiff. Plaintiff's agent, Anna Bincsik-Hawker, endorsed the check on plaintiff's behalf without restriction and delivered the check to Ditech. Ditech deposited the funds into an escrow account pending receipt of further information regarding plaintiff's claim. On July 27, 2015, Ditech issued a check in the amount of \$43,950, payable to Wujciak, Chappell, and plaintiff, but the check was returned as undeliverable because Wujciak's address was unknown.

In the meantime, Wujciak failed to make timely payments under her mortgage. A balance of \$106,469.91 remained due on Wujciak's mortgage debt. Without informing plaintiff, Ditech decided that restoration of the unit was not feasible because the insurance proceeds were insufficient. Ditech initiated foreclosure by sheriff's sale in December 2016. The proceeds from the sheriff's sale and the insurance payment satisfied Wujciak's mortgage debt in full.

Plaintiff thereafter brought this action against defendants for statutory and common-law conversion, breach of contract, and assumpsit. These claims were based on plaintiff's theory that Ditech's original plan to apply the insurance proceeds to restoration precluded Ditech from subsequently abandoning that plan on the ground that restoration was not feasible. Ditech brought a counterclaim for a declaratory judgment. Plaintiff moved for summary disposition of Ditech's counterclaim. Defendants also moved for summary disposition pursuant to [MCR 2.116\(C\)\(10\)](#), arguing that there was no genuine issue of material fact that restoration was not feasible because the insurance proceeds were insufficient to cover the restoration costs. The trial court jointly heard both motions and thereafter issued an opinion and order denying both motions on the basis that there were questions of fact precluding summary disposition in favor of either party. However, the court did not identify the question or questions that it found to be in dispute.

## II. SUMMARY DISPOSITION ANALYSIS

### A. PROCEDURAL GROUND

Preliminarily, we reject defendants' unpreserved argument that procedural deficiencies in plaintiff's response to defendants' summary disposition motion entitled defendants to summary disposition as a matter of law.

\*3 Defendants filed their motion for summary disposition shortly after plaintiff filed its own motion for summary disposition under [MCR 2.116\(C\)\(10\)](#). Plaintiff's brief in response to defendants' motion simply referenced plaintiff's own motion and supporting brief, and the exhibits submitted with plaintiff's motion, to oppose defendants' motion for summary disposition. Defendants argue that plaintiff's response to their motion was procedurally deficient, entitling them to summary disposition as a matter of law. We disagree. We review de novo issues involving the interpretation and application of court rules. *Lech v. Huntmore Estates Condo Ass'n.*, 315 Mich. App. 288, 290; 890 N.W.2d 378 (2016).

When a party files a motion for summary disposition under [MCR 2.116\(C\)\(10\)](#), “[t]he moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence.” *Lockwood v. Ellington Twp.*, 323 Mich. App. 392, 401; 917 N.W.2d 413 (2018) (quotation marks and citation omitted). Once that burden is satisfied, “the party opposing summary disposition under [MCR 2.116\(C\)\(10\)](#) may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Id.* (quotation marks and citation omitted). Defendants argue that the trial court should have granted their motion for summary disposition because plaintiff failed to submit a properly supported response. Defendants rely on [MCR 2.116\(G\)](#), which provides, in pertinent part:

(3) Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required

(a) when the grounds asserted do not appear on the face of the pleadings, or

(b) when judgment is sought based on subrule (C)(10).

(4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

Defendants argue that plaintiff failed to satisfy the requirements of subparagraph (G)(4) by filing a response that merely referenced plaintiff's own motion for summary disposition. Defendants also argue that plaintiff failed to satisfy [MCR 2.119\(A\)\(2\)](#), which provides that “[a] motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based.” Defendants further argue that plaintiff's attempt to incorporate by reference its brief in support of its own motion for summary disposition was ineffective pursuant to [MCR 2.113\(G\)](#), which provides that “[s]tatements in a pleading may be adopted by reference only in another part of the same pleading.”

A motion for summary disposition brought under [MCR 2.116\(C\)\(10\)](#) “tests the factual sufficiency of the complaint,” and “should be granted when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Lockwood*, 323 Mich. App. at 400 (quotation marks and citation omitted). Even accepting that plaintiff's response to defendants' motion could be considered procedurally deficient because, standing alone, it did not properly set forth the factual support for plaintiff's opposition to defendant's motion, we are not persuaded that this deficiency entitled defendants to summary disposition as a matter of law under the circumstances of this case.

\*4 Defendants and plaintiff had filed competing motions for summary disposition. The motions involved the same legal and factual issues. The trial court had discretion to hear and decide the motions at the same time, cf. *Zaremba Equip., Inc v. Harco Nat'l. Ins. Co.*, 302 Mich. App. 7, 21; 837 N.W.2d 686 (2013), which it did. Moreover, a court hearing a summary disposition motion may sua sponte render judgment in favor of the opposing party if it determines that the opposing party is entitled to judgment. [MCR 2.116\(I\)\(2\)](#). Thus, regardless of whether plaintiff failed to adhere to the formalities for responding to a motion by failing to file an entirely separate

brief in response to defendants' motion, the trial court was still permitted to consider plaintiff's cross-motion for summary disposition, as well as that motion's supporting brief and exhibits, in determining whether plaintiff or defendants were entitled to judgment as a matter of law.

Defendants' reliance on *Barnard Mfg. Co., Inc. v. Gates Performance Engineering, Inc.*, 285 Mich. App. 362; 775 N.W.2d 618 (2009), is misplaced. In that case, this Court recognized that a trial court does not have a duty “to independently consider all the evidence contained in the court record” before granting a motion for summary disposition. *Id.* at 375-376. In this case, plaintiff did not invite the trial court to conduct its own review of the record to determine if the evidence supported finding that there was a genuine issue of material fact that precluded judgment for defendants. Rather, plaintiff referenced the supportive evidence it submitted in support of its own motion for summary disposition, which was properly before the court at the time it considered and decided defendants' cross-motion for summary disposition. Accordingly, defendants are not entitled to relief on this basis. See *id.* at 377 (“[I]f a party refers to and relies on an affidavit, pleading, deposition, admission, or other documentary evidence, and that evidence is ‘then filed in the action or submitted by the parties,’ the trial court must consider it.”).

## B. SUBSTANTIVE MERITS OF PLAINTIFF'S CLAIMS

Defendants argue that the trial court erred by finding that genuine issues of material fact precluded summary disposition in their favor with respect to each of plaintiff's claims. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Lockwood*, 323 Mich. App. at 400. When reviewing a motion under MCR 2.116(C)(10), the court must consider all of the admissible evidence in a light most favorable to the nonmoving party. *Liparoto Constr., Inc. v. Gen. Shale Brick, Inc.*, 284 Mich. App. 25, 29; 772 N.W.2d 801 (2009). “However, the party opposing summary disposition under MCR 2.116(C)(10) may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Lockwood*, 323 Mich. App. at 401 (quotation marks and citation omitted). “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.” *Id.* (quotation marks and citation omitted). A motion brought under MCR 2.116(C)(10) is properly “granted when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* at 400 (quotation marks and citation omitted).

Additionally, questions concerning the proper interpretation of a contract are questions of law that we review de novo. *McDonald v. Farm Bureau Ins. Co.*, 480 Mich. 191, 197; 747 N.W.2d 811 (2008).

## 1. CONVERSION

The civil tort of conversion is defined as “any distinct act of domain wrongfully exerted over another's property in denial of or inconsistent with the rights therein.” *Lawsuit Fin, LLC v. Curry*, 261 Mich. App. 579, 591; 683 N.W.2d 233 (2004) (citation omitted). Statutory conversion requires an additional showing that the defendant “employed the converted property for some purpose personal to the defendant's interests.” *Aroma Wines & Equip., Inc. v. Columbian Distrib. Servs., Inc.*, 497 Mich. 337, 358-359; 871 N.W.2d 136 (2015); see also MCL 600.2919a.

\*5 “To support an action for conversion of money, the defendant must have obtained the money without the owner's consent to the creation of a debtor-creditor relationship and must have had an obligation to return the specific money entrusted to his care.” *Lawsuit Fin*, 261 Mich. App. at 591 (quotation marks and citation omitted). Defendants argue that they cannot be liable for conversion because Ditech was entitled to retain the insurance proceeds pursuant to the mortgage contract and plaintiff's bylaws. “In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning.” *In re Smith Trust*, 480 Mich. 19, 24; 745 N.W.2d 754 (2008). “If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law.” *Id.*

The plain language of the mortgage contract unambiguously imposes on Ditech the requirement to apply the proceeds of the property insurance to restoration or repair of the subject unit, (1) *if* the restoration or repair is economically feasible, and (2) *if* Ditech's security is not lessened. The plain language of plaintiff's bylaws provides that the bylaws cannot take

priority over the rights of Ditech, as first mortgagee, pursuant to the mortgage contract. It is not disputed that the cost of restoration of the subject unit was \$141,000, or that Farm Bureau's insurance payout was \$87,900. That left \$53,100 unpaid on the restoration contract. Together with the \$12,000 paid for demolition, that left a net unpaid balance of \$41,100 unpaid. These figures support Ditech's determination that restoration was not feasible because Ditech would be required to pay approximately one-third of the cost of restoration merely to return the subject unit to its status quo ante as security for the loan. Thus, Ditech's security interest would be lessened.

Plaintiff argues that Ditech originally pursued a plan of restoration but abandoned that course without informing plaintiff of its changed decision, and that this conduct should preclude Ditech from contending that restoration was not feasible. Even if plaintiff's frustration with the events is understandable, the circumstances here do not provide a legal basis for concluding that Ditech had no right to apply the insurance proceeds to Wujciak's unpaid loan balance. The mortgage contract did not require Ditech to give plaintiff notice or to consult with plaintiff before applying the proceeds to Wujciak's debt. The mortgage contract did not prohibit Ditech from effectively rescinding the \$43,950 check after it failed in its efforts to deliver the check to Wujciak for her endorsement.

Plaintiff also asserts that there is a question of fact regarding the feasibility of restoration because the \$87,900 payment would be supplemented by the insurance payments for debris removal and depreciation, and by plaintiff's \$30,000 contribution. Plaintiff asserts that the \$144,000 sum of the \$87,900 payment, its own \$30,000 expenditure, the \$12,000 insurance payment for demolition and debris removal, and the depreciation check for \$14,100, was sufficient to pay Chappell's \$141,000 total cost. However, the notation in Farm Bureau's record that plaintiff "had to use" \$30,000 from its own savings account because Ditech "has not released any funds" indicates that plaintiff was not contributing part of the cost to supplement the insurance deficiency, but instead acting on the expectation that it would eventually receive payment from Ditech. There is no evidence that plaintiff attempted to negotiate a shared cost arrangement with Ditech. Under these circumstances, plaintiff cannot establish a question of fact whether Ditech should have known that restoration was feasible despite the substantial difference between the insurance proceeds and restoration costs.

\*6 Plaintiff also argues that defendants are estopped from claiming that reconstruction was not feasible because defendants originally agreed to reconstruction by issuing the check for \$43,950 payable to Chappell, Wujciak, and plaintiff. "Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, and the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of the facts." *Wigfall v. Detroit*, 322 Mich. App. 36, 43; 910 N.W.2d 730 (2017). Defendants did not misrepresent facts related to the feasibility of reconstruction. Plaintiff and defendants had access to the same facts concerning Chappell's estimate and Farm Bureau's resolution of the claim. The response to an e-mail in August 2016, from Farm Bureau's claims specialist, Thomas Nault, to plaintiff's board member, Jacqueline Gutierrez, showed that plaintiff expected payment in addition to the \$87,900 and smaller payments already received, contrary to the adjuster's report issued on July 6, 2015. Defendant, however, was not responsible for plaintiff's misunderstanding.

Accordingly, the trial court erred by denying defendants' motion for summary disposition with respect to plaintiff's claims for conversion.

## 2. BREACH OF CONTRACT

To prevail on a claim for breach of contract, a plaintiff must prove the following elements: "(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 America, NA v. First American Title Ins. Co.*, 499 Mich. 74, 100; 878 N.W.2d 816 (2016). "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." *Id.* at 101 (quotation marks and citation omitted).

Defendants assert that they were entitled to summary disposition on plaintiff's claim for breach of contract because there was no evidence of a contract between plaintiff and defendants. We agree.

Plaintiff addresses this argument indirectly, by stating that Ditech "breached the contract implied by the mortgage by applying the proceeds of Woodland's insurance to Wujciak's loan." Plaintiff does not identify any transaction, document, or communication in which plaintiff and Ditech entered into a

contract. “It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Mudge v. Macomb Co.*, 458 Mich. 87, 105; 580 N.W.2d 845, 854 (1998) (quotation marks and citation omitted).

Here, plaintiff was not a party to the mortgage contract between defendants and Wujciak. Plaintiff claims that the mortgage contract language did not give Ditech discretion on whether to apply the insurance proceeds, but plaintiff does not claim status as a third-party beneficiary to the contract. Plaintiff and Ditech were parties to the insurance policy as insureds, but the policy does not govern application of proceeds toward repair cost and debt satisfaction.

For these reasons, the trial court erred by denying defendants' motion for summary disposition with respect to plaintiff's claim for breach of contract.<sup>1</sup>

<sup>1</sup> In light of our decision on this issue, it is unnecessary to address defendants' additional argument that any oral contract would have been unenforceable under the statute of frauds, [MCL 566.132](#).

### 3. ASSUMPSIT

Defendants argue that they were entitled to summary disposition of plaintiff's claim for assumpsit because assumpsit has been abolished as a form of action. In *Fisher Sand & Gravel Co. v. Neal A Sweebe, Inc.*, 494 Mich. 543, 564; 837 N.W.2d 244 (2013), our Supreme Court recognized that “assumpsit as a form of action was abolished” with the adoption of the General Court Rules in 1963. The Court further stated, however, that “notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved.” *Id.* Consequently, plaintiff's use of the term “assumpsit” in labeling its claim does not warrant dismissal if plaintiff otherwise substantively pleaded

a valid claim. See also *Adams v. Adam (On Reconsideration)*, 276 Mich. App. 704, 710-711; 742 N.W.2d 399 (2007) (“It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.”).

\*7 Plaintiff alleged in Count III that (1) it was the owner of the insurance proceeds with the right to immediate possession of the funds for restoration costs; (2) defendants were holding the funds; and (3) defendants were unjustly enriched by exercising dominion over the funds. In substance, this claim was a reiteration of plaintiff's conversion claim. This is a valid theory of relief, but as already addressed, there is no evidentiary support for plaintiff's claim that defendants were not entitled to apply the funds to satisfy the mortgage debt. Accordingly, the trial court should have granted defendants' motion for summary disposition with respect to this claim.

### III. CONCLUSION

All of plaintiff's claims against defendants lacked evidentiary support because the mortgage contract authorized defendants to apply the insurance proceeds toward satisfaction of Wujciak's mortgage debt if restoration and repair of the property was not feasible. There was no genuine issue of material fact that restoration was not feasible because the insurance proceeds were insufficient to pay the restoration cost of \$141,000. The trial court therefore erred by denying defendants' motion for summary disposition on plaintiff's claims. This matter is remanded for entry of an order granting defendants' motion for summary disposition.

Reversed and remanded for entry of an order granting summary disposition in favor of defendants, as to plaintiff's claims. We do not retain jurisdiction. Defendants, as the prevailing parties, may tax costs pursuant to [MCR 7.219](#).

#### All Citations

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