STATE OF MICHIGAN

COURT OF APPEALS

JAMES HEOS, Individually and on Behalf of All Others Similarly Situated, Plaintiff-Appellee,	UNPUBLISHED April 13, 2023
v	No. 361105, 361138 Ingham Circuit Court
CITY OF EAST LANSING, Defendant-Appellant.	LC No. 20-000199-CZ

Before: GLEICHER, C.J., and O'BRIEN and MALDONADO, JJ.

PER CURIAM.

In these consolidated appeals, defendant, the City of East Lansing (the City), appeals the trial court's opinions and orders partially denying the City's motion for summary disposition and granting partial summary disposition to plaintiff[1] on his competing motion for summary disposition.

At issue is a "franchise fee" that the Lansing Board of Water and Light (LBWL), a public utility provider, charged its customers (plaintiff and the class). The LBWL collected the fees and remitted them to the City pursuant to a franchise agreement between the LBWL and the City. Plaintiff brought this class action challenging the franchise fee as an unlawful tax imposed in violation of the Headlee Amendment,[2] MCL 141.91, and the Foote Act, 264 PA 1905. In partially denying the City's motion for summary disposition, the trial court reasoned that plaintiff's Headlee claim was not barred by the statute of limitations. The trial court further reasoned that plaintiff's claims for unjust enrichment and assumpsit premised on MCL 141.91 were distinct from his

[1] The trial court granted plaintiff's request for class certification.

[2] More precisely, plaintiff claims that the "franchise fee" was a new local tax levied without voter approval contrary to Const 1963, art 9, § 31. "The 'Headlee Amendment' is the popular name for Const 1963, art 9, §§ 25-34." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 121; 537 NW2d 596 (1995).

Headlee Claim. As to plaintiff's claims based on the Foote Act, the trial court denied the City's motion for summary disposition.

Being bound by *Morgan v City of Grand Rapids*, 267 Mich App 513; 705 NW2d 387 (2005), we conclude that the trial court erred by holding that plaintiff's Headlee claim was not barred by the statute of limitations. We further conclude that plaintiff's unjust enrichment and assumpsit claims premised on MCL 141.91 are not distinct from his Headlee claims, and are therefore likewise time-barred. Finally, we conclude that plaintiff is not a real party in interest for purposes of enforcing the Foote Act. Accordingly, we reverse the trial court's opinions and orders, and remand for the trial court to enter an order granting summary disposition in favor of the City.

I. BACKGROUND

The City is serviced by two electric utility providers—the LBWL and Consumers Energy. The LBWL provides service to a significantly larger portion of the City; its service area encompasses about 89% of the City's total rights of way, while Consumers services the rest.

In 2015 or 2016, the City approached the LBWL and Consumers about charging them a franchise fee to continue operating within the City. Consumers refused to pay a franchise fee, while the LBWL was amenable to paying one. Eventually, the LBWL and the City came to an agreement in which the City granted the LBWL use of the City's rights of way, permission to conduct its business of distributing electricity within the City, and an exclusive right to service certain areas of the City. In exchange, the LBWL agreed to "collect and remit to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax, from the retail sale of electric energy by the [LBWL] within the City," with the fee "appear[ing] on the corresponding energy bills." The franchise agreement further provided that it should not be construed as the LBWL relinquishing any rights it had under the Foote Act, nor as the City waiving its ability to contest the LBWL's assertion of such rights. The City began receiving franchise fees from the LBWL pursuant to their franchise agreement in September 2017.

In April 2020, plaintiff filed the six-count complaint giving rise to this case. Counts I, II, and III alleged that the franchise fee was an impermissible tax and requested a refund of the franchise fees paid. Count I alleged a Headlee claim, while Counts II and III were based on alleged violations of MCL 141.91, which prohibits the collection of taxes not authorized by law. Count IV alleged that the franchise fee violated the Equal Protection Clause of the Michigan Constitution, Const 1963, art I, § 2, because it applied only to customers of the LBWL, not customers of Consumers. Counts V and VI alleged that the franchise fee was prohibited by the Foote Act, and requested a return of the franchise fees paid.

The parties eventually filed competing motions for summary disposition. The City argued that it was entitled to summary disposition on all counts. As to Count I, the City argued that plaintiff's Headlee claim was barred by the statute of limitations. The City argued that Counts II and III were likewise barred by the statute of limitations because those counts were indistinct from Count I. For Count IV, the City argued that plaintiff could not request money damages for an equal-protection violation. For plaintiff's claims premised on the Foote Act, the City argued that plaintiff was not a real party in interest and could therefore not enforce the act. The trial court

granted the City's motion for summary disposition as to plaintiff's equal-protection claim, but otherwise denied the motion.

In his competing motion, plaintiff asked the trial court to grant plaintiff and the class summary disposition on Counts I, II, and III of the complaint. In granting the motion, the trial court held that the franchise fee could be a tax on plaintiff and the class because, under the terms of the franchise agreement, plaintiff and the class were "responsible for paying the franchise fee." The trial court then applied the criteria from *Bolt v Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998) to the franchise fee to determine whether it was a "user fee" or a "tax," and concluded that the franchise fee was a tax. As the tax had not been approved by a majority of voters and was not otherwise authorized by law, the trial court held that plaintiff was entitled to summary disposition on Counts I, II, and III.

This appeal followed.

II. STATUTE OF LIMITATIONS

On appeal, the City argues that the trial court erred when it ruled that plaintiff's Headlee claim in Count I was not barred by the statute of limitations. The City further argues that plaintiff's equitable claims premised on MCL 141.91 in Counts II and III are likewise time-barred because they are identical to plaintiff's Headlee claim in Count I. We agree.

A. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Michigan Assn of Home Builders v City of Troy*, 504 Mich 204, 211; 934 NW2d 713 (2019). An argument that a claim is barred by the statute of limitations is properly brought under MCR 2.116(C)(7). See *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 222; 779 NW2d 304 (2009). As explained in *Dextrom v Wexford County*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010):

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [Citations omitted.]

B. HEADLEE CLAIM

"The 'Headlee Amendment' is the popular name for Const 1963, art 9, §§ 25-34." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 121 n 2; 537 NW2d 596 (1995) (*TACT*). As pertinent to this case, Const 1963, art 9, § 31 provides that a local governmental unit is "prohibited from levying any tax not authorized by law or charter" unless a majority of

voters have approved the levying of the new tax. See also *Shaw v City of Dearborn*, 329 Mich App 640, 652; 944 NW2d 153 (2019). Const 1963, art 9, § 32 provides that "[a]ny taxpayer of the state shall have standing to bring suit . . . to enforce the provisions of" the Headlee Amendment. MCL 600.308a(1) provides in which courts an action "under section 32 of article 9 of the state constitution of 1963 may be commenced," and subsection (3) provides that such an action must be "commenced within 1 year after the cause of action accrued."

Our Supreme Court has held that when a plaintiff is seeking a refund of an unlawful tax under the Headlee Amendment, the claim "accrues at the time the tax is due." *TACT*, 450 Mich at 123. The tax at issue in this case is slightly different than the one in *TACT*. In *TACT*, at issue was a one-time property transfer tax that was paid by the property owner directly to the governmental entity-defendant. Here, on the other hand, at issue is a recurring (alleged) tax on plaintiff's electricity bill that plaintiff paid to a third party—the LBWL—who remitted the alleged tax to the City. The parties dispute what effect this has on when plaintiff's claim accrued. Plaintiff argues that these differences do not affect the analysis, and that a Headlee claim accrued each time the alleged tax was due. The City, on the other hand, argues that this case is analogous to *Morgan*, 267 Mich App 513, and that, like in *Morgan*, plaintiff's claim accrued when the City entered into the franchise agreement with the LBWL.

We agree with the City that this case is analogous to *Morgan*. At issue in *Morgan* was a franchise fee charged by Comcast pursuant to a franchise agreement it had entered into with the City of Grand Rapids on July 10, 2001. *Id*. at 514. The plaintiff brought a proposed class action on behalf of Comcast cable subscribers to recoup the franchise fees, arguing that the fees constituted an unlawful tax in violation of the Headlee Amendment. *Id*. This Court held that the plaintiff's action was untimely, explaining:

> Comcast paid defendant a "franchise fee" consisting of five percent of its gross revenues. The five percent fee is specifically permitted by the federal Cable Communications Policy Act, 47 USC 521, *et seq*, which also allows cable providers to list separately in their billing statements the amount representing the subscriber's portion of the franchise fee. 47 USC 542. However, the mere listing of the charge on a separate line does not render plaintiff the charge's payer. Rather, plaintiff paid her entire bill according to her contractual obligation to Comcast, which paid the charge to defendant according to the franchise agreement. Defendant had no recourse against plaintiff for any unpaid portion of her bill, so this case is analogous to a sales tax scenario in which the seller passes on the sales tax obligation to the buyer but remains primarily liable to pay the tax. *World Book, Inc v. Dep't of Treasury*, 459 Mich 403, 407-408; 590 NW2d 293 (1999); *Sims v Firestone Tire & Rubber Co*, 397 Mich 469, 474; 245 NW2d 13 (1976). In those situations, courts have generally held that the sellers must challenge the illegal taxes directly, and the consumers have no standing to pursue tax relief unless the tax burden potentially interferes with a federal right. See *Nat'l Bank of Detroit v Dep't of Revenue*, 334 Mich 132, 141-142; 54 NW2d 278 (1952), and the cases cited therein. In short, when the tax obligation falls primarily on the retailer, "retailers are considered to be the taxpayers." *Sims*, 397 Mich at 474. In this case, Comcast, as the retailer, paid the charge and merely passed the charge's burden onto plaintiff's shoulders.

> In *Taxpayers Allied for Constitutional Taxation* [*TACT*] *v Wayne Co*, 450 Mich 119, 124-125 n 7; 537 NW2d 596 (1995), our Supreme Court held that individuals who do not pay a tax directly may still challenge whether the tax violates the Headlee Amendment. Const 1963, art 9, § 32. However, the Court noted that the one-year statute of limitations, MCL 600.308a(3), would apply to such a plaintiff and would begin running at the time the offending tax resolution was enacted. *TACT*, 450 Mich at 125 n 7. The Court reasoned that "the only wrong that could give rise to a cause of action is the enactment of the resolution—an action that is not continuing in nature." *Id*. at 124-125 n 7.
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> Like the situation described in *TACT*, the starting point for the limitations period depends on when the defendant did the alleged wrong. Plaintiff points to the moment she received her bill as the moment of initiation, but the inclusion of the charge on the bill was Comcast's action, not defendant's. Similarly, defendant's collection from Comcast would not initiate the period, because the collection would be a wrong against Comcast, not plaintiff. Following the example in *TACT*, plaintiff's Headlee claim accrued when defendant first imposed the "franchise fee" on Comcast—July 10, 2001. Because plaintiff failed to bring her Headlee claim within one year from that date, the trial court correctly granted defendant's motion for summary disposition. [*Morgan*, 267 Mich App at 514-516.]

The crux of *Morgan*'s holding relies on the fact that Comcast agreed to pay the franchise fee to the defendant as a condition of the defendant granting Comcast a franchise. The plaintiff did not owe the franchise fee to the defendant; the plaintiff paid the franchise fee to Comcast pursuant to the plaintiff's contractual obligation to Comcast, and if the plaintiff did not pay the charge, the defendant had no recourse against the plaintiff. While Comcast passed the franchise fee onto consumers, *Morgan* held that this did not make the plaintiff a taxpayer, similar to how a consumer is not a taxpayer if the retailer passes the burden of sales tax onto the consumer.

Analogously, here, the LBWL agreed to pay the franchise fee to the City as a condition of the City granting the LBWL a franchise. Plaintiff does not owe the franchise fee to the City; plaintiff's only liability for paying the franchise fee stems from his obligations to the LBWL. If plaintiff does not pay the fee to the LBWL, the City has no recourse against plaintiff. While the LBWL passed the franchise fee onto plaintiff and the class, this did not make them taxpayers. Thus, we conclude that, like in *Morgan*, plaintiff's only means of contesting the franchise fee as an allegedly unlawful tax under the Headlee Amendment was through a suit on behalf of the public as identified in *TACT*, 450 Mich at 124-125 n 7, which accrued when the franchise fee was passed by ordinance. See *Morgan*, 267 Mich App at 515-516. It follows that, because more than one year has passed since that time, plaintiff's Headlee claim is time-barred.

Plaintiff attempts to distinguish *Morgan*, but his arguments are unpersuasive. Plaintiff argues that this case is distinguishable from *Morgan* because "the LBWL is not independently liable to the City for any amount of Franchise Fees; the LBWL merely adds the Franchise Fees to Plaintiff's bill (and the bills of all class members) and gives the City whatever money the LBWL collects . . . ." Here, however, it appears that the LBWL *is* "independently liable" to the City for the franchise fees. Ostensibly, if the LBWL did not pay the franchise fees to the City pursuant to their agreement, the City would have any number of remedies against the LBWL, including not

only bringing a breach-of-contract claim to recover the fees from the LBWL but revoking the LBWL's franchise.

Plaintiff also argues that he "has standing to sue the City because the LBWL was a mere collection agent for the Franchise Fees . . . ." Plaintiff, however, is rather flippant with his characterization of the LBWL as the City's agent. Agency is a legal doctrine, and plaintiff makes no attempt to demonstrate how, as a matter of law, the LBWL was an "agent" of the City. Cursorily reviewing relevant caselaw, it is not apparent that the LBWL was even arguably an agent of the City because it is unclear that the City had any right to control the conduct of the LBWL, or that the LBWL had actual or apparent authority to act on the City's behalf. See *St Clair Intermediate Sch Distt v Intermediate Ed Assn/Michigan Ed Ass'n*, 458 Mich 540, 557-558; 581 NW2d 707 (1998). Rather, the LBWL and the City were two independent parties with contractual obligations to one another.

Accordingly, because we are bound by *Morgan*, we conclude that plaintiff's Headlee claim was time-barred.

C. MCL 141.91

In *TACT*, our Supreme Court stated that it "has long recognized that statutes of limitation may apply by analogy to equitable claims." *TACT*, 450 Mich at 127 n 9. Both parties agree on appeal that plaintiff's claims premised on MCL 141.91 are equitable in nature, and so we accept that as true for purposes of this opinion. Plaintiff's claims premised on MCL 141.91 rely on the same arguments and proofs as plaintiff's Headlee claim; plaintiff did not even present distinct arguments for his Headlee claim and his MCL 141.91-related claims when arguing that he was entitled to summary disposition. For all three claims, plaintiff argued that the franchise fee was a tax because plaintiff and the class bore the "legal incidence" of the fee, and then argued that the *Bolt* criteria should be applied to the fee to determine whether it was a tax or a user fee. According to plaintiff, applying the *Bolt* criteria made clear that the fee was actually a tax, which entitled plaintiff to summary disposition on both his Headlee claim and his MCL 141.91-related claims.

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," *TACT*, 450 Mich at 127 n 9, we conclude that plaintiff's unjust enrichment and assumpsit claims premised on MCL 141.91 are barred by analogy.

Plaintiff asserts that his claims premised on MCL 141.91 "are distinct causes of action from his Headlee Amendment claim," but he never explains a difference between them except by noting that he is seeking "a one-year refund under Headlee and a six-year refund under MCL 141.91." This, however, is what our Supreme Court sought to avoid with its guidance in *TACT*: "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." *TACT*, 450 Mich at 127 n 9 (quotation marks, citation, and alteration omitted).

III. FOOTE ACT

The City also argues that the trial court erred by not dismissing plaintiff's Counts V and VI, which are premised on the Foote Act. The Foote Act provided in relevant part:

> Any person, firm, or corporation authorized by the laws of this state to conduct the business of producing and supplying electricity for purposes of lighting, heating and power, and which shall be engaged or which shall hereafter desire to engage in the business of the transmission of such electricity, shall have the right to construct and maintain lines of poles and wires for use in the transmission and distribution of electricity on, along or across any public streets, alleys and highways and over, under or across any of the waters of this state, and to construct and maintain in any such public streets, alleys or highways all such erections and appliances as shall be necessary to transform, convert and apply such electricity to the purposes of lighting, heating and power, and to distribute and deliver the same to the persons, firms and public or private corporations using the same: Provided, that the same shall not injuriously interfere with other public uses of such streets, alleys or highways, or with the navigation of said waters, and that the designation and location of all lines of poles and wires shall be subject to the regulation, direction and approval of the common council of cities, the village council of villages, and the township board of townships, as the case may be: Provided, that this act shall not apply to the county of Wayne: Provided further, that nothing herein shall deprive cities, villages or townships of the power and control over their streets and highways, which they have by the general laws of this state. [264 PA 1905. See also *Lansing v Mich Power Co*, 183 Mich 400, 404; 150 NW 250 (1914).]

The Foote Act was abrogated by Const 1908, art 8, § 28. But, in *Lansing*, 183 Mich at 410-411, our Supreme Court held that Const 1908, art 8, § 28 could not impair a state franchise that had already vested under the Foote Act before the 1908 Constitution's enactment. The Court explained, in pertinent part:

> The [Foote Act] tendered a franchise to defendant; such franchise was accepted by defendant by way of installing its service equipment in the public streets and providing a service of a public utility; and this tender and acceptance constitute a contract between the state and defendant beyond the power of the Legislature, the Constitution, or of this court to impair by destroying the contract right to remain in the streets. [*Lansing*, 183 Mich at 410-411.]

See also *Traverse City v Consumers Power Co*, 340 Mich 85, 103; 64 NW2d 894 (1954) ("This Court has held that rights acquired under the 1905 act are vested rights . . . .")

Plaintiff's complaint alleged that the LBWL operated in the City prior to 1908, and so the Foote Act prohibited the City from imposing any fees as a condition of allowing the LBWL to provide electric service to the City. The City argues that plaintiff cannot assert such claims because the Foote Act applies only to electric utility providers, and, thus, plaintiff is not a real party in interest. We agree.

"Whether an individual is the real party in interest is a question of law that we review de novo." *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013).

As explained by this Court in *Beatrice Rottenberg Living Trust*:

> [A]lthough the principle of statutory standing overlaps significantly with the real-party-in-interest rule, they are distinct concepts. See *Kent v Northern Cal Regional Office of American Friends Serv Comm*, 497 F2d 1325, 1329 (CA 9, 1974). The principle of statutory standing is jurisdictional; if a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits. *Miller v Allstate Ins Co*, 481 Mich 601, 608-612; 751 NW2d 463 (2008). In contrast, the real-party-in-interest rule is essentially a prudential limitation on a litigant's ability to raise the legal rights of another. See, e.g., *Elk Grove Unified Sch Dist v Newdow*, 542 US 1, 12; 124 S Ct 2301; 159 L Ed 2d 98 (2004); *Zurich Ins Co v Logitrans, Inc*, 297 F3d 528, 532 (CA 6, 2002).
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> "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). The real-party-in-interest rule " 'requir[es] that the claim be prosecuted by the party who by the substantive law in question owns the claim asserted . . . .' " *Rite-Way Refuse Disposal, Inc v VanderPloeg*, 161 Mich App 274, 278; 409 NW2d 804 (1987) (citation omitted). [*Beatrice Rottenberg Living Trust*, 300 Mich App at 355-356.]

"A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013).

The Foote Act plainly applies only to electric utility providers. See 264 PA 1905 ("Any person, firm, or corporation authorized by the laws of this state to conduct the business of producing and supplying electricity . . . shall have the right . . . ."). Thus, the entity here with a potential "vested right" is the LBWL; plaintiff and the class have no rights or interests stemming from the Foote Act. Accordingly, plaintiff and the class cannot assert a cause of action stemming from a violation of the Foote Act because they are not a real party in interest.[3]

IV. CONCLUSION

For the reasons explained, the trial court erred by denying the City's motion for summary disposition as to Counts I, II, III, V, and VI of plaintiff's complaint, and granting summary

[3] We further note that nothing in the Foote Act or subsequent cases interpreting the act prevents electric utility providers from relinquishing their vested rights under the act, or—as is the case here—from agreeing to reserve but not pursue their rights under the act. While this may also go to the merits of plaintiff's claim (i.e., there was no Foote Act violation), it tangentially relates to whether plaintiff is a real party in interest—the LBWL holds any vested rights under the Foote Act, and it is the only entity that can decide whether and how it wishes to enforce those rights.

disposition to plaintiff on Counts I, II, and III of plaintiff's complaint. We therefore reverse the trial court's opinions and orders, and remand for the trial court to enter an order granting the City's motion for summary disposition.

Reversed and remanded. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien
/s/ Allie Greenleaf Maldonado