STATE OF MICHIGAN
COURT OF APPEALS

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

Plaintiff/Appellee/Cross-Appellant,

v.

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

Defendant/Appellant/Cross-Appellee.

COA Case No. 369632

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

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PLAINTIFF/CROSS-APPELLANT'S <u>CORRECTED</u>
REPLY BRIEF ON CROSS-APPEAL

ORAL ARGUMENT REQUESTED

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Cases

Rules

I. THE DRAINAGE DISTRICT FAILS TO REBUT PLAINTIFF'S SHOWING THAT BINDING PRECEDENT PRESERVED ASSUMPSIT AS A CAUSE OF ACTION AND/OR REMEDY, AS PLAINTIFF DESCRIBED IN HIS BRIEF ON CROSS-APPEAL

A. The Drainage District Ignores Critical Language from *Fisher Sand & Gravel* as Well as Related Authority

To revive a dated pop culture reference, when it comes to the law of assumpsit, the Drainage District sounds like Sergeant Schultz from *Hogan's Heroes* (1965-1971): "I know nothing!" It is hard to see how the Drainage District's arguments could reflect anything but willful blindness. It simply repeats the same mantra – "assumpsit has been abolished as a cause of action" – without actually addressing Plaintiff's arguments or the portions of the appellate opinions where this Court and the Michigan Supreme Court confirmed that assumpsit remains a viable remedy for an unlawful exaction by a unit of government.

Most blatantly, the Drainage District incompletely and misleadingly quotes *Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc*, 494 Mich. 543, 564; 837 NW2d 244 (2013), citing the sentence where the Supreme Court held that "[w]ith the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished" **but leaving out the very next sentence where the court stated:** "But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved …" The traditional remedy for assumpsit is for the plaintiff to "recover back the amount of the illegal exaction …" *Detroit v. Martin*, 34 Mich. 170, 174 (1876); *see also Porter v. Ridge*, 310 Mich. 425, 426; 17 N.W.2d 239 (1945) ("This is an action in assumpsit for the return of $500 paid under the terms of a land contract for the sale of real estate."); *Metzen v. Dep't of Revenue*, 310 Mich. 622, 624, 629-30, 17 N.W.2d 860 (1945) (after paying an unlawful tax, "plaintiff commenced an action for its recovery" and prevailed).

In fact, let us consider the *Fisher Sand & Gravel* holding in its entirety, including the supporting block quotation showing how the Supreme Court supported its holding:

> 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:
>
> > It is to be understood that the abolition of the forms of action *does not abolish the remedies thereunder*. **If a cause of action is stated in the complaint showing the pleader entitled to relief, the appropriate substantive remedy will remain,** no matter if the action is labeled as to form or is merely designated as a civil action.
>
> [*Fisher Sand & Gravel*, 494 Mich. at 564-65, 837 N.W.2d 244 (2013) (quoting Committee Comment, reprinted in 1 Honigman and Hawkins, Michigan Court Rules Annotated (2d ed), p 179) (italic emphasis added to Committee Comment by the *Fisher* court, bold emphasis added by Plaintiff).]

The Drainage District asks the Court to "put the cart before the horse." Plaintiff alleged in his Complaint that the Drainage District violated the common law by overcharging Plaintiff and the Class or stormwater drainage. *See* Complaint, Cross Appx. 4, ¶¶ 45-53; 46-71. The Drainage District has not even alleged that Plaintiff's allegations are insufficient to establish a violation of the common law. Instead, the Drainage District jumps straight to the remedy – "assumpsit isn't available." This is particularly backwards if, as the Drainage District alleges, assumpsit cannot stand on its own. If so, and assumpsit is a mere remedy, then it is improper to consider the available remedies until the Court has decided whether the Drainage District is liable under Plaintiff's independent common law claims.

Assumpsit is a fairly ancient remedy and cause of action. As the Michigan Supreme Court stated in *Moore v. Mandlebaum*, 8 Mich. 433, 448 (1860):

> 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.

It is well settled that when there has been an illegal or excessive collection of fees, a plaintiff may maintain an "action of assumpsit to recover back the amount of the illegal exaction." *Bond v. Pub. Sch. of Ann Arbor Sch. Dist.*, 383 Mich. 693, 704; 178 N.W.2d 484 (1970). Indeed, "an action seeking a

refund of fees paid to [a governmental entity] is properly characterized as a claim in assumpsit for money had and received." *Service Coal Co v. Unemployment Compensation Comm*, 333 Mich. 526, 530-531; 53 N.W.2d 362 (1952); *Yellow Freight Sys, Inc v. Michigan*, 231 Mich. App. 194, 203; 585 N.W.2d 762 (1998), rev'd on other grounds, 464 Mich. 21; 627 N.W.2d 236 (2001), rev'd, 537 U.S. 36, 123 S. Ct. 371, 154 L. Ed. 2d 377 (2002).

Consider the substantive law the plaintiff alleged the defendant had violated in each of the above cases. In *Bond*, 383 Mich. 693, 696-97, the plaintiffs sued to enforce a constitutional provision prohibiting public schools from charging students or their parents for books and supplies. In *Serv. Coal*, 333 Mich. at 528-29, the plaintiffs sued under a statute prohibiting certain charges related to the Michigan Unemployment Fund. In Yellow Freight, 231 Mich. App. at 196, the plaintiffs asserted that the State of Michigan had collected registration fees in violation of a statute. These cases could not exist if assumpsit had been abolished in its entirety. Each of these cases involved a violation of substantive law that was remedied by a refund in assumpsit. Plaintiff pointed out the Drainage District's incomplete quotation in its Response to the GWKDD's Motion for Summary Disposition, attached in part as Exhibit 1 hereto, pp. 10-11, and again in its Brief on Cross-Appeal, pp. 10-11. At some point it becomes difficult to see how the Drainage District can continue, in brief after brief, to omit a highly relevant sentence from *Fisher Sand & Gravel* and avoid any discussion of what that sentence might mean.

The Supreme Court's pronouncement in *Fisher Sand & Gravel* that "notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved" must mean **something.** Plaintiff has explained what he thinks the *Fisher Sand & Gravel* court meant when it said "substantive remedies traditionally available under assumpsit were preserved …" *See* Brief on Cross-Appeal, pp. 9-15. Plaintiff has also provided his interpretation of what the

Fisher Sand & Gravel quotation means in the context of other opinions addressing assumpsit as a cause of action versus a remedy. *Id.*

Moreover, although the rule against surplusage applies less strictly to judicial opinions than it does to statutes, courts still presume that language "essential to the determination" of an issue has meaning and is not dicta or surplusage. *Cf. Case v. Saginaw*, 291 Mich. 130, 151; 288 N.W. 357 (1939) ("Claimed error in statements made by the trial court in its opinion granting the motion to dismiss, not essential to the determination thereof, could be treated as surplusage in any event, the trial court having properly decided the determining questions."); *Howard v. Barnett*, 21 F.3d 868, 872 (8th Cir. 1994) ("The distinction provided by the inclusion of the term sadistically' [in the court's opinion in *Cummings v. Malone*, 995 F.2d 817, 822 (8th Cir. 1993)] is one of significance, for 'maliciously' and 'sadistically' have different meanings, and the two together establish a higher level of intent than would either alone.").[1]

And *Fisher Sand & Gravel* hardly stands alone. Among the many cases Plaintiff discussed in his Brief on Cross-Appeal was *Bond*, 383 Mich. at 703-04, where the Supreme Court held:

> In *Merrelli v. City of St. Clair Shores* (1959), 355 Mich 575, plaintiff sued for a declaratory judgment challenging the validity of fees charged for building permits. This Court held that a city may not defray the general cost of government under the guise of reimbursement for special services required in the regulation and control of new buildings. *Cf. University Custom Homes, Inc., v. Township of Redford* (1959), 355 Mich 606.
>
> Following the decision in *Merrelli,* in *Beachlawn Building Corporation v. City of St. Clair Shores* (1963), 370 Mich 128, an action was brought to recover excessive fees paid

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[1] Plaintiff uses the "*Cf.*" signal because cited cases do not directly hold that courts must avoid construing judicial opinions to contain surplus language. However, the cases indicate that courts should give effect to language that is, in the words of the Michigan Supreme Court in *Case v. Saginaw*, "essential to the determination" of an issue in a precedential opinion. *Case* in particular holds the converse of the principle at issue here. *Case* held that the trial court correctly "treated as surplusage" certain "language not essential to the determination" of the case. Here, the Court should **not treat as surplusage** language that **was essential** to the determinations about the status of assumpsit under Michigan law.

for building permits under the ordinance that had been declared invalid in *Merrelli*. In holding the payments to have been involuntary, Justice Dethmers, speaking for a unanimous Court, quoted with approval the following from the early case of *City of Detroit v. Martin* (1876), 34 Mich 170 (p 174):

> "There is no doubt but that where the parties do not stand upon equal terms, as * * * where the plaintiff was entitled to a license, and the defendant to grant it, but refused to deliver it except upon payment of a sum of money he was not entitled to * * * in all such cases, the party pays under compulsion and may afterwards in an action of assumpsit recover back the amount of the illegal exaction."

See, also, *Beachlawn Building Corporation v. City of St. Clair Shores* (1965), 376 Mich 261.

The case of *Theatre Control Corporation v. City of Detroit* (1963), 370 Mich 382, involved an annual "demand charge" by the City of Detroit for users of water furnished by the city to parties operating air conditioning equipment which did not recirculate the water. This Court found the charges were arbitrary and unreasonable. It was pointed out that plaintiffs could, from a practical standpoint, pursue no other course but to pay the added charges and await a determination of their rights by final disposition of the case. Plaintiffs were held entitled to a return of the unwarranted charges. [*Bond*, 383 Mich. at 703-04.]

In *Bond* and the authority cited therein, going all the way back to *Moore v. Mandeville* in 1860, the Supreme Court consistently reaffirmed that assumpsit was available both as a cause of action and a remedy. Plaintiff is not aware of any binding authority to the contrary. In *Fisher Sand & Gravel*, the Supreme Court again reaffirmed – **in 2013** – that assumpsit survived to the present, at a minimum as a remedy. The Drainage District's attempt to address this body of authority (set forth in Plaintiff's Brief on Cross-Appeal, pp. 9-15) is thin, to say the least.

B. The Drainage District Cites Inapposite and Non-Binding Case Law to Avoid *Fisher Sand & Gravel*'s Clear Holding and the Other Binding Authority in Plaintiff's Brief on Cross-Appeal

Again, where is the Drainage District's argument about what it thinks the sentence "[b]ut notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved …" means, or what the other binding, on-point case law in Plaintiff's Brief on Cross-Appeal means? Let us look at the Drainage District's citations of law.

Allen v. Mich. State Univ., ____ Mich. App. ____; ____ N.W.2d ____; 2024 Mich. App. LEXIS 9668 (Dec. 4, 2024) (Exhibit 2 hereto), which the Drainage District cites on p. 11 of its Appellee's Brief on Cross-Appeal, did not involve disgorgement of an unlawful exaction. In *Allen*, the plaintiff sued for breach of contract and unjust enrichment "seeking partial refunds of money paid for tuition, room and board, and other fees because he allegedly did not receive the expected benefit of those payments." *Id.* at *3. An action on an express contract, with a claim for unjust enrichment in the alternative, is nothing like the present case.

Here, Plaintiff seeks disgorgement of money the Drainage District collected in violation of the common law, which requires the Drainage District's Stormwater Disposal Charges to be "reasonable" (*Trahey v. City of Inkster*, 311 Mich. App. 582, 595; 876 N.W.2d 582 (2015); *Mapleview Estates v. City of Brown City*, 258 Mich. App. 412 (2003)), which in turn requires an inquiry about whether the Stormwater Disposal Charges to Plaintiff and the putative Class, "viewed as a whole", have been "excessive" (*Youmans v. Bloomfield Township*, 336 Mich. App. 161, 219, 969 N.W.2d 570 (2021)). Plaintiff does not allege that the Drainage District breached a contract. Plaintiff alleges that the Drainage District violated the common law, and seeks to use assumpsit as a vehicle to recover Stormwater Disposal Overcharges – *i.e.,* the portion of the Stormwater Disposal Charges that was excessive and therefore unlawful.

In addition, it is difficult to parse *Allen*'s holding. This Court stated that "[a]ssumpsit has been abolished as a cause of action, and assumpsit claims are simply a subset of unjust-enrichment claims. … The Olins' claim for money had and received is merely duplicative of their tuition-and-fee-based unjust enrichment claim." *Id.* at *45 (citing *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 213; 969 NW2d 570 (2021)). If assumpsit claims are merely a "subset of unjust-enrichment claims," as this Court held in *Allen*, why did the Supreme Court in its 2013 decision in *Fisher Sand & Gravel* **expressly**

preserve assumpsit as a separate substantive remedy, regardless of the status of any "forms of action"?

If this Court is at all inclined to apply *Allen* in the context of an unlawful exaction, it should at a minimum avail itself of the "conflicting opinion" provisions of MCR 7.215(J)(2), "indicate in the text of its opinion" that it is following *Allen* only because it is required to do so by MCR 7.215(J)(1), cite MCR 7.215(J)(2), explain its disagreement with *Allen* (or simply the question of whether to extend *Allen*'s holding to unlawful exaction cases), and invoke the procedures for convening a special panel under MCR 7.215(J)(3)-(6). How easily could the *Fisher Sand & Gravel* court have said that unjust enrichment has absorbed assumpsit such that assumpsit no longer exists? The Michigan Supreme Court went out of its way to hold that assumpsit remains as, at a bare minimum, a remedy for an unlawful exaction regardless of "the forms of action." *Fisher Sand & Gravel*, 494 Mich. at 564. And only three of this Court's 22 judges sat on the *Allen* panel. This panel should not allow three of 22 judges to "overrule" a Supreme Court decision.

Midwest Valve & Fitting Co. v. City of Detroit, 347 Mich. App. 237, 250-51; 14 N.W.3d 826 (2023) is irrelevant. This Court's published opinion did not address the plaintiff's assumpsit claims:

> At the conclusion of proofs, the trial court dismissed Counts II and VI, which alleged independent causes of action of assumpsit. This was not erroneous because Michigan no longer recognizes an independent cause of action for assumpsit. *Fisher Sand & Gravel Co v Neal A Sweebe*, Inc, 494 Mich 543, 564; 837 NW2d 244 (2013). Notably, plaintiff does not challenge the dismissal of those counts. Instead, plaintiff focuses on its allegations that the charges were unlawful because they were imposed in violation of the city charter and ordinances. Thus, only plaintiff's claims pertaining to the alleged violations of the city charter and ordinances are before this Court. [*Id.*]

Nor did the Supreme Court' opinion address assumpsit, for obvious reasons. *See generally Midwest Valve & Fitting Co. v. City of Detroit*, 14 N.W.3d 393, 396 (Mich. 2024).

Nofar v. City of Novi, No. 363356, 2024 Mich. App. LEXIS 10031 (Dec. 17, 2024) (Exhibit 3 hereto) is unpublished and, inexplicably, repeatedly cites the *Midwest Valve* opinion that found assumpsit was not before this Court. Just as inexplicably, the *Nofar* opinion cited *Youmans v. Charter Twp. of Bloomfield*, 336 Mich. App. 161, 213, 969 N.W.2d 570 (2021), which quoted *Fisher Sand & Gravel*'s statement that "notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved[.]" *Id.* (quoting *Fisher Sand & Gravel*, 494 Mich at 564).

IV. CONCLUSION

The Drainage District does not coherently explain why this Court might not be bound by *Fisher Sand & Gravel* and related authority. It does not even acknowledge the entire key quotation from *Fisher Sand & Gravel*. This Court should reverse the Circuit Court's decision granting summary disposition to the Drainage District on Plaintiff's assumpsit claims. Alternatively, if this Court entertains any doubt about the meaning of *Fisher Sand & Gravel*'s holding as applied to this Court's other recent decisions, it should convene a conflict panel.

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STATEMENT OF WORD COUNT

Pursuant to MCR 7.212(B)(3), Plaintiff's counsel states that Plaintiff's Response to the Drainage District's Application for Leave to Appeal contains 2,821 "countable words" as defined under MCR 7.212(B). Counsel relies on the word count function of its word processing system, as permitted under MCR 7.212(B)(3).

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2025, I electronically served the foregoing document on all counsel of record using the court's electronic filing system.

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

4900-2378-4229 v.1

EXHIBIT - 1

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

IV. ARGUMENT

A. Assumpsit Remains a Proper Remedy for an Unlawful Governmental Exaction

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

The Drainage District misconstrues the prevailing law. *Midwest Valve & Fitting Co. v. City of Detroit*, No. 358868; 2023 Mich. App. LEXIS 3915 (March 9, 2023) (Exhibit 3 hereto), which the Drainage District cites on pp. 13-14 of its Brief, is unpublished and non-binding. Moreover, the *Midwest Valve* court recognized that "[a]lthough no independent cause of action for assumpsit exists, 'the substantive remedies traditionally available under assumpsit were preserved.' *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). In this instance, appellant's counts of assumpsit essentially were covered by its claims of unjust enrichment." *Midwest Valve*, 2023 Mich. App. LEXIS 3915 at *15, n.6.

The binding, published authority supports Plaintiff's right to recover in assumpsit. In *Fisher Sand & Gravel*, 494 Mich. at 564, which the Drainage District also cites in its Brief, the court observed that "[w]ith 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.* (emphasis added); *see also Wright v. Genesee Cty.*, 504 Mich. 410, 431-37; 934 N.W.2d 805 (2019) (Markman, J., concurring) (discussing the law of assumpsit at length); *Gentry v. Charter Twp. of Clinton*, No. 360116, 2023 Mich. App. LEXIS 2259, at *26 (Mar. 30, 2023) (quoting *Youmans v Charter Twp of Bloomfield*, 336 Mich. App. 161, 213; 969 N.W.2d 570 (2021)) (Exhibit 4 hereto) ("Though plaintiff's complaint contains a claim of 'assumpsit,' assumpsit has technically been abolished as a cause of action, but 'the substantive remedies traditionally available under assumpsit were preserved[.]"

Thus, as long as a plaintiff can demonstrate that money was obtained by a defendant in violation of the law, that plaintiff properly invokes the equitable doctrine of assumpsit to obtain a remedy. That is why the Michigan appellate courts have repeatedly recognized long after the adoption of the General Court Rules in 1963 that a plaintiff who can establish that the government collected monies in violation of the law can properly invoke the remedy of assumpsit. Here, Plaintiff's causes of action are based upon the common law requirement that the Drainage District's charges be "reasonable." *See* Complaint, ¶¶ 45-62. Assumpsit merely provides the **substantive remedy** for the Drainage District's violation of the common law. **Assumpsit is not the source of Plaintiff's substantive rights**.

In *Bond v. Pub. Sch. of Ann Arbor Sch. Dist.*, 383 Mich. 693, 696-97; 178 N.W.2d 484 (1970), the plaintiffs sued the Ann Arbor public school district alleging that the district's fees for books and supplies violated a provision of the Michigan Constitution that required "a system of free public elementary and secondary schools". The plaintiffs claimed "that large amounts were illegally collected by defendant from its pupils as general fees, so-called, determined pursuant to a schedule adopted by the board of education of defendant." *Id.* at 697. The plaintiffs thus sought a "judgment for the full amount of the general fees collected." *Id.* at 698. The Michigan Supreme Court ruled in their favor:

EXHIBIT - 2

Allen v. Mich. State Univ.

Court of Appeals of Michigan

December 4, 2024, Decided

No. 358135, No. 358136, No. 358137

Reporter
2024 Mich. App. LEXIS 9668 *; 2024 WL 4982523

JAMES ALLEN, Plaintiff-Appellant, v MICHIGAN STATE UNIVERSITY and BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, Defendants-Appellees.ALISA OLIN and MATTHEW OLIN, Plaintiffs-Appellants, v MICHIGAN STATE UNIVERSITY, Defendant-Appellee.RICHARD PLACKO, CINDY PLACKO, and MEGAN PLACKO, Plaintiffs-Appellants, v MICHIGAN STATE UNIVERSITY and MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, Defendants-Appellees.

Prior History: **[*1]** Court of Claims. LC No. 20-000057-MK. Court of Claims. LC No. 20-000101-MK. Court of Claims. LC No. 20-000120-MK.

Core Terms

tuition, summary disposition, in-person, unjust enrichment, trial court, semester, housing, promise, on-campus, online, room and board, parties, campus, Spring, catalog, contracts, documents, genuine issue of material fact, contract claim, implied-in-fact, contractual, quotation, programs, marks, reservation of rights, no evidence, pandemic, format, written contract, circumstances

Case Summary

Overview
Key Legal Holdings

- No evidence supports the conclusion that an express contract existed for a particular form of instruction or services in exchange for tuition and fees, as claimed by plaintiffs.
- A university's course catalog and promotional materials do not constitute an express contract between the university and students regarding the specific format for providing educational instruction and services.
- Even if an implied-in-fact contract exists between a university and its students regarding educational instruction and services, a reservation of rights clause in the university's catalog allows the university to modify its programs and the format of delivering education.
- A university is not unjustly enriched by retaining tuition and fees during a situation where it transitions to online instruction and remote services, provided it continues to deliver its core educational mission, there was no agreement specifying a particular format, and tuition/fees are not dependent on the format.

Material Facts

- Michigan State University (MSU) transitioned to remote online instruction and suspended on-campus activities and services during the Spring 2020 semester due to the COVID-19 pandemic.
- Plaintiffs, who were MSU students during Spring 2020, paid tuition, fees, and room and board, but did not receive the expected in-person educational experience and access to campus facilities/services.
- MSU's course catalog included a reservation of rights clause allowing the university to modify its programs and policies.

Controlling Law

- Contract law principles, including express and implied contracts (Michigan state law).
- Unjust enrichment doctrine (Michigan state law).

Court Rationale

The court reasoned that MSU did not make any express promise to provide only in-person instruction or a particular format of services in exchange for tuition and fees. The course catalog and promotional materials did not constitute an enforceable contract, and the reservation of rights clause allowed MSU to modify its offerings. Regarding implied contracts, the court held that while MSU's conduct and materials could suggest an implied agreement for in-person education initially, the reservation of rights clause showed there was no mutual assent on a specific format, precluding an implied-in-fact contract. On unjust enrichment, the court found that MSU was not unjustly enriched by retaining tuition and fees because it continued providing educational instruction and funded services, and there was no agreement tying the payments to a specific format.

Outcome
Procedural Outcome

The Michigan Court of Appeals affirmed the trial court's grant of summary disposition in favor of MSU, dismissing the plaintiffs' claims for breach of contract, unjust enrichment, conversion, and money had and received.

LexisNexis® Headnotes

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

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

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

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN1 **Entitlement as Matter of Law, Appropriateness**

An appellate court reviews de novo a trial court's decision on a motion for summary disposition. Summary disposition is proper under *MCR 2.116(C)(10)* if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The existence and interpretation of a contract are questions of law reviewed de novo. Whether contract language is ambiguous is also reviewed de novo as a question of law. Whether a specific party has been unjustly enriched is generally a question of fact, but whether a claim for unjust enrichment can be maintained is a question of law reviewed de novo. When reviewing a decision under *MCR 2.116(C)(10)*, an appellate court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.

Contracts Law > Breach > Breach of Contract Actions > Elements of Contract Claims
Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

HN2 **Breach of Contract Actions, Elements of Contract Claims**

A party asserting a breach of contract must establish by a preponderance of the evidence that there was a contract which the other party breached, thereby resulting in damages to the party claiming breach. The party seeking to enforce a contract bears the burden of proving that the contract exists. Moreover, the party claiming a breach of contract is required to prove the terms of the contract that the defendant allegedly breached.

Contracts Law > Types of Contracts > Express Contracts
Business & Corporate Compliance > Contracts > Types of

Contracts > Express Contracts

HN3 **Types of Contracts, Express Contracts**

A contract may be express or implied. An express contract is one in which the terms were openly uttered and avowed at the time of the making or one where the intention of the parties and the terms of the agreement are declared or expressed by the parties, in writing or orally, at the time it is entered into.

Contracts Law > Types of Contracts > Contracts Implied in Fact
Business & Corporate Compliance > Contracts > Types of Contracts > Contracts Implied in Fact

Public Contracts Law > Bids & Formation > Implied Contracts > Implied-in-Fact Contracts

Business & Corporate Compliance > Contracts > Contract Formation > Meeting of Minds
Contracts Law > Contract Formation > Acceptance > Meeting of Minds

HN4 **Types of Contracts, Contracts Implied in Fact**

There are two kinds of implied contracts: one implied in fact and the other implied in law. An implied-in-fact contract does not exist unless the minds of the parties meet, by reason of words or conduct. An implied-in-law contract is quasi or constructive, and does not require a meeting of minds, but is imposed by fiction of law to enable justice to be accomplished, even in cases where no contract was intended.

Contracts Law > Types of Contracts > Contracts Implied in Fact
Business & Corporate Compliance > Contracts > Types of Contracts > Contracts Implied in Fact

Business & Corporate Compliance > Contracts > Contract Formation > Meeting of Minds
Contracts Law > Contract Formation > Acceptance > Meeting of Minds

Contracts Law > Contract Formation > Consideration > Mutual Obligations
Business & Corporate Compliance > ... > Contract Formation > Consideration > Mutual Obligations

HN5 **Types of Contracts, Contracts Implied in Fact**

An implied-in-fact contract requires mutual assent just like any other contract, with the difference being that the mutual assent is inferred from the parties' words and actions since the parties did not directly express their mutual assent and intent to contract. A contract is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction. A contract implied in fact arises under circumstances which, according to the ordinary course of dealing and common understanding of people, show a mutual intention to contract.

Business & Corporate Compliance > Contracts > Types of Contracts > Quasi Contracts
Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN6 **Types of Contracts, Quasi Contracts**

The concept of an implied-in-law contract, which is a quasi-contract, is intricately linked with the concept of unjust enrichment. 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. The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another. To sustain a claim that a contract should be implied in law to prevent unjust enrichment, a plaintiff must show receipt of a benefit by the defendant from the plaintiff and that it is inequitable for the defendant to retain that benefit.

Business & Corporate
Compliance > Contracts > Contract Formation > Meeting of Minds
Contracts Law > Contract Formation > Acceptance > Meeting of Minds

Contracts Law > Contract Formation > Consideration > Mutual Obligations
Business & Corporate Compliance > ... > Contract Formation > Consideration > Mutual Obligations

Business & Corporate Compliance > ... > Contract Formation > Consideration > Sufficient Consideration
Contracts Law > Contract Formation > Consideration > Sufficient Consideration

HN7 **Contract Formation, Meeting of Minds**

A valid contract requires five elements: parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. Fundamentally, a contract is a promise or a set of promises for which the law recognizes a remedy in the event of a breach of those promises. A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. Before a contract can be completed, there must be an offer and acceptance. Further, a contract requires mutual assent or a meeting of the minds on all the essential terms. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.

Contracts Law > Types of Contracts > Contracts Implied in Fact
Business & Corporate
Compliance > Contracts > Types of Contracts > Contracts Implied in Fact

HN8 **Types of Contracts, Contracts Implied in Fact**

An implied-in-fact contract arises when the circumstances, according to the ordinary course of dealing and common understanding, demonstrate a mutual intention to contract that is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction.

Contracts Law > Types of Contracts > Contracts Implied in Fact
Business & Corporate
Compliance > Contracts > Types of Contracts > Contracts Implied in Fact

Public Contracts Law > Bids & Formation > Implied Contracts > Implied-in-Fact Contracts

Torts > ... > Affirmative Duty to Act > Types of Special Relationships > Schools

HN9 **Types of Contracts, Contracts Implied in Fact**

A university's relationship with its students is crucial in determining what can be reasonably inferred when assessing the existence of an implied-in-fact contract.

Education Law > Students > Student Discipline > Academic Dismissals

Education Law > ... > Student Discipline > Disciplinary Proceedings > Appeals & Reviews

HN10 **Student Discipline, Academic Dismissals**

When judges are asked to review the substance of a genuinely academic decision. they should show great respect for the faculty's professional judgment. Courts may not override a university's academic judgment unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Education Law > Academic Instruction

HN11 **Education Law, Academic Instruction**

The United States Supreme Court has recognized four essential freedoms of a university: to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. When a student is admitted to a college, there is an implied understanding that the student shall not be arbitrarily dismissed from the institution.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN12[] **Equitable Relief, Quantum Meruit**

To establish an unjust enrichment claim regarding tuition and fees, plaintiffs must establish that the defendant received a benefit from the plaintiffs and that it would be inequitable for the defendant to keep the benefit.

Contracts Law > Contract Interpretation > Intent

HN13[] **Contract Interpretation, Intent**

In interpreting a contract, a court's obligation is to determine the intent of the contracting parties. If the language of the contract is unambiguous, the court construes and enforces the contract as written.

Business & Corporate
Compliance > Contracts > Breach > Nonperformance
Contracts Law > Breach > Nonperformance

HN14[] **Breach, Nonperformance**

A breach of contract occurs if a party does not perform a contractual duty due under the contract's terms.

Contracts Law > Types of Contracts > Express Contracts
Business & Corporate
Compliance > Contracts > Types of Contracts > Express Contracts

HN15[] **Types of Contracts, Express Contracts**

Courts may not imply a contract under an unjust-enrichment theory if there is an express agreement covering the same subject matter.

Torts > Intentional Torts > Conversion > Elements

HN16[] **Conversion, Elements**

Under the common law, conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with their rights therein. Money is treated as personal property, and an action may lie in conversion of money provided that there is an obligation to keep intact or deliver the specific money in question, and where such money can be identified. The money must be identical money or checks, not merely a payment.

Contracts Law > Breach > Breach of Contract Actions > Assumpsit
Business & Corporate
Compliance > ... > Breach > Breach of Contract Actions > Assumpsit

Business & Corporate
Compliance > ... > Breach > Breach of Contract Actions > Money Had & Received
Contracts Law > Breach > Breach of Contract Actions > Money Had & Received

HN17[] **Breach of Contract Actions, Assumpsit**

An action for money had and received is an action of assumpsit. Assumpsit has been abolished as a cause of action, and assumpsit claims are simply a subset of unjust-enrichment claims.

Business & Corporate
Compliance > Contracts > Contract Formation > Meeting of Minds
Contracts Law > Contract Formation > Acceptance > Meeting of Minds

HN18[] **Contract Formation, Meeting of Minds**

Mutual assent and a meeting of the minds are crucial to forming a contract.

Contracts Law > Breach > Breach of Contract Actions > Elements of Contract Claims
Business & Corporate
Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Evidence > Burdens of Proof > Allocation

HN19[] **Breach of Contract Actions, Elements of Contract Claims**

Plaintiffs bear the burden of proving the existence of the contract terms they intend to enforce.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

HN20 **Summary Judgment, Burdens of Proof**

A party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence.

Business & Corporate Compliance > ... > Standards of Performance > Impossibility of Performance > Frustration of Purpose
Contracts Law > Standards of Performance > Impossibility of Performance > Frustration of Purpose

HN21 **Impossibility of Performance, Frustration of Purpose**

Frustration of purpose is generally asserted where a change in circumstances makes one party's performance virtually worthless to the other, frustrating their purpose in making the contract. According to the Restatement, the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that they had in mind some specific object without which they would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. *Contracts Second § 265(a)*.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN22 **Standards of Review, Abuse of Discretion**

An appellate court reviews for an abuse of discretion a trial court's denial of a motion to amend a complaint. The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN23 **Summary Judgment, Entitlement as Matter of Law**

A party may move to amend the pleadings after the trial court grants summary disposition under MCR 2.116(C)(10) unless the evidence then before the court shows that amendment would not be justified. MCR 2.116(I)(5). Leave shall be freely given when justice so requires. MCR 2.118(A)(2). However, the trial court may deny the motion if the amendment would be futile. A proposed amendment is futile when summary disposition would be appropriately granted regarding the new claims, either when a party has not established a genuine issue of material fact regarding an element or when the undisputed facts establish that summary disposition would be appropriate.

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

HN24 **Appellate Review, Standards of Review**

An appellate court will affirm a trial court's decision on a motion for summary disposition if it reached the correct result, even if the appellate court's reasoning differs.

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For MICHIGAN STATE UNIVERSITY, Defendant - Appellee (358135): BENJAMIN W JEFFERS.

For ALISA OLIN, Plaintiff - Appellant (358136): DAVID H FINK, NATHAN FINK.

For MICHIGAN STATE UNIVERSITY, Defendant - Appellee (358136): BENJAMIN W JEFFERS.

For RICHARD PLACKO, Plaintiff - Appellant (358137): DAVID H FINK, NATHAN FINK.

For MICHIGAN STATE UNIVERSITY, Defendant -

Appellee (358137): BENJAMIN W JEFFERS.

Judges: Before: BORRELLO, P.J., and N. P. HOOD and YOUNG, JJ.

Opinion by: Stephen L. Borrello

Opinion

BORRELLO, P.J.

In these consolidated appeals,[1] plaintiffs appeal by right the final order of the Court of Claims granting summary disposition in favor of defendants, Michigan State University and the Michigan State University Board of Trustees (collectively, MSU). For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

These cases arise out of MSU's response to the COVID-19 pandemic during the spring of 2020. Plaintiffs James Allen, Matthew Olin, and Megan Placko were students at MSU during the Spring 2020 semester. **[*2]** [2] Plaintiff Alisa Olin is Matthew's mother, and plaintiffs Richard Placko and Cindy Placko are Megan's parents.

On March 10, 2020, Governor Gretchen Whitmer declared a statewide state of emergency after the first two presumptive-positive cases of COVID-19 in Michigan had been identified. Executive Order No. 2020-4. On March 11, 2020, MSU President Samuel L. Stanley Jr., M.D., sent a communication to the MSU community indicating that the university was "suspending face-to-face instruction in lectures, seminars and classroom settings and moving coursework to virtual instruction" until April 20, 2020, subject to ongoing reevaluation as more information became available. The letter further stated in relevant part:

> We are continuing to work with faculty and staff on laboratory and performance classes, and the university will provide additional guidance in the coming week. This will be an evolving process and I ask for everyone's patience.
>
> During this time period, students doing purely remote work can return to their permanent place of residence and we strongly encourage this because there are advantages for social distancing. But for those not able to go home, we will continue to fully support **[*3]** students in our residence halls and dining facilities. Regardless of where our students are, we encourage them to practice appropriate social distancing and enhanced preventative public health measures such as those we've previously discussed . . . .

On March 16, 2020, Vennie Gore, MSU Vice President for Auxiliary Enterprises, sent a letter to MSU on-campus residents reiterating that although students were encouraged to return to their permanent residences if possible, students could remain in on-campus housing if leaving campus was not possible or if MSU was a student's permanent home. The letter further stated that MSU was offering a $1,120 credit to students who checked out of on-campus housing by April 12.[3]

On April 16, 2020, Allen filed an action in the Court of Claims seeking partial refunds of money paid for tuition, room and board, and other fees because he allegedly did not receive the expected benefit of those payments. Allen raised claims of breach of contract and unjust enrichment based on each of these three categories. He alleged that he had entered into a contract with MSU to pay tuition in exchange for "live in-person instruction in a brick and mortar classroom" and that **[*4]** MSU had breached that contract by transitioning the remainder of the Spring 2020 semester to online distance learning platforms that were inferior to in-person classes without refunding the difference in value. With respect to room and board, Allen alleged that MSU breached its contractual agreement to provide housing by failing to provide housing for the entire semester without fully refunding the unused portion of Allen's room and board payments. Allen also alleged that MSU had breached its contract to provide "services" in exchange for other "fees" by closing MSU buildings and cancelling student activities for the remainder of the semester without refunding unused fees that had been collected. Finally, Allen raised a corresponding unjust enrichment claim for each of these three categories.

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[1] *Allen v Mich State Univ, unpublished order of the Court of Appeals, entered August 30, 2021 (Docket Nos. 358135, 358136, and 358137), 2021 Mich. App. LEXIS 5190*.

[2] We note that all three previously consolidated actions were brought as purported class actions. However, the issue of class certification is not pertinent to the issues raised on appeal. We therefore only refer to the named plaintiffs.

[3] It appears that this letter was only submitted in Allen's case. However, the room-and-board issue is only relevant in Allen's appeal.

The Olins filed a somewhat similar complaint in the Court of Claims, seeking partial refunds of tuition and fees based on claims of breach of contract, breach of implied contract, unjust enrichment, conversion, and money had and received. They alleged that MSU had breached its contractual obligation, whether express or implied, to provide "in-person educational services, experiences, opportunities, **[*5]** and other related services" for the entire semester in exchange for the tuition and fees the Olins paid. For the unjust enrichment claim, the Olins alleged that MSU had unjustly retained the full benefit of tuition and fee payments without fully providing the "in-person and on-campus live education and access to MSU's services and facilities for which tuition and the mandatory fees were paid." Additionally, the Olins alleged that MSU had converted a portion of the tuition and fees collected from the Olins when MSU "canceled a portion of the semester, moved all in-person classes to a remote online format, canceled all on-campus events, and discontinued services for which the mandatory fees were intended to pay, all while retaining the property (tuition and portions of the mandatory fees)." Finally, the Olins asserted a claim for money had and received based on MSU's retention of tuition and fees "while not providing in-person educational services, activities, opportunities, resources, and facilities for which those monies were paid."

The Plackos also filed a complaint in the Court of Claims, seeking partial refunds of tuition, room and board, and fee payments based on similar claims **[*6]** of breach of contract, unjust enrichment, and conversion. They alleged that MSU breached contracts to provide (1) "live in-person instruction in a physical classroom" in exchange for tuition by moving all classes to online formats without refunding or reducing tuition; (2) "services . . . as advertised" in exchange for fees by closing campus facilities and canceling student activities, and (3) housing and meals for the entire semester in exchange for room-and-board payments. The Plackos further asserted corresponding unjust enrichment and conversion claims for each category. Although these three actions were eventually consolidated in the Court of Claims, they initially proceeded separately. In Allen's case, MSU filed concurrent motions for a protective order staying discovery and for summary disposition under *MCR 2.116(C)(8)*. Allen had not attached any documents to his complaint purporting to constitute contracts that supported his claims. MSU first argued that Allen's tuition-and-fee-based contract claims should be dismissed because Allen had the burden to prove the existence and terms of any contract on which he relied, and he could not demonstrate that there was a contract regarding the "manner" **[*7]** in which MSU would provide instruction or spend specific fees. MSU maintained that such agreements did not exist. Regarding the contractual-room-and-board claim, MSU attached to its motion for summary disposition a copy of the written Student Housing Contract and argued in relevant part that the $1,120 credit that Allen accepted for room and board when he moved off campus was consistent with the refund provision in the written contract.

Additionally, MSU argued that it was entitled to summary disposition on the unjust enrichment claims because it was empowered to manage expenditures under Michigan's Constitution. With respect to room and board, MSU argued there was an express written contract covering the subject matter. The trial court granted MSU's motion for a protective order and stayed discovery pending the resolution of the summary disposition motion. The trial court also entered an order stating in relevant part as follows:

> One critical issue presented in the [summary disposition] motion is whether an express or implied written contract for in-person instruction exists. Though plaintiff claims that a written contract for in-person instruction does exist, no written contract was **[*8]** attached to the complaint. And though plaintiff alleged per court rule that the contract is in the possession of defendants, defendants disclaim possession of any such contract. Accordingly, in order to properly determine the pending motion, the Court orders plaintiff to submit to the Court any and all documents currently in [his] possession that forms the basis for [his] assertion that a written express or implied contract exists with respect to receiving only in-person instruction.

Allen responded to the trial court's order by submitting 13 exhibits consisting of "a selection of documents provided by the University to its students describing the various academic program offerings and the consideration (tuition) students must provide to enroll in these programs." Allen argued:

> These exhibits contain some of the representations made by the University which created the contractual obligation to provide live in-person instruction. The terms of the parties' relationship are governed not just by the University's representations, but also by the parties' reasonable expectations. Thus, the documents referenced in

> this filing not only fill in the details as to what the University represented **[*9]** it would provide to students, they are also relevant to the determination of the parties' mutual expectations and the reasonableness of students' expectation that classes would be in-person. The attached Exhibits demonstrate that MSU represented that when a student elected to take a class in-person, the modality of instruction for that class would be in-person. At most, MSU's arguments against enforcement of that expectation, betray an ambiguity on the issue, which can only be resolved by applying the reasonable expectation that instruction would be in-person where the student registered for that mode of instruction.

Allen's exhibits consisted of sample pages from the 2020 Spring Term Class Schedule Listing for various programs offered by the University, the MSU Union Student Guide, and multiple pages of what appear to be promotional materials from MSU's website regarding various facilities, departments, and programs at the university. The 2020 Spring Term Class Schedule Listing pages provided physical meeting locations and times for traditional classes and expressly designated other classes as "online" or "hybrid" classes. The classes designated as "hybrid" indicated that they blended **[*10]** online and in-person learning. The other exhibits, which were essentially promotional materials for the university, contained what Allen characterized as "a wide variety of representations to . . . students that [MSU] would provide in-person instruction [and activities] on the University's campus."

The trial court issued a written opinion and order granting MSU's motion for summary disposition in part and denying the motion in part, considering the motion under both *MCR 2.116(C)(8)* and *(C)(10)*. First, the court granted summary disposition in favor of MSU on Allen's three breach-of-contract claims and dismissed those counts. After considering the exhibits submitted by Allen, the trial court determined that "[n]one of these documents include the required elements of a contract" or "contain a promise that, with the payment of tuition, MSU would exclusively provide in-person instruction." The court reasoned:

> That the brochures and catalogs were written with the expectation that instruction would be in-person does not create a contractual promise that no matter the circumstance, all instruction would be in-person. Rather, the brochures merely explain the types of classes available and the possibility of "hands-on" **[*11]** experience or instruction in the different university facilities.

Accordingly, the trial court concluded that there was "no genuine issue of material fact that there is no contract between plaintiff and MSU promising live, in-person instruction only in exchange for tuition payments" and that MSU was therefore entitled to summary disposition as a matter of law on the tuition-based breach-of-contract claim because Allen could not show the existence of a contract.

Regarding the fee-based contract claim, the trial court similarly concluded that there was "no genuine issue of material fact that no contract exists regarding student services" because there were "no documents containing promises relative to services to be provided in exchange for a fee, what the fees would go toward, or any other material provisions found in a contract." The court, therefore, dismissed this claim.

Concerning the room-and-board contract claim, the trial court noted the existence of the written housing contract included dining services, which MSU had provided. However, the trial court concluded that there was no genuine issue of material fact regarding whether MSU had breached the contract by encouraging students **[*12]** to leave campus if possible, continuing to provide room and board for students who chose to stay, and offering credit to students who opted to leave campus. The court relied on a provision in the contract that specifically allowed MSU to breach the contract by encouraging students to leave campus if possible, continuing to provide room and board for students who elected to stay, and offering credit to students who elected to leave campus. The court relied on a provision in the contract that specifically allowed MSU to "terminate or temporarily suspend the Contract or any part of it, without notice, in case of an emergency that would make continued operation of resident housing impossible." The court also concluded that the credit offered by MSU to students who left campus was consistent with the amount students could obtain under the "Contract Buyout" provision if they chose to move out of campus housing early.

The trial court also determined that MSU was entitled to summary disposition on Allen's unjust enrichment claim regarding room and board because there was an express written contract for room and board. However, the trial court denied MSU's motion for summary disposition regarding **[*13]** the tuition-and-fee-based unjust enrichment claims. The court reasoned:

> [W]here no express contract exists regarding tuition and fees, and summary disposition under MCR 2.116(C)(8) is based on the pleadings alone, . . . plaintiff has sufficiently pleaded a claim for unjust enrichment related to tuition and fees in Counts IV and VI. In Count IV, plaintiff alleged that (1) MSU received tuition payment from plaintiff and other members of the tuition class, and (2) plaintiff experienced an inequity when MSU kept the tuition payment, but provided online rather than in-person instruction for the remainder of the semester. . . . In Count VI, plaintiff alleged that (1) MSU received payment for student services from plaintiff and other members of the fee class, and (2) plaintiff experienced an inequity when MSU kept the fee payment, but did not provide student services for the remainder of the semester. . . . Plaintiff alleges that this unjustly enriched MSU. MSU's arguments based on its constitutional authority to control expenditures and plaintiff's lack of standing because his family paid for room and board are unavailing. On the basis of plaintiff's pleadings alone, . . . summary disposition of plaintiff's **[*14]** unjust enrichment claims related to tuition and fees is improper. MCR 2.116(C)(8).

MSU filed a motion for partial reconsideration, arguing that it was also entitled to summary disposition on the remaining unjust enrichment claims. MSU asserted that it was not unjustly enriched by retaining total tuition payments because "tuition is based on *credit hours*, *not* the *format* of the class" and MSU thus did not receive a windfall from Allen's tuition payment. MSU further argued that its catalog contained "a clear reservation of rights giving MSU absolute discretion to make changes to its academic programs and course formats," therefore, it was not unjust for MSU to exercise this discretion. Additionally, MSU contended that an unjust enrichment claim could not be based on a purported difference between the quality of instruction obtained and the expected quality. In support, MSU referred to record evidence consisting of portions of MSU's catalog. The catalog specifically provided that "[c]harges will be assessed on a credit hour basis, except for graduate-professional student fees which are assessed on a semester basis and some graduate student fees which are assessed on a semester or program basis . . ." **[*15]** and that "[t]he University reserves the right to make changes in its programs, policies, rules, regulations, procedures, fees, tuition, housing rates, organizational structure, and faculty and staff through the appropriate University processes."

In a written opinion and order, the trial court granted MSU summary disposition on Allen's tuition-based unjust enrichment claim because the evidence reflected that there was no genuine issue of material fact regarding whether tuition was charged per credit hour and that Allen would have thus been charged the same amount of tuition for online courses. Thus, the trial court established that MSU was not unjustly enriched by retaining the tuition. However, the trial court denied MSU's motion concerning the fee-based unjust enrichment claim.

Meanwhile, MSU had also moved for summary disposition under MCR 2.116(C)(8) of the claims in the Plackos' case. The Plackos failed to attach any documents to their complaint that could be deemed contracts supporting their claims. MSU's motion for summary disposition challenged the tuition-and-fee-based contract claims on the same grounds as in Allen's case. MSU asserted that the Plackos did not demonstrate any personal loss **[*16]** related to room and board, making their room-and-board contract claim untenable. Regarding unjust enrichment, MSU maintained that it was entitled to summary disposition because it had the authority to manage expenditures under Michigan's Constitution and an express written contract pertaining to room and board. Concerning the conversion claims put forward by the Plackos, MSU argued that summary disposition was warranted, as a claim for money conversion can only be sustained if a duty exists to keep intact or deliver specific identifiable money. The trial court issued a written opinion and order granting MSU's motion in part and denying it in part. Noting that both parties had attached exhibits to their summary disposition filings, the court considered the motion under both MCR 2.116(C)(8) and (C)(10).

The trial court determined that there was no evidence of any promise that MSU would exclusively provide in-person instruction in exchange for tuition, that the Plackos had not alleged the existence of any documents that would establish such a contract, and that the course catalog contained a reservation of rights clause permitting MSU to: "make changes in its programs, policies, rules, regulations, procedures, **[*17]** fees, tuition, housing rates, organizational structure, and faculty and staff through the appropriate University processes." Thus, the court concluded that MSU was entitled to summary disposition on the tuition-based contract claim because there was no genuine issue of material fact regarding the alleged contract's existence or, if the contract existed, whether there was a breach. The trial court also granted MSU summary disposition

on the fee-based contract claim because there was no evidence of a contractual promise regarding the services to be provided in exchange for fees and because there was no breach due to the reservation of rights clause. The court dismissed the room-and-board contract claim because the Plackos did not contest that Megan did not live in on-campus housing; therefore, she did not have standing to bring this claim on her behalf or on behalf of the asserted class. Furthermore, the court concluded that there was no genuine issue of material fact that a breach could not be established.

In terms of unjust enrichment, the trial court determined that a written contract for housing and dining barred the room-and-board claim. Additionally, the trial court affirmed MSU's **[*18]** entitlement to summary disposition on the tuition claim, citing unrebutted evidence that tuition was based on credit hours rather than class format. Nonetheless, the court denied MSU's motion for summary disposition regarding the fee-based unjust enrichment claim under *MCR 2.116(C)(8)*, stating that this claim was adequately pled and that there was no proof of an express contract. Lastly, regarding conversion, the trial court found that the Plackos had not articulated a claim for relief concerning tuition, fees, and room and board, as they could not demonstrate that MSU acted wrongfully or unlawfully in managing the funds.

In the Olins' case, MSU also moved for summary disposition and raised arguments similar to those described in the other cases. Unique to the Olins' case was the claim for money had and received, which MSU argued was equivalent to an unjust enrichment claim and should be dismissed for the same reasons.

The trial court issued a written opinion and order granting MSU's motion on all of the Olins' claims with the exception of the unjust enrichment claim regarding fees. The court considered the motion under both *MCR 2.116(C)(8)* and *(C)(10)*. The trial court granted MSU's summary disposition motion on the contract **[*19]** claims because there was no evidence of the relevant contract or that the contract was breached if it existed. Regarding the contract claims, the court explained:

> There is no evidence that the documents plaintiffs refer to—the course catalog, website, and promotional materials—include the required elements of a contract, or any promise that, with the payment of tuition and fees, MSU would exclusively provide in-person instruction and on-campus services. . . .
>
> . . . Nor have plaintiffs alleged or otherwise suggested that there are other documents other than brochures, informational pamphlets, academic course outlines, etc., that comprise the alleged contracts, express or implied. Therefore, there is no genuine issue of material fact that there are no contracts between plaintiffs and MSU promising live, in-person instruction only and on-campus services only in exchange for tuition and fee payments. Because plaintiffs cannot establish that such contracts exist, the express and implied breach-of-contract claims regarding tuition and fees fail, and MSU is entitled to summary disposition as a matter of law. . . .

Furthermore, noting the reservation of rights clause in the catalog and the financial **[*20]** responsibility statement[4] to which students agree, the court determined that

> assuming arguendo that plaintiffs could establish the existence of a contract and the first element of a breach-of-contract claim, there is no genuine issue of material fact that plaintiffs cannot establish a breach because of the reservation of rights clause and the financial responsibility statement. . . . The reservation of rights clause allows MSU to modify its courses and programs, which it did when it transitioned to online learning. The reservation of rights clause also allows MSU to make changes in its fees. And each student agrees to be responsible for tuition and fees upon agreeing to the financial responsibility statement.

Subsequently, the trial court granted summary disposition in favor of MSU on the unjust enrichment claim about tuition on the grounds that there was uncontradicted evidence indicating that tuition was determined by credit hours rather than the class format. Consequently, the tuition charged would have remained constant for online and in-person classes. The court deduced that there was no legitimate question of material fact regarding whether MSU had been enriched. Nevertheless, akin **[*21]** to the other two cases, the trial court denied MSU's motion for summary disposition concerning the fee-based unjust enrichment claim. Additionally, the court granted summary disposition to Michigan State University on the

[4] The financial responsibility statement provided: "I understand that when I enroll/register for any class at Michigan State University (MSU) or receive any service from MSU, I accept full responsibility to pay all tuition, fees, housing and other associated costs assessed as a result of my registration and/or receipt of services."

conversion claim, employing the same rationale as in the Plackos' case. The court also granted MSU summary disposition on the money-had-and-received claim, concluding that "plaintiffs have no claim against MSU that it had in its possession money which in equity and good conscience belonged to plaintiffs because instruction and services were still provided, and plaintiffs suffered no compensable loss."

After the above rulings in each case by the trial court, these three cases were consolidated to address the issue of whether MSU was unjustly enriched by retaining fees paid for services during the portion of the Spring 2020 semester held remotely.

MSU subsequently moved for summary disposition of the remaining unjust enrichment claims under *MCR 2.116(C)(10)*. MSU submitted evidence, including an affidavit by Assistant Vice President for Student Affairs Allyn R. Shaw, Ph.D., showing that the student fees were used to fund Associated Students of Michigan State University (ASMSU), which **[*22]** is MSU's undergraduate student government; the Residence Hall Association (RHA), which is MSU's on-campus residence hall governing group; Impact 89FM, which is the student radio station; and The State News, which is the student newspaper. These fees amounted to $21, $25, $3, and $7.50, respectively.[5] Shaw further averred that these organizations continued to operate and serve students during the remainder of the Spring 2020 semester after the onset of the COVID-19 pandemic; there was no interruption in Impact 89FM's broadcast, The State News continued to report on events and produce new content, ASMSU and RHA continued to convene remotely and allocated over $265,000 to COVID-19 support for students, and students continued to have access to various services provided by ASMSU and RHA. Shaw also averred that these organizations did not realize substantial cost savings during the second half of the Spring 2020 semester. MSU argued that plaintiffs thus received a benefit in return for the fees they paid and that MSU did not realize a financial windfall or unjust profit.

In response, plaintiffs argued that MSU's retention of all fees was inequitable because plaintiffs were denied the opportunity **[*23]** to attend live, in-person events and plaintiffs did not receive all of the services covered by the fees. In support of these assertions, plaintiffs attached sworn "declarations" of plaintiffs Megan Placko and Matthew Olin. In her declaration, Megan stated:

> 6. Because Defendants cancelled events in the Spring 2020 Semester, I was denied, among other things, the opportunity to (1) attend MSU's March 19, 2020 Testing and Tasting: Practice Talk and CAL Care Week 2020 events, (2) March 25, 2020 Innovate Speaker Series: Bob Fish, (3) April 2, 2020 Java & Jam, (4) April 18, 2020 Global Day of Service, (5) IT'S ON U.S. Week of Action, (6) all MSU Film Collective events, (7) all Innovate State Speaker Series events, (8) all Visiting Artist Lecture events, 9) the Spring Concert and (10) my on-campus graduation Commencement. Cancellation of many of these events is posted on MSU's website . . . .
>
> 7. I was also denied the opportunity to utilize the following services, or received no benefit from these services, which were part of the benefits resulting from payment of the ASMSU Tax (at least in part as discussed above), and State News Tax. To the best of my recollection, the State News continued **[*24]** to publish during the Spring 2020 semester, but the type of articles published was limited as compared to earlier publications and primarily reported on Covid-19 and restated information previously sent to me by MSU. As a result of this change, I did not benefit from the State News during the second half of the Spring 2020 semester.

Similarly, Matthew stated in his declaration that because MSU "cancelled events in the Spring 2020 Semester," he was denied the opportunity to attend CALE Care Week 2020 events "focusing on selfcare and community," speaker Bob Fish on business and entrepreneurship, an April 2, 2020 MSU alumni networking event titled "Java & Jam," the April 18, 2020 Global Day of Service, Film Collective events, Innovate State Speaker Series events, Visiting Artist Lecture events, Spring Concert, IT'S ON U.S. Week of Action, Counseling and Psychological Services Connect Sessions and Outreach Services, intramural sports, and in-person events held by registered student organizations and the MSU Class Council. Matthew also stated that he was unable to use the MSU Safe Ride Program and the Resource Center for Persons With Disabilities "in a private manner."

The trial court issued **[*25]** a written opinion and order granting MSU's motion for summary disposition and dismissing the case. The court concluded that there was no genuine issue of material fact that the fees at issue continued to support services or programs offered or

[5] Billing statements submitted by MSU reflected that of the three student plaintiffs, only Allen paid the RHA fee.

sponsored by the organizations that received the fees as funding. The court further concluded that there was no evidence to support a finding that it was inequitable for MSU to retain the fees for the remainder of the 2020 semester.

These appeals followed.

II. STANDARD OF REVIEW

HN1[] This Court reviews de novo a trial court's decision on a motion for summary disposition. Zwiker v Lake Superior State Univ, 340 Mich App 448, 473; 986 NW2d 427 (2022). Summary disposition is proper under MCR 2.116(C)(10) "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. at 473-474. "The existence and interpretation of a contract are questions of law reviewed de novo." Kloian v Domino's Pizza LLC, 273 Mich App 449, 452; 733 NW2d 766 (2006). We also review de novo as a question of law whether contract language is ambiguous. Klapp v United Ins Group Agency, Inc, 468 Mich 459, 463; 663 NW2d 447 (2003). "Whether a specific party has been unjustly enriched is generally a question of fact," but "whether a claim for unjust enrichment can be maintained is a question of law, which we review de novo." Morris Pumps v Centerline Piping, Inc, 273 Mich App 187, 193; 729 NW2d 898 (2006). This Court "review[s] de novo a trial court's dispositional ruling **[*26]** on an equitable matter." *Id.* "When reviewing a decision under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." Zwiker, 340 Mich App at 473.

III. ANALYSIS

A. TUITION AND FEES

The paramount issue raised by these appeals pertains to the existence of an express or implied contract that confers upon the plaintiffs the right to seek recovery from MSU. This inquiry is particularly relevant considering MSU's transition from conventional in-person instruction and on-campus student activities and services to an online remote delivery format during the latter portion of the Spring 2020 semester, necessitated by the COVID-19 pandemic.

HN2[] "A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." Miller-Davis Co v Ahrens Constr, Inc, 495 Mich 161, 178; 848 NW2d 95 (2014). "The party seeking to enforce a contract bears the burden of proving that the contract exists." AFT Mich v State of Michigan, 497 Mich 197, 235; 866 NW2d 782 (2015). Moreover, the party claiming a breach of contract is required to prove the "*terms*" of the contract that the defendant allegedly breached. Van Buren Charter Twp v Visteon Corp, 319 Mich App 538, 554; 904 NW2d 192 (2017) (emphasis added).

HN3[] A contract may be express or **[*27]** implied. McInerney v Detroit Trust Co, 279 Mich 42, 46; 271 NW 545 (1937). An express contract has been defined as "one in which the terms were openly uttered and avowed at the time of the making" or "one where the intention of the parties and the terms of the agreement are declared or expressed by the parties, in writing or orally, at the time it is entered into." *Id.* (quotation marks and citations omitted).

HN4[] Alternatively, a contract may instead be implied from the circumstances:

> "There are two kinds of implied contracts; one implied in fact and the other implied in law. The first does not exist, unless the minds of the parties meet, by reason of words or conduct. The second is quasi or constructive, and does not require a meeting of minds, but is imposed by fiction of law, to enable justice to be accomplished, even in case no contract was intended." [McInerney, 279 Mich at 49 (quotation marks and citation omitted); see also City of Highland Park v State Land Bank Authority, 340 Mich App 593, 604; 986 NW2d 638 (2022) (stating the same rule).]

HN5[] Thus, an implied-in-fact contract requires mutual assent just like any other contract, with the difference being that in the case of an implied-in-fact contract, the mutual assent is inferred from the parties' words and actions since the parties did not directly express their mutual assent and intent to contract. McInerney, 279 Mich at 49; Erickson v Goodell Oil Co, 384 Mich 207, 212; 180 NW2d 798 (1970). "A contract **[*28]** is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction." Erickson, 384 Mich at 212. "A contract implied in fact arises under circumstances which, according to the ordinary course of dealing and common understanding, of [people], show a mutual intention to contract." Id. at

211-212.

HN6[] In contrast, the concept of an implied-in-law contract—which is a quasi-contract—is intricately linked with the concept of unjust enrichment. See McInerney, 279 Mich at 49; City of Highland Park, 340 Mich App at 604 ("Quasi-contract doctrine is itself a subset of the law of unjust enrichment.") (quotation marks and citation omitted). "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, 273 Mich App at 193 (quotation marks and citation omitted; alteration in original). "The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives **[*29]** and retains a benefit from another." Id. at 194. To sustain a claim that a contract should be implied in law to prevent unjust enrichment, a plaintiff must show: "(1) receipt of a benefit by the defendant from the plaintiff and, (2) which benefit it is inequitable that the defendant retain." Dumas v Auto Club Ins Ass'n, 437 Mich 521, 546; 473 NW2d 652 (1991) (opinion by RILEY, J.) (quotation marks and citation omitted).

Plaintiffs assert a right to recover under theories of express, implied-in-fact, and implied-in-law contracts. They contend that they paid for and anticipated in-person delivery of education and the availability of services. Plaintiffs argue that the online alternatives provided were inherently inferior and did not constitute the product for which they had contracted. Consequently, they claim entitlement to a partial refund based on the disparity between the anticipated and actual value delivered by MSU. Furthermore, plaintiffs argue that the contract with MSU, which promised in-person education and services, is evidenced by the course catalog, brochures, advertisements, promotional materials, and the online student portal. In an alternate argument, plaintiffs maintain that an implied-in-fact contract existed based on the conduct of the parties, **[*30]** MSU's historical practice of providing in-person education on campus, and the aforementioned written materials that led both them and MSU to reasonably believe that they were engaging in an exchange of tuition payments for in-person, on-campus instruction and access afforded by the university. Additionally, plaintiffs assert that MSU has been unjustly enriched by retaining the entirety of the tuition and fees paid by the plaintiffs without fulfilling the expected semester of in-person education and services. Instead, they argued, MSU offered only inferior emergency online courses and canceled on-campus activities and events.

MSU contends that the contracts alleged by plaintiffs were never made because MSU never promised to provide only in-person instruction and services, even amid a global pandemic, and MSU never promised to issue refunds if in-person learning and activities were interrupted by a pandemic. MSU argues that not only did plaintiffs fail to provide any evidence that the alleged contract existed, but plaintiffs also failed to allege any facts supporting a claim that such a contract was made. Furthermore, MSU contends that this Court, in Cuddihy v Wayne State Univ Bd of Governors, 163 Mich App 153; 413 NW2d 692 (1987), rejected the notion that student **[*31]** handbooks or other similar informational materials may create implied contracts between a student and university. More broadly, MSU also asserts that its decisions regarding how to deliver education and services, including under the circumstances of an unexpected global pandemic, remain within the exclusive purview of the university as an academic institution. Therefore, students do not have any implied contractual rights to expect any specific form of instructional delivery or student services. MSU argues that it expressly retained its discretion to modify programs and policies in a reservation of rights clause contained in the academic catalog, even if that catalog was construed as a contract. Regarding unjust enrichment, MSU maintains that it could not have been unjustly enriched by transitioning to online instruction because per-credit-hour tuition is the same for in-person and online courses. Additionally, MSU argues that it was not unjustly enriched by retaining the fees collected because the organizations funded by those fees continued to operate, and there was no evidence that the plaintiffs' fees secured any particular or specific event, activity, or service terminated during **[*32]** the pandemic.

We begin our analysis by considering whether there was an express contract. HN7[] As mentioned earlier, an express contract is "one where the intention of the parties and the terms of the agreement are declared or expressed by the parties, in writing or orally, at the time it is entered into." McInerney, 279 Mich at 46 (quotation marks and citations omitted). "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." AFT Mich, 497 Mich at 235. "Fundamentally, a contract is a promise or a set of promises for which the law recognizes a remedy in the event of a breach of those

promises. 1 *Restatement Contracts, 2d, § 1, p 5*. A promise, in turn, is 'a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.' *Id.* at *§ 2, p 8*." Bodnar v St John Providence, Inc, 327 Mich App 203, 212; 933 NW2d 363 (2019). "Before a contract can be completed, there must be an offer and acceptance. . . . Further, a contract requires mutual assent or a meeting of the minds on all the essential terms." Kloian, 273 Mich App at 452-453 (quotation marks and citation omitted). "A meeting of the minds is judged by an objective standard, looking to the express words **[*33]** of the parties and their visible acts, not their subjective states of mind." Id. at 454 (quotation marks and citation omitted).

Here, plaintiffs have not cited any record evidence demonstrating that MSU affirmatively promised and committed itself to providing only in-person instruction under all circumstances for the entire semester in exchange for tuition. Plaintiffs also have not cited any evidence in the record demonstrating that MSU affirmed its promise and commitment to providing any particular type of service on campus in exchange for fees. Plaintiffs have not shown any evidence that MSU expressly manifested, in writing or orally, an intent to provide only in-person instruction or particular types of services on campus for the entire semester under all circumstances. Bodnar, 327 Mich App at 212; McInerney, 279 Mich at 46. There is no evidence that MSU ever offered to make such promises to plaintiffs, or any students. See Kloian, 273 Mich App at 453 ("An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.") (quotation marks and citation omitted). Accordingly, there is no evidence of mutual assent. Id. at 452-454.

The record evidence shows **[*34]** that MSU reserved its right to make these changes. The MSU catalog states, "The University reserves the right to make changes in its programs, policies, rules, regulations, procedures, fees, tuition, housing rates, organizational structure, and faculty and staff through the appropriate University processes." Accordingly, no evidence supports the conclusion that an express contract existed for a particular form of instruction or services in exchange for tuition and fees, as claimed by plaintiffs. Kloian, 273 Mich App at 452.

However, whether there were implied-in-fact contracts for in-person instruction and on-campus access to facilities and student services presents a somewhat closer question. **HN8**[↑] As previously stated, an implied-in-fact contract arises when the circumstances, "according to the ordinary course of dealing and common understanding," demonstrate a "*mutual* intention to contract" that is "to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction." Erickson, 384 Mich at 211-212 (emphasis added).

Plaintiffs assert that an implied-in-fact contract obligates MSU to provide in-person education and on-campus services **[*35]** in exchange for the tuition and fees paid. They ground this assertion in representations outlined in the MSU catalog and other informational materials, alongside MSU's established practice of delivering in-person education and campus experiences. Plaintiffs assert that both students and MSU operated under the fundamental assumption of a traditional college experience, and this understanding was central to their agreement to pay tuition and fees for education and on-campus services. Plaintiffs assert that, although MSU retained the right to modify programs and policies, no reasonable person would expect significant changes to impact something as fundamental as the shift from in-person instruction and services to an online format. To address this matter definitively, we must examine the relevant legal principles that clearly outline the rights and responsibilities between students and higher education institutions, especially given the unique nature of their relationship. **HN9**[↑] A university's relationship with its students is crucial in these situations, as it determines what can be reasonably inferred when assessing the existence of an implied-in-fact contract. See Erickson, 384 Mich at 211-212. Furthermore, MSU argues **[*36]** explicitly on appeal that "Plaintiffs' implied contract theory failed under Cuddihy v Wayne State Univ Bd of Governors, 163 Mich App 153; 413 N.W.2d 692 (1987), which broadly rejected the proposition that student handbooks and the like may provide a basis such an implied or quasi-contract claim by a student against a university." As an initial matter, we do not understand this Court's decision in *Cuddihy* to stand for such a broad proposition.

In *Cuddihy*, plaintiff was a student dismissed from her academic program in May 1979 after failing many of her comprehensive examinations. Cuddihy, 163 Mich App at 154-155. In her lawsuit against the university, plaintiff advanced an implied contract or promissory estoppel argument and claimed that she had relied on a promise made by her academic adviser that she would complete

the educational program by September 1978. Id. at 155-157. This Court held that the "statement made by plaintiff's academic adviser does not amount to an enforceable promise" because the "comment was merely an opinion." Id. at 157-158. The Court further reasoned:

> [I]t strains credulity to suggest that a student in a rigorous academic environment would "rely" on a "promise" by her academic adviser that she could graduate soon without also being cognizant that she must maintain her grades and pass her examinations. **[*37]** It is unlikely that a graduate student believed that merely by paying her tuition fees she was entitled to graduate with a masters degree. We conclude that plaintiff did not state a claim for promissory estoppel. [Id. at 158.]

This Court in *Cuddihy* clearly held that the statement attributed to the plaintiff's academic adviser did not constitute an enforceable promise. However, the opinion does not state that student handbooks, course catalogs, or other informational materials issued by a university can never create any type of contractual obligations.

The *Cuddihy* Court relied on Regents of the Univ of Mich v Ewing, 474 U.S. 214; 106 S Ct 507; 88 L Ed 2d 523 (1985), in which a district court's ruling was left intact concluding that a pamphlet issued by the university had not given the plaintiff medical student a right to retake an examination on contract or estoppel grounds. Cuddihy, 163 Mich App at 157; see also Ewing, 474 U.S. at 223-224 & nn 9-10. In the present case, MSU maintains that Ewing sets forth "a clear policy of judicial restraint and non-interference with the university-student academic relationship." The Ewing Court stated:

> When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. **HN10**[⬆] Plainly, they may not override it unless it is such a substantial **[*38]** departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. [Ewing, 474 U.S. at 225.]

This judicial deference was partly grounded in a concern for safeguarding the academic freedom of state and local educational institutions under the First Amendment. Id. at 226. **HN11**[⬆] The United States Supreme Court has recognized "'four essential freedoms' of a university," id. at 226 n 12 (citations omitted), tracing its recognition back to Justice Frankfurter's concurring opinion in Sweezy v New Hampshire, 354 U.S. 234; 77 S Ct 1203; 1 L Ed 2d 1311 (1957):

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring in result) (quotation marks and citation omitted).

Additionally, our Supreme Court has stated that "when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom." Booker v Grand Rapids Med College, 156 Mich 95, 99-100; 120 NW 589 (1909). The Ewing Court also conceded that a student may generally have an "implied contract right to continued enrollment **[*39]** free from arbitrary dismissal." Ewing, 474 U.S. at 223.[6]

Here, plaintiffs argue on appeal that there was an implied-in-fact contract between the students and MSU, which stated that MSU would provide in-person educational instruction and on-campus student services in exchange for tuition and fees. Plaintiffs contend that this implied-in-fact contract was based on the conduct of the parties and "MSU's long-standing custom of in-person, face-to-face education on campus," along with the MSU course catalog, brochures, the online student portal, promotional materials, and advertisements. In these cases, there was record evidence that MSU expressly designated certain courses in its class schedule as "online" or "hybrid" (combining online with in-person instruction) and that traditional in-person classes included a designated meeting time and location for the class. The record also contains evidence of various MSU promotional materials explaining the types of facilities and experiences that students could

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[6] As the United States Supreme Court recognized, Booker is "an antiquated race discrimination decision of the Michigan Supreme Court (whose principal holding has since been overtaken by events) . . . ." Ewing, 474 U.S. at 223 n 7. Nonetheless, the United States Supreme Court seemed to agree that there still remained a general implied contractual right to continued enrollment without arbitrary dismissal from the university.

expect to have access to both in and out of the classroom. Furthermore, there was evidence that course instructors were expected to meet with their classes at the designated scheduled times.

However, plaintiffs' **[*40]** argument on this issue ignores that MSU's catalog included a broad reservation of rights to amend these offerings. Therefore, even if we assume an implied-in-fact contract agreeing to exchange tuition for educational instruction and fees for various student activities, the reservation of rights language indicates there was no offer—and thus no meeting of the minds—on any specific format for delivering education and services. *Kloian, 273 Mich App at 452-454*; *McInerney, 279 Mich at 49*; *Erickson, 384 Mich at 212*. This conclusion decisively resolves this issue on appeal, as there is no evidence supporting the contractual terms plaintiffs claim were breached. MSU rightly received summary disposition regarding the plaintiffs' implied-in-fact contract claims for tuition and fees.

HN12[↑] Turning to the unjust enrichment claims regarding tuition and fees, plaintiffs "must establish that the defendant received a benefit from the plaintiff[s] and that it would be inequitable for the defendant to keep the benefit." *Zwiker, 340 Mich App at 482*. Evidence presented to the trial court shows that MSU charged equal tuition for both in-person and online courses, and the funded organizations continued their operations and services for students. It is undeniable that courses were initially offered as in-person classes **[*41]** and that on-campus events were canceled due to an unexpected global crisis, the pandemic. Despite the pandemic, MSU successfully maintained the core of its educational mission—providing instruction and various services for students—throughout the pandemic. Furthermore, there was never an agreement stipulating that education and services had to be delivered in a specific format. Therefore, it is wholly fair and just for MSU to retain the tuition and fees it collected. *Id.*; see also *Dumas, 437 Mich at 546* (opinion by RILEY, J.) (concluding that there was no unjust enrichment when an employer made changes to the compensation plan that were not prohibited by contractual agreement with the employees). MSU was entitled to summary disposition on these unjust enrichment claims.

B. ROOM AND BOARD

Next, Allen argues that the trial court erred by dismissing his breach of contract claim based on room and board.

HN13[↑] "In interpreting a contract, our obligation is to determine the intent of the contracting parties. If the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Products & Concepts Co v Nagel Precision, Inc, 469 Mich 362, 375; 666 NW2d 251 (2003)* (citation omitted).

The record contains a copy of the written student housing and dining services contract and the **[*42]** On-Campus Housing Handbook that was expressly incorporated in the written contract. The housing and dining contract stated that it was "binding" on the student for "the entire academic year." There was a "Contract Buyout" clause in the contract stating:

> If more than 14 days have passed since you signed your housing contract or if you have moved into your residence hall or apartment, you may obtain relief from the obligations of your housing contract upon payment of 60 percent of the remaining room and board fees for the remaining portion of the contract term. You should notify the Housing Assignment Office in writing of your intent to exercise the buyout, but you will continue to be responsible for the full amount of the room and board charges until you have properly checked out of your residence hall or apartment community. The buyout option is not available the last two weeks of the spring semester.

Additionally, the handbook that was incorporated into the contract stated:

> Michigan State University may terminate or temporarily suspend the Contract or any part of it, without notice, in case of an emergency that would make continued operation of resident housing impossible. Michigan State **[*43]** University may also terminate or temporarily suspend this Contract for renovation, maintenance and construction projects.

Here, the record indicates that MSU encouraged students living on campus to return to their permanent residences if possible. MSU also informed students that they could remain in on-campus housing if MSU was the student's permanent residence or if leaving was not possible. MSU also offered a $1,120 credit to students who chose to move out of on-campus housing. Allen admitted that he moved out of on-campus housing in March 2020 and appeared to concede that he received the $1,120 credit. MSU stated below that this credit was consistent with what a student could obtain under the buyout provision of the contract, and the defendant does not dispute this contention.

HN14[] A breach occurs if a party does not perform a contractual duty due under the contract's terms. Woody v Tamer, 158 Mich App 764, 771-772; 405 NW2d 213 (1987), citing *Restatement Contracts, 2d, § 235*. Here, Allen has not identified any promise that MSU made in the contract that it did not perform. Although Allen asserts that he is entitled to a full prorated refund for the remainder of the semester during which he did not live on campus, instead of the partial refund he received, no contractual language **[*44]** gives Allen an enforceable right to what he claims. Thus, there is no question of material fact that there was no breach of the contract. *Id.*; Miller-Davis Co, 495 Mich at 178. MSU was entitled to summary disposition on this breach-of-contract claim. HN15[] MSU was also entitled to summary disposition on the unjust enrichment claim related to room and board because "[c]ourts may not imply a contract under an unjust-enrichment theory if there is an express agreement covering the same subject matter." Zwiker, 340 Mich App at 482.

C. CONVERSION

The Olin and Placko plaintiffs argue that the trial court erred by granting summary disposition on their conversion claims.

HN16[] "Under the common law, conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc, 497 Mich 337, 346; 871 NW2d 136 (2015). "Money is treated as personal property, and an action may lie in conversion of money provided that 'there is an obligation to keep intact or deliver the specific money in question, and where such money can be identified.'" Dunn v Bennett, 303 Mich App 767, 778; 846 NW2d 75 (2013), quoting Garras v Bekiares, 315 Mich 141, 149; 23 NW2d 239 (1946). The money must be "identical money or checks," not merely a payment. Garras, 315 Mich at 148 (quotation marks and citation omitted). In this case, neither the Olins nor the Plackos asserted that MSU was obligated **[*45]** to deliver a specific money or check; rather, both alleged that MSU had wrongfully retained payments. This is insufficient to state a claim for conversion. The trial court did not err by granting MSU summary disposition on the conversion claims.

D. MONEY HAD AND RECEIVED

The Olins argue that the trial court erred in granting summary disposition of their claim for money they had and received for tuition and fees.

HN17[] An action for money had and received is an action of assumpsit. Youmans v Bloomfield Charter Twp, 336 Mich App 161, 213; 969 NW2d 570 (2021). Assumpsit has been abolished as a cause of action, and assumpsit claims are simply a subset of unjust-enrichment claims. *Id.* The Olins' claim for money had and received is merely duplicative of their tuition-and-fee-based unjust enrichment claim. Summary disposition of this claim was thus also proper for the same reasons.

E. MISCELLANEOUS ISSUES

Plaintiffs assert they were wrongfully denied the opportunity to conduct discovery, yet they fail to specify what evidence they could have uncovered. They imply that discovery might lead to the unearthing of the contracts underlying their claims. HN18[] However, mutual assent and a meeting of the minds are crucial to forming a contract. Thus, plaintiffs must demonstrate their status **[*46]** as parties to these alleged contractual agreements by explaining their basis for belief and detailing the evidence sought to prove the existence of those contracts, even if they no longer have copies of documents. Instead, plaintiffs have only declared the existence of contracts and demanded that MSU search for and produce contracts meeting their criteria, all while MSU contends that such contracts never existed. HN19[] This approach directly contradicts the established rule that plaintiffs bear the burden of proving the existence of the contract terms they intend to enforce. AFT Mich, 497 Mich at 235. Plaintiffs have not demonstrated that further discovery "stands a fair chance of uncovering factual support for the opposing party's position." Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 283 Mich App 264, 292; 769 NW2d 234 (2009). HN20[] A "party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence." *Id.*

For the same reasons, and because they have not alleged the existence of any evidence that would create a genuine issue of material fact regarding their claims and prohibit summary disposition in MSU's favor, any error that plaintiffs allege occurred in the trial court's treatment of (C)(8) **[*47]** motions as (C)(10) motions was harmless.[7] MCR 2.613(A).

We reject plaintiffs' argument that the frustration of

[7] Because it is not necessary to make such a finding, we express no opinion on whether an error actually occurred.

purpose doctrine applies and entitles them to restitution. ***HN21***[] "Frustration of purpose is generally asserted where 'a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract.'" *Liggett Rest Group, Inc v City of Pontiac, 260 Mich App 127, 133-134; 676 NW2d 633 (2003)*, quoting *Restatement Contracts, 2d, § 265, comment a*. According to the Restatement,

> the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that he had in mind some specific object without which he would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. [*Restatement Contracts, 2d, § 265, comment a*.]

In light of our analysis in the preceding parts of this opinion, the principal purpose of the contracts—a college education—was not rendered virtually worthless, thereby constituting a frustration of purpose. *Liggett Restaurant Group, 260 Mich app at 133-134*.

Finally, plaintiffs argue that the trial court abused its discretion by denying plaintiffs' motion to amend their complaint. ***HN22***[] This Court reviews for an abuse of discretion a trial court's denial of a motion to amend a complaint. *Zwiker, 340 Mich App at 474*. The trial **[*48]** court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.*

HN23[] A party may move to amend the pleadings after the trial court grants summary disposition under *MCR 2.116(C)(10)* "unless the evidence then before the court shows that amendment would not be justified." *MCR 2.116(I)(5)*. "Leave shall be freely given when justice so requires." *MCR 2.118(A)(2)*. However, the trial court may deny the motion if the amendment would be futile. *Zwiker, 340 Mich App at 484*. A proposed amendment is futile when "summary disposition would be appropriately granted regarding the new claims, either when a party has not established a genuine issue of material fact regarding an element . . . or when the undisputed facts establish that summary disposition would be appropriate . . . ." *Id.*

Here, the trial court denied plaintiffs' motion to amend their complaint on the ground of futility. The court explained:

> With respect to the attempts to revive the breach-of-contract and unjust enrichment claims that were previously dismissed, the Court concludes that the proposed amendments would be futile. In adhering to the law set forth in prior opinions of this Court, it is clear that none of the "new" documents submitted with the proposed amended **[*49]** complaint allow for the proposed amendments. In other words, they are futile. Neither the Statement of Financial Responsibility, nor any of the other documents attached to the proposed amended complaint, contain express or implied promises supporting the proposed allegations. Nor do any of the proposed new allegations overcome the law previously relied upon in addressing these claims.

Based on our review of plaintiffs' motion, the trial court's ruling was not outside the range of reasoned and principled outcomes. *Id. at 474, 484*. The trial court did not abuse its discretion by denying the motion to amend. *Id.*

HN24[] To the extent our reasoning on any of the above issues in this opinion differs from that of the trial court, "[w]e will affirm a trial court's decision on a motion for summary disposition if it reached the correct result, even if our reasoning differs." *Kyocera Corp v Hemlock Semiconductor, LLC, 313 Mich App 437, 449; 886 NW2d 445 (2015)*.

Affirmed. Defendants having prevailed in full are entitled to tax costs. *MCR 7.219(A)*.

/s/ Stephen L. Borrello

/s/ Noah P. Hood

/s/ Adrienne N. Young

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EXHIBIT - 3

Nofar v. City of Novi

Court of Appeals of Michigan

December 17, 2024, Decided

No. 363356

Reporter
2024 Mich. App. LEXIS 10031 *; 2024 WL 5148061

WILLIAM NOFAR, on Behalf of Himself and All Others Similarly Situated, Plaintiff-Appellant/Cross-Appellee, v CITY OF NOVI, Defendant-Appellee/Cross-Appellant.

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

Subsequent History: Reconsideration denied by *Nofar v. City of Novi, 2025 Mich. App. LEXIS 747 (Mich. Ct. App., Jan. 29, 2025)*

Prior History: **[*1]** Oakland Circuit Court. LC No. 2020-183155-CZ.

Nofar v. City of Novi, 2023 Mich. App. LEXIS 401 (Mich. Ct. App., Jan. 17, 2023)

Core Terms

rates, water and sewer, trial court, summary disposition, cash reserve, unjust enrichment, municipality, assumpsit, principles, retention, infrastructure, accumulation, costs, unjust-enrichment, Overcharges, usage, statute of limitations, equitable, reserves, funds, documentary evidence, cause of action, utility rate, replacement, premised, charges, partial, projects, finance, capital improvement

Counsel: For NOFAR WILLIAM/ALL OTHERS SIMILARLY SITUATED, Plaintiff - Appellant - Cross-Appellee: GREGORY D. HANLEY; EDWARD F. KICKHAM, III.

For CITY OF NOVI, Defendant - Appellee - Cross-Appellant: THOMAS R. SCHULTZ.

Judges: Before: MARKEY, P.J., and BORRELLO and GARRETT, JJ. BORRELLO, J. (concurring).

Opinion

PER CURIAM.

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 **[*2]** 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.[1] 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 **[*3]** 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.

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, **[*4]** 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.

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 **[*5]** 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.
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> 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 **[*6]** 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

[1] 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.

> 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)* . . . .
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> 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.]

Plaintiff alleged six counts or causes of action in the complaint. There were three counts of unjust **[*7]** 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 **[*8]** [was] not voluntary."[2] 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.

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."[3] 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 **[*9]** rates were not just and reasonable.[4]

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, **[*10]** 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

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

[3] Plaintiff made this same allegation in all three assumpsit counts.

[4] 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.

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.

On the other **[*11]** 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 **[*12]** 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 **[*13]** 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 **[*14]** 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 **[*15]** 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."

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 **[*16]** 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*.
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> 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 **[*17]** *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 **[*18]** 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."

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 **[*19]** 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 **[*20]** 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.[5]]

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 **[*21]** 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.[6]

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 &

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[5] The trial court also ruled that the city had the authority under statute and treasury rules to make the $17 million transfer.

[6] 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.

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).[7]

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

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. **[*23]** [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).
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> 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 **[*24]** 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

"Even though no contract may exist between two parties, under the equitable doctrine of unjust

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[7] 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, **[*22]** 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.]

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 **[*25]** 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. Mandlebaum, 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. City of Detroit, Mich App , ; NW3d , 2023 Mich. App. LEXIS 3915 (2023); slip op at 6-7*. "Although no independent cause of action for assumpsit exists, 'the substantive remedies **[*26]** traditionally available under assumpsit were preserved.'" *2023 Mich. App. LEXIS 3915 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 **[*27]** 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

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 **[*28]** 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 **[*29]** 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,[8] 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 **[*30]** on MCL 141.91 rely on the same arguments and proofs as plaintiff's Headlee claim; plaintiff did not even present distinct arguments for his Headlee claim and his MCL 141.91-related claims when arguing that he was entitled to summary disposition. For all three claims, plaintiff argued that the franchise fee was a tax because plaintiff and the class bore the "legal incidence" of the fee, and then argued that the Bolt criteria should be applied to the fee to determine whether it was a tax or a user fee. According to plaintiff, applying the Bolt criteria made clear that the fee was actually a tax, which entitled plaintiff to summary disposition on both his Headlee claim and his MCL 141.91-related claims.
>
> It is apparent both from the pleadings and from plaintiff's arguments that plaintiff's claims premised on MCL 141.91 are identical to his Headlee claim. As the statute of limitations may apply by analogy to equitable claims, 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 **[*31]** 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.]

We find *Heos* persuasive on the issue of the statute of limitations.[9] 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

[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).

[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.

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 **[*32]** 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.

3. THE REBUTTABLE PRESUMPTION OF REASONABLENESS

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 **[*33]** 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 **[*34]** 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 **[*35]** 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.
>
> 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 **[*36]** 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 **[*37]** 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 **[*38]** 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 **[*39]** 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.

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.[10]

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, **[*40]** 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 **[*41]** 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.[11] 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 *Britton v. Mills, 248 Mich. App. 244, 250, 639 N.W.2d 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).

We affirm. Having fully prevailed on appeal, the city may tax costs under *MCR 7.219*.

/s/ Jane E. Markey

/s/ Kristina Robinson Garrett

Concur by: Stephen L. Borrello

Concur

BORRELLO, J. *(concurring)*

I concur in the result only.

/s/ Stephen L. Borrello

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[10] 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.

[11] Again, the assumpsit claims fail because assumpsit is not a recognized cause of action.