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STATE OF MICHIGAN
IN THE SUPREME COURT

JAMES HEOS,
individually and as representative
of a class of similarly-situated
persons and entities,

Plaintiff/Appellee,
v.

CITY OF EAST LANSING,
a municipal corporation,

Defendant/Appellant.

Supreme Court Case No. 165763

Court of Appeals No. 361138, 361105
Ingham County Circuit Court Case
No. 20-199-CZ
Hon. Wanda M. Stokes

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PLAINTIFF/APPELLEE'S REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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I. THIS CASE INVOLVES CRITICAL QUESTIONS ABOUT UNLAWFUL TAXATION AND A PARTY'S RIGHT TO ASSERT MULTIPLE THEORIES OF RECOVERY

This case is not a "mundane" statute of limitations dispute. Response, p. 4. The Court of Appeals Opinion says a municipality can deputize a person or entity to collect and remit to the municipality a tax the municipality could not collect directly from its citizens, as long as the tax goes unchallenged for a year after it is enacted. If it does, the municipality can continue forever. The Court of Appeals nomially based its holding on the statute of limitations, but it really held that Plaintiff lacked standing because he paid the Franchise Fees to the City through an intermediary, the LBWL. This ruling, if left undisturbed, could authorize an end-run around the Headlee Amendment and MCL 141.91's vital tax limitations.

The Court of Appeals also held that if a plaintiff brings a Headlee claim and asserts a **separate and independent** tax-based claim based upon a violation of a **separate state statute**, both claims are subject to Headlee's short one-year statute of limitations. This is a perversion of this Court's suggestion in a footnote to *Taxpayers Allied for Constitutional Taxation v. Wayne County*, 450 Mich. 119, 127 n.9; 537 N.W.2d 596 (1995) ("*TACT*") that the Headlee statute of limitations might apply to "analogous" equitable claims. Plaintiff's claims based on MCL 141.91 are not "analogous" to his Headlee claims. This Court should specifically define the term "analogous" in this context and instruct the lower courts how to apply statutes of limitations in cases with multiple claims, based upon multiple theories of liability, grounded in multiple legal authorities.

II. THIS COURT SHOULD GRANT LEAVE TO DEFINE WHAT CLAIMS ARE "ANALOGOUS" TO HEADLEE CLAIMS AND THUS POTENTIALLY SUBJECT TO THE ONE-YEAR STATUTE OF LIMITATIONS GOVERNING HEADLEE CLAIMS

Below is Footnote 9 from *TACT*, which the Court of Appeals relied upon to hold that Plaintiff's MCL 141.91 claims were time-barred:

> This is not to say that the limitation period will never bar actions for injunctive relief under any circumstances. To the contrary, this Court has long recognized that statutes of limitation may apply by analogy to equitable claims. *See, e.g., Smith v Davidson*, 40 Mich. 632, 633 (1879); *Lothian v Detroit*, 414 Mich. 160, 168-170; 324 N.W.2d 9 (1982). If legal limitations

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> 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." *Id.* at 169. To illustrate, § 308a(3) might apply by analogy where a plaintiff seeks to enjoin collection of a long-overdue tax bill on the basis that the tax was constitutionally invalid. [*TACT*, 450 Mich. at 127 n.9.]

Many opinions in addition to the Court of Appeals' below and *Morgan v. City of Grand Rapids*, 267 Mich. App. 513; 705 N.W.2d 387 (2005) have cited *TACT*. *See, e.g.*, *Tenneco Inc. v. Amerisure Mut. Ins. Co.*, 281 Mich. App. 429, 455-56, 761 N.W.2d 846, 863 (2008) ("a careful reading of *Taxpayers* leads to the conclusion that when the statute of limitations would bar granting relief on the underlying substantive claim, it also bars the same claim when stated as one seeking declaratory relief.") (citation omitted); *Terlecki v. Stewart*, 278 Mich. App. 644, 662, 754 N.W.2d 899, 911 (2008) ("We conclude that the trial court correctly applied the 15-year limitations period of MCL 600.5801(4) to plaintiffs' equitable claim seeking to preclude defendants from obtaining a prescriptive flowage easement that would flood plaintiffs' property."); *Mary T. Mashni Recovable Living Tr. v. Estate of Boulos Mashni*, No. 358017, 2023 Mich. App. LEXIS 627, *20-21 (Jan. 26, 2023) (Exhibit 1) (applying *TACT* to hold that the plaintiff's unjust enrichment claims were subject to the six-year breach of contract limitations period); *Underwood v. Albery*, No. 292151, 2010 Mich. App. LEXIS 2339, *6-7 (Dec. 7, 2010) (Exhibit 2) (applying *TACT* to apply contract limitations period to unjust enrichment claim); *Romeo Inv. v. Mich. Consol. Gas Co.*, No. 260320, 2007 Mich. App. LEXIS 1190, *26 (May 1, 2007) (Exhibit 3) (applying *TACT* to apply contract limitations period to unjust enrichment claim).

But what does Footnote 9 really mean? The unpublished cases hold that unjust enrichment claims are analogous to breach of contract claims, which seems reasonable. They are alternate, mutually exclusive[1] theories of recovery, one requiring an express contract and the other implying a contract. But which claims, if any, are "analogous" to Headlee claims?

[1] "[A] a contract will be implied only if there is no express contract covering the same subject matter." *Bellevue Ventures, Inc. v. Morang-Kelly Inv.*, 302 Mich. App. 59, 64, 836 N.W.2d 898 (2013) (citation omitted).

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This Court had a recent opportunity to identify "analogous" suits in *Gottesman v. City of Harper Woods*, 508 Mich. 942, 942-43; 964 N.W.2d 365 (2021):

> In addition, the Court of Appeals erred by holding that plaintiff's equitable claims could afford additional relief because "plaintiff would be entitled to recover for several more years under [his equitable claims] than under [the Headlee Amendment.]" Gottesman, 2019 Mich. App. LEXIS 7657 at *29. As this Court has recognized, "statutes of limitations may apply by analogy to equitable claims." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 127; 537 N.W.2d 596 n 9 (1995) (*TACT*). Thus, the fact that the six-year limitations period for plaintiff's equitable claims, MCL 600.5813, exceeds the one-year limitations period for the Headlee Amendment claim, MCL 600.308a(3), does not necessarily mean that the equitable claims may proceed.
>
> In light of these errors, we REMAND to the Court of Appeals to consider: (1) whether the appellant's impermeable-acreage charges were "service charges" under 1970 CL 280.539, so that they were authorized prior to the ratification of the Headlee Amendment, see Const 1963, art 9, § 31, *see American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 357; 604 N.W.2d 330 (2000); and (2) if not, whether plaintiff may seek equitable remedies for the alleged violation of MCL 141.91 beyond the one-year limitations period governing the Headlee Amendment claim, *see TACT*, 450 Mich at 127 n 9.

This Court's delegation of the "analogous claim" question was unfortunate for the parties here, because *Gottesman* settled before the Court of Appeals ruled. This Court should grant leave to appeal to correct the Court of Appeals' erroneous holding in this case.

TACT concerned whether "a plaintiff could dodge the bar set up by a limitations period simply by resorting to an alternate form of relief provided by equity." *TACT*, 450 Mich. at 127 n.9. The *Tenneco* court correctly held that a plaintiff could not use a declaratory action for future relief to avoid the contract limitations period. *See Tenneco*, 281 Mich. App. at 455-62. So did the *Terlicki* court when it applied a 15-year statute covering claims for possession of land to an action seeking future relief. *Terlicki*, 278 Mich. App. at 661 ("Here, plaintiffs seek to invoke the equitable jurisdiction of the court to prevent the flooding of their property. They seek both to preclude defendants from creating a prescriptive easement of flowage that would authorize the continuation of the flooding and to enforce their own flowage easement in the pre-existing rate of water flow over the spillway that defendants control."). *Terlicki*'s analysis is too complex to discuss in full, but the Court should review the entire

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opinion.

This Court should establish that "analogous" equitable claims under *TACT* are **those that would obtain relief coextensive with a time-barred legal claim.** No other interpretation of "analogous" makes sense, and any other would deprive plaintiffs of equitable rights that exist separately from and in addition to their legal rights. Under this proposed standard, Plaintiff's MCL 141.91 claim would clearly survive. MCL 141.91 is not coextensive with the Headlee Amendment because (1) MCL 141.91 applies only to cities and villages, while Headlee applies to all municipalities; (2) MCL 141.91 applies to taxes that were not imposed prior to January 1, 1964, while Headlee applies to taxes that were not imposed prior to December 23, 1978; and (3) MCL 141.91 has a six-year limitations period under MCL 600.5813.

Moreover, MCL 141.91 existed when the legislature enacted the Headlee statute of limitations. If the legislature wanted that limitations period to apply to MCL 141.91, it could have said so in MCL 600.5803, or it could have amended or repealed MCL 141.91 at the same time. It didn't, which shows legislative intent to allow MCL 141.91 to continue to stand on its own and confer rights on the people separate from those conferred by Headlee.

III. THIS CASE MAY HAVE FAR-REACHING IMPLICATIONS FOR MUNICIPALITIES' ABILITY TO AVOID THE HEADLEE AMENDMENT AND MCL 141.91 BY APPOINTING A "TAX FARMER" TO COLLECT UNLAWFUL TAXES

Again, this is not a "mundane" statute of limitations case. The Court of Appeals' opinion is not published, but municipalities will nevertheless use it as a shield against claims under the Headlee Amendment and MCL 141.91.

Imagine the City of East Lansing has two bookstores, each with an **exclusive right** to sell books within a certain territory. (For now, forget antitrust law and any other reason this wouldn't work.) The City tells the booksellers that in exchange for the continued right to use the City's rights of way to convey books to their stores, they can collect and remit a 5% "franchise fee" from their customers, on top of their regular prices, **to the extent that the booksellers can actually collect the**

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"franchise fee." The booksellers will have **no personal liability** for any amount of money beyond what they can actually collect, and they get to keep 2% of whatever they collect.

One bookseller – "Consumers Books" – refuses outright, and nothing happens; the City does not bar Consumers Books from using its rights of way. The other bookseller – "Lansing Board of Books" – agrees and begins collecting and remitting the 5% "franchise fee." Henceforth, it will not let customers take merchandise from his store without paying the 5% franchise fee. LBB will treat them like customers who do not pay the book's cover price. LBB thus enforces payment of the fee in the same manner as it enforces the underlying price of the books, and has no personal liability for any amounts it does not actually collect.

Under the Court of Appeals' opinion in this case, the above arrangement would not be a tax under the Headlee Amendment or MCL 141.91, because the City would not directly collect the "franchise fee." By deputizing the bookseller, the city would have washed its hands of any unlawful tax stain. Such a regime would be obviously unfair. It would be a scheme to avoid Headlee and MCL 141.91 by using a fig leaf to disguise a tax imposed by the city. Why? **Because the bookstore would only be liable to the City for franchise fees it actually collected.**

The City forgets this when it says this case is identical to *Morgan*. In *Morgan*, Comcast "paid the charge [to the city] and merely passed the charge's burden onto plaintiff's shoulders." Response, p. 15 (quoting *Morgan*, 267 Mich. App. at 515). In *Morgan*, the burden of the charge did rest, however briefly, on Comcast's shoulders. **Here, the burden never rests on the LBWL's shoulders, because the LBWL has no duty to pay the City any Franchise Fees the LBWL does not collect.** The City's agreement with the LBWL is a pure "pay if paid" relationship. This is why the City's statement of facts ignores that the City assiduously avoided any liability by the LBWL for amounts beyond what it **actually collected** from Plaintiff and the class.

The LBWL clearly was the City's "collection agent," but this case does not turn on whether the LBWL is legally the City's "agent," with the accompanying right of the City to control the LBWL's

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conduct or any grant of apparent authority. The issue here is whether the LBWL had to pay the City a certain amount of money – as Comcast did in *Morgan* – after which the LBWL was turned loose to collect that money from Plaintiff and the class as best it could. **That is not what happened here.** The LBWL did not have to pay the City any Franchise Fees beyond what it **actually collected.** A more accurate version of the City's chart on p. 16 of its Brief would look like this, with the corrected portions underlined and in bold:

Morgan v City of Grand Rapids	***Heos v City of East Lansing***
Comcast paid the city a "franchise fee" consisting of five percent of its gross revenues. *Morgan,* 267 Mich App at 514.	BWL **collected and remitted to** the city a "franchise fee" consisting of five percent of its gross revenues.
Comcast had to pay the city the franchise fee up front, regardless of whether it collected any money from the end users.	**The LBWL only had to collect and remit to the City any Franchise Fees it actually collected, less the LBWL's portion**
The fee was set by a franchise agreement between Comcast and the city. *Id.* at 515.	The fee was set by a franchise ordinance agreed to by BWL and the city.
The city had no recourse against plaintiff for any unpaid portion of her Comcast bill. *Id.* at 515.	The city has no recourse against plaintiff for any unpaid portion of his BWL bill.
Plaintiff failed to file her Headlee claim within one year after the city first imposed the franchise fee on Comcast, so her claim was time-barred. *Id.* at 516.	Plaintiff failed to file his Headlee claim within one year after the city first imposed the franchise fee on BWL, so his claim was time barred.

Even if *Morgan* was correctly decided at the time, this Court abrogated *Morgan*'s "one and done" accrual rule in *Township of Fraser v. Haney*, 509 Mich. 18; 983 N.W.2d 309 (2022), which addressed the scope of the "continuing wrong" doctrine.[2] In *Fraser*, this Court held that a plaintiff's failure to timely challenge a violation of the law based upon the time it was first committed did not preclude that plaintiff from challenging subsequent violations of the law committed within the statutory period:

[2] Plaintiff preserved this argument in his Motion for Leave to File Supplemental Brief on Appeal, Exhibit 4 hereto.

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> Plaintiff has alleged a harm that has occurred every day on which defendants maintain hogs on their property. Plaintiff's action is timely under MCL 600.5813 because its complaint was initiated within six years of defendants' most recent offenses. The Court of Appeals erred by analyzing this case as a "continuing wrongs" case because plaintiff does not seek to reach back and remedy or impose monetary fines for violations that occurred outside the period of limitations. Rather, plaintiff's injunctive action seeks to remedy only present violations, which occurred within the six-year period of limitations. [*Fraser*, 509 Mich. at 21].

This Court noted that the proper accrual rule under such circumstances can be summarized as follows:

> a plaintiff's failure to timely sue on the first violation in a series does not grant a defendant immunity to keep committing wrongful acts of the same nature. **A plaintiff is free to bring a new action each time a defendant commits a new violation**. [*Id.* at 28-29 (emphasis added)]

The LBWL collects the Franchise Fees through its ongoing monthly bills to City inhabitants. Each time the City imposed and the LBWL collected an unlawful Franchise Fee, the City committed a "new violation" of Headlee. *Fraser* dictates that where a defendant continues to periodically impose and collect an allegedly unlawful fee, a plaintiff is able to timely sue to recover all the fees it incurred in the statutory limitations period. Thus, to the extent that *Morgan* held that a plaintiff was forever barred from challenging an illegal tax if he or she did not sue within the statutory period following the initial imposition of the tax, the accrual rule applied by *Morgan* was abrogated by *Fraser*.

IV. PLAINTIFF'S APPLICATION DOES NOT SEEK LEAVE TO APPEAL HIS SUBSTANTIVE FOOTE ACT CLAIMS

The City argues that "Plaintiff is precluded from enforcing the Foote Act." Response, p. 24. But in his Application, pp. 24-26, Plaintiff uses the Foote Act only to demonstrate that the City cannot impose the Franchise Fees directly on the LBWL. This is different from Plaintiff's substantive claims in his Complaint for "Violation of the Foote Act."

In his Application, Plaintiff uses the Foote Act to show why the City could not have done what Grand Rapids did in *Morgan*. Grand Rapids imposed its franchise fee directly on Comcast. *See Morgan*, 267 Mich. App. at 514-15. That was possible because the Cable Communications Policy Act, 47 USC § 521, authorized the direct imposition of a cable franchise fee on the cable service provider. *See*

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discussion in Application, pp. 23-24.

Here, Plaintiff uses the Foote Act to show that not only do the undisputed facts confirm that the legal incidence of the Franchise Fees does not fall on the LBWL, but also that **the Foote Act precludes the City from imposing the legal incidence of the Franchise Fees on the LBWL.** *See* Application, pp. 24-26.

The City's arguments are inapposite, because the City continues to focus on whether Plaintiff is a "real party in interest" who can enforce a substantive claim under the Foote Act. Response, p. 24. The City never addresses Plaintiff's actual argument, which is that the Foote Act provides **one more reason** the legal incidence of the Franchise Fees cannot fall on the LBWL. The City has not provided any reason why this Court should not grant Plaintiff's Application and consider his Foote Act argument along with his other arguments.

V. CONCLUSION

The City gives no reason why the issues Plaintiff raised in his Application do not deserve this Court's attention.[3] This is not a "mundane" statute of limitations case; it involves critical questions about a plaintiff's right to choose his theories of recovery and the interplay between legal claims and "analogous" equitable claims.

What is an "analogous" equitable claim? Is it just any equitable claim that has the same general basis as a legal claim? Moreover, how far does *Morgan*'s pass-through analysis extend? Does it matter whether an unlawful exaction is imposed directly on an intermediary, versus the intermediary having the duty to "collect and remit" the exaction, with no independent liability for any amount of money? If that question matters, how are future courts supposed to square the Court of Appeals' holding in this

[3] Plaintiff's counsel inadvertently and mistakenly claimed that "[t]he Court of Appeals agreed with the City that assumpsit is no longer a viable cause of action in Michigan." Application, p. 33. The Court of Appeals, however, did not reach any such holding. Plaintiff therefore withdraws the argument in Section IV of the Argument section of its Application, pp. 33-35, which renders moot the City's argument that "Michigan law no longer recognizes assumpsit as a cause of action" set forth on pp. 22-24 of its Brief. Plaintiff's counsel regrets the error.

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case with its holding in *Morgan*?

This Court should grant leave to appeal to address these important issues and others set forth above and in Plaintiff's Application.

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Dated: August 3, 2023

STATEMENT OF WORD COUNT

Pursuant to MCR 7.212(B)(3), Plaintiff's counsel states that Plaintiff's reply brief on appeal contains 3,197 "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 August 3, 2023, I electronically served the foregoing pleadings on all counsel of record using the court's electronic filing system.

/s/ Kim Plets
Kim Plets

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EXHIBIT - 1

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Mary T. Mashni Recovable Living Trust v. Estate of Boulos Mashni

Court of Appeals of Michigan

January 26, 2023, Decided

No. 358017

Reporter
2023 Mich. App. LEXIS 627 *; 2023 WL 436300

MARY T. MASHNI REVOCABLE LIVING TRUST, by MARY MASHNI, Trustee, Plaintiff-Appellee/Cross-Appellant, v ESTATE OF BOULOS N. MASHNI, by ROUBA HANNA AL-ARAJ, Personal Representative, Defendant-Appellant/Cross-Appellee.

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

Prior History: **[*1]** Wayne Circuit Court. LC No. 20-015375-CB.

Core Terms

statute of frauds, statute of limitations, loans, trial court, repayment, repay, plaintiff's claim, installments, summary disposition, gas station, accrued, asserting, doctrine of equitable estoppel, home equity loan, limitations period, promise, bank account, equitable estoppel, monthly payment, argues, terms, allegations, untimely, payable on demand, alleged loan, equitable, demanded, defendant argues, six years, monthly

Counsel: For MARY MASHNI TRUSTEE, Plaintiff - Appellee - Cross-Appellant: ANDREW D CONCANNON.

For AL-ARAJ ROUBA HANNA PERSONAL REPRESENTATIVE, Defendant - Appellant - Cross-Appellee: H WILLIAM BURDETT, JR.

Judges: Before: YATES, P.J., and JANSEN and SERVITTO, JJ.

Opinion

PER CURIAM.

Plaintiff Mary Mashni, as trustee of the Mary T. Mashni Revocable Living Trust, brought this action for breach of contract and unjust enrichment against her son, defendant Boulos N. Mashni, seeking recovery for a series of loans that she and her husband allegedly made to Boulos between 2003 and 2013 that were not repaid. In lieu of filing an answer, Boulos moved for summary disposition under *MCR 2.116(C)(7)*, alleging that plaintiff's claims were barred by the statute of limitations and the statute of frauds. The trial court denied Boulos's motion. After Boulos filed an interlocutory application for leave to appeal the trial court's order, he died while the application was still pending. This Court thereafter granted the application and substituted Rouba Hanna Al-Araj, the personal representative of Boulos's estate, as defendant-appellant.[1] *Mary T Mashni Revocable Living Trust v Estate of Boulos N Mashni*, unpublished **[*2]** order of the Court of Appeals, entered November 29, 2021 (Docket No. 358017). For the reasons stated in this opinion, we affirm in part, reverse in part, and remand for further proceedings.

I. FACTS AND PROCEEDINGS

This action involves a series of alleged loans that Mary Mashni and Naim Mashni made to their son, Boulos Mashni, all pursuant to oral agreements.[2] First, plaintiff alleged that in 2003, she and Naim transferred to Boulos the assets of two corporate entities—one that owned and operated a gas station and one that owned the gas station land. According to plaintiff, the business and real estate had a combined value of $2,700,000, and Boulos agreed to repay them $1,800,000 in monthly

[1] For clarity, this opinion will refer to the original defendant by his first name, Boulos.

[2] Plaintiff is trustee of the Mary T. Mashni Revocable Living Trust. Although the alleged loans were made by both plaintiff and Naim, plaintiff alleges that they assigned their interests in the loans to her trust.

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installments of $10,000 each, beginning when he had the financial wherewithal to repay the debt. We will refer to this alleged loan as the "gas station loan." Second, plaintiff alleged that in 2006, she and Naim obtained a 15-year, $200,000 home equity loan and, in turn, gave the loan proceeds to Boulos pursuant to an oral loan agreement whereby he agreed to repay the loan by making plaintiff and Naim's monthly mortgage payments until the debt was satisfied. We will refer to this second loan as the **[*3]** "home equity loan." Third, plaintiff alleged that in 2012, she loaned Boulos $33,000, which he promised to repay, but never did. We will refer to this third loan as the "$33,000 loan." Fourth, plaintiff alleged that Boulos, who held a power of attorney for plaintiff and Naim, borrowed $254,000 from plaintiff's and Naim's bank accounts between 2006 and 2007, which he promised to repay, but never did. We will refer to this fourth series of loans as the "bank account loans." Plaintiff alleged that Boulos made two monthly payments toward the home equity loan shortly after that loan agreement was made, but he did not make any additional payments, and he did not pay back any of the other loans. Plaintiff alleged that she demanded repayment of all of the loans in January 2017, but Boulos did not pay back any of the loans.

On November 24, 2020, plaintiff brought this action against Boulos for repayment of the four loans. She asserted claims for breach of contract and unjust enrichment. She also asserted a claim for equitable estoppel, alleging that Boulos's pleas of financial hardship over the years and reassurances that he would repay all the loans estopped him from asserting defenses based **[*4]** on the statute of limitations and the statute of frauds. In lieu of filing an answer, Boulos moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's claims were barred by the statute of limitations and the statute of frauds. Boulos also requested sanctions under MCL 600.2591, alleging that plaintiff's claims were frivolous. Plaintiff denied that her claims were untimely or barred by the statute of frauds, but further argued that to the extent that the statute of limitations or the statute of frauds applied, Boulos should be equitably estopped from asserting those defenses. The trial court ruled that Boulos failed to establish that any of the claims were barred by the statute of limitations or the statute of frauds. It further held that, to the extent that the statute of limitations or the statute of frauds might later be found to apply, development of a factual record was necessary to resolve plaintiff's claim that Boulos should be equitably estopped from asserting those defenses. Accordingly, the trial court denied Boulos's motion for summary disposition. This Court granted defendant's application for leave to appeal the trial court's order.

II. STANDARD OF REVIEW

A trial court's decision **[*5]** on a motion for summary disposition is reviewed de novo. West v Gen Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003). Boulos moved for summary disposition under MCR 2.116(C)(7), which permits a court to grant summary disposition when a claim is barred by the statute of limitations or the statute of frauds. A motion under Subrule (C)(7) may be supported by affidavits, pleadings, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Unlike a motion brought under Subrule (C)(10), however, "a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material." Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999). 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 **[*6]** inappropriate. [Dextrom v Wexford Co, 287 Mich App 406, 428-429; 789 NW2d 211 (2010) (footnotes omitted).]

In this case, Boulos did not submit any affidavit or other documentary evidence in support of his motion. Plaintiff, however, submitted her own affidavit, which the trial court was permitted to consider in determining whether any questions of fact existed that could provide a basis for recovery.

III. STATUTE OF LIMITATIONS

Defendant argues that all of plaintiff's claims are barred by the statute of limitations. Defendant does not dispute that plaintiff's claims are subject to the six-year limitations period that applies to actions for breach of contract. MCL 600.5807(9). Defendant argues, however, that all of plaintiff's claims accrued more than six years before plaintiff filed this action on November 24, 2020.

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"Generally, the burden is on the defendant who relies on a statute of limitations defense to prove facts that bring the case within the statute." Kincaid v Cardwell, 300 Mich App 513, 522; 834 NW2d 122 (2013). "Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues." MCL 600.5827. Unless otherwise provided by statute, "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damages results." *Id.* "[T]his Court has generally held that **[*7]** a cause of action for breach of contract accrues when the breach occurs, i.e., when the promisor fails to perform under the contract." Blazer Foods, Inc v Restaurant Props, Inc, 259 Mich App 241, 245-246; 673 NW2d 805 (2003).

As the trial court observed, resolution of the statute-of-limitations issue depends on when plaintiff's claims accrued. In the context of this case, accrual depended on when Boulos first became obligated to repay the loans and failed to do so. According to plaintiff's complaint, and plaintiff's affidavit, there was no specified repayment date for at least the gas station loan and the $33,000 loan. Plaintiff alleged in her complaint that Boulos was required to begin repaying the gas station loan "at a future date after [Boulos] had the financial wherewithal to pay the monthly payments of $10,000," and she averred in her affidavit that Boulos "promised that he would pay $10,000 per month for 15 years after he developed the business." Plaintiff did not allege a repayment date for the $33,000 loan in her complaint, but she averred in her affidavit that this loan was payable on demand, and that she demanded payment in January 2017. Plaintiff alleged in both her complaint and her affidavit that the $254,000 bank account loans were payable on demand, and **[*8]** that she demanded payment in January 2017. Regarding the home equity loan for $200,000, plaintiff alleged in her complaint both that Boulos agreed to "make[] the monthly refinancing payments until the loan was paid" and "promis[ed] to make the monthly payments over a period of fifteen years equal to the mortgage payment as increased by the loan." In her affidavit, however, she also averred that this loan was payable on demand, and that she demanded repayment in January 2017. In his motion for summary disposition, Boulos generally emphasized that each of the alleged loan agreements were made much more than six years before plaintiff filed her complaint and generally suggested that any breach would have occurred almost immediately. He acknowledged plaintiff's demand in January 2017, but argued that this demand could not revive a contract claim that had accrued more than six years earlier. Significantly, Boulos did not submit any affidavit or other evidence to factually support any specific date for when any repayment obligation may have arisen and was not satisfied.

Considering the nature of the alleged loan agreements and the submitted evidence, it is necessary to determine (1) when **[*9]** does a claim accrue for payment of an on-demand loan; (2) when does a claim accrue for payment of a loan payable when a debtor is financially able to repay the loan; and (3) when does a claim accrue for payment of a loan that is repayable in installments. Further, because plaintiff asserted equitable estoppel in her complaint, it is also necessary to consider whether the doctrine of equitable estoppel can save any claim that otherwise is untimely.

It is generally accepted that an oral loan with no terms expressing a time for repayment is due upon demand, and that a claim for a loan payable on demand accrues either when a demand is made, or a reasonable amount of time has elapsed without a demand. See Jackson v Estate of Green, 484 Mich 209, 215, 771 N.W.2d 675 (YOUNG, J., and CORRIGAN J., concurring), 233 (CAVANAGH, J., and M. KELLY, J., concurring); 771 N.W.2d 675, 484 Mich. 209 (2009). Further, we agree with Justice Young's statement in Jackson, that "[d]etermining what constitutes a reasonable amount of time to request repayment of a loan is necessarily a factual question properly decided by the jury." Id. at 217.

Michigan law is clear that, with respect to an oral contract that requires the debtor to repay a loan when the debtor is able to pay, the claim accrues when the debtor acquires the **[*10]** ability to repay the loan. In Dewey v Tabor, 226 Mich App 189, 190; 572 NW2d 715 (1997), the plaintiff alleged that he orally agreed to lend $8,000 to the defendants to help them start a business. The defendants agreed to repay the loan, with interest, when "they made some money" and "were able to pay it." *Id.* (quotation marks omitted). The defendants assured the plaintiff several times in the following four years that they would soon be able to repay him, but payment never came. Id. at 191-192. The plaintiff filed suit for breach of contract and unjust enrichment seven years after he made the loan. Id. at 192. This Court stated that it was required to initially determine "when the period of limitation begins to run against a contract such as the one in the present case involving a promise to pay 'when able.'" Id. at 193. This Court recognized that, under the majority rule, "the promise to pay when able is a conditional promise, so that a cause of action to enforce the promise accrues, and the relevant period

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of limitations begins to run, when the promisor's ability to pay arises." *Id. at 194*. Under the minority rule, "the promise to pay when able or when convenient is considered to be too indefinite to constitute a true conditional promise, and, therefore, it is regarded as an absolute **[*11]** promise to pay within a reasonable time." *Id.* "Thus, the cause of action accrues, and the period of limitation begins to run, within a reasonable time after the promise has been made without reference to the actual ability to pay." *Id.* In *Dewey*, this Court adopted the majority rule, concluding that it was "better reasoned and more in accord with the intent of the parties in these types of situations, which commonly involve loans or transactions among friends and relatives." *Id. at 195*. This Court concluded that the trial court prematurely granted summary disposition on grounds of untimeliness because the record evidence did not yet establish when the defendants had the ability to repay the loan, which was when the claim accrued. *Id. at 195-196*.

On the basis of these authorities, we conclude that with respect to any loans that were payable on demand, plaintiff's claims are not untimely if they were brought within the six-year period after she initially demanded payment, provided that any delay in making the demand was not unreasonable. With respect to any loans that were payable when Boulos became financially able to repay, because any claim for repayment would not have accrued until Boulos had the financial ability **[*12]** to repay the loans, plaintiff's claims would not be untimely if she can establish that she filed this action within six years after Boulos became financially able to repay the loans. In the context of summary disposition, the trial court was required to review the pleadings and any supporting evidence submitted by the parties in a light most favorable to plaintiff, the nonmoving party, to determine whether undisputed facts demonstrated that plaintiff's claims were barred by the statute of limitations. *Kincaid, 300 Mich App at 522-523*. Notably, Boulos did not submit any documentary evidence in support of his motion. In particular, he did not submit any evidence indicating when plaintiff demanded repayment of any loans, or indicating whether and when he had the financial ability to repay any of the loans alleged in plaintiff's complaint. Plaintiff, however, submitted evidence in the form of her own affidavit that described the terms and circumstances of the various loans, and a copy of a written demand for repayment of the various loans that she claimed to have given to Boulos in January 2017. Thus, the trial court was required to review the pleadings and the evidence submitted by plaintiff, and it could properly grant **[*13]** summary disposition only if there was no genuine issue of fact that plaintiff's claims were time-barred as a matter of law.

Regarding the gas station loan, plaintiff's complaint alleged that Boulos was required to begin repaying this loan "at a future date after [Boulos] had the financial wherewithal to pay the monthly payments of $10,000," and plaintiff averred in her affidavit that Boulos "promised that he would pay $10,000 per month for 15 years after he developed the business." Preliminarily, plaintiff's complaint and affidavit seem inconsistent in identifying the event that would have triggered Boulos's obligation to begin repaying the gas station loan. The complaint indicates that the repayment obligation would have been triggered when Boulos acquired the financial wherewithal to pay monthly payments of $10,000, whereas plaintiff's affidavit indicates that this obligation would have arisen after Boulos "developed the business." Despite this uncertainty over the event that triggered Boulos's obligation to begin repaying the gas station loan, Boulos did not present any evidence showing if or when either contingency occurred. That is, he did not submit an affidavit or other documentary **[*14]** evidence indicating when he "developed the business" or otherwise had the financial ability to pay the $10,000 monthly payments. Plaintiff, however, alleged in her complaint that a demand for repayment of the gas station loan was made in January 2017, "when it appeared that [Boulos] then had the wherewithal to make payments." There are no allegations or evidence otherwise indicating when the gas station property was developed. Defendant argues that the gas station loan could not have allowed for deferred payments because the alleged agreement set forth a schedule of payments. According to plaintiff's complaint, however, the scheduled payments were not to begin until the occurrence of a triggering event, and Boulos did not present any evidence that the triggering event occurred more than six years before plaintiff filed her complaint.

In sum, on the basis of the allegations in the pleadings and the submitted evidence, the trial court did not err by holding that Boulos failed to establish that there was no genuine issue of fact that plaintiff's claim for the gas station loan accrued more than six years before plaintiff filed this action on November 24, 2020. Accordingly, the trial court **[*15]** properly denied summary disposition with respect to this claim. *Smith v Estate of Smith, 91 Mich 7, 11-12, 51 N.W. 694 (1892)*.

According to both plaintiff's complaint and her affidavit,

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there was no specified repayment date for the $33,000 loan made in 2012. Therefore, this loan was payable on demand. Plaintiff did expressly allege that the bank account loans, made in 2006-2007, were payable on demand. Plaintiff alleged that she demanded payment of both of these loans in January 2017. Boulos did not present any evidence that plaintiff demanded repayment of either loan at any time before January 2017. Plaintiff filed this action within six years after demanding repayment of these loans in January 2017. Therefore, whether these claims were timely depends on whether plaintiff's delay in waiting until January 2017 to demand repayment was reasonable. Plaintiff waited only five years to demand payment of the $33,000 loan. This period of time cannot be considered unreasonable. Indeed, a period of six years to make a demand has been held to be reasonable as a matter of law because that would be equivalent to the six-year period for bringing an ordinary contract claim. See *id.* Further, Boulos did not present any evidence of any circumstances **[*16]** involving this loan to establish that it was unreasonable to wait until January 2017 to demand repayment of the $33,000 loan. The delay in demanding repayment of the $254,000 bank account loans, approximately 10 to 11 years, presents a closer question. As noted earlier, what constitutes a reasonable time to demand repayment of a loan is generally a question of fact for the jury. Plaintiff alleged in her complaint that she delayed demanding repayment of this loan because of Boulos's repeated assurances that he would repay all sums loaned. Boulos did not present evidence of any circumstances to show that the delay in demanding repayment of the bank account loans should be considered unreasonable. Under these circumstances, the trial court did not err by holding that Boulos failed to demonstrate that there was no genuine issue of fact that plaintiff's claims for the $33,000 loan and the bank account loans were untimely. Accordingly, the trial court properly denied summary disposition with respect to these claims.

Plaintiff's claim involving the home equity loan in 2006 is different because plaintiff's complaint does not allege that this loan was payable on demand. Rather, plaintiff alleged **[*17]** that she and her husband refinanced their home and obtained loan proceeds of $200,000, which they in turn loaned to Boulos in exchange for his promise to "make[] the monthly refinancing payments until the loan was paid," which involved "promising to make the monthly payments over a period of fifteen years equal to the mortgage payment as increased by the loan." Thus, according to plaintiff's complaint, this loan was subject to a set repayment schedule, which began when the loan was made in 2006. The complaint also alleged that Boulos "failed to make any of the monthly payments with the exception of two." According to plaintiff's affidavit, Boulos "made one payment early on and ultimately stopped paying . . . ." On the basis of these allegations, Boulos would have breached the home equity loan shortly after it was made in 2006, when he stopped making the monthly payments as required by the terms of the alleged loan agreement. Thus, any claim for repayment of that loan would have accrued at that time.

Plaintiff argues that if her claim for the home equity loan accrued when Boulos first missed an installment payment, she is nonetheless permitted to sue for missed installment payments that **[*18]** were due within the six-year limitations period. "[W]hen an installment contract does not contain an acceleration clause, claims based upon a breach of the installment contract accrue, and the statute of limitations begins to run, as each separate installment falls due." *Sparta State Bank v Covell, 197 Mich App 584, 587; 495 NW2d 817 (1992)*. Plaintiff alleged in her complaint that Boulos "promis[ed] to make the monthly payments over a period of fifteen years equal to the mortgage payment as increased by the loan[.]" Accepting this allegation as true, Boulos would have been required to repay the home equity loan in monthly installments over a 15-year period, beginning in 2006 and ending in 2021. Plaintiff's complaint was filed on November 24, 2020. Therefore, any claim for installments due before November 24, 2014, would be untimely. However, the statute of limitations does not bar recovery of installment payments due on or after November 24, 2014.[3]

Defendant argues that if the home equity loan originated as an on-demand loan or an able-to-pay loan, then his first payment triggered his obligation to make monthly

[3] Similarly, as explained earlier, the gas station loan also involved an agreement to repay the loan in installments, but that installment agreement was not scheduled to begin until Boulos had the financial ability to pay the $10,000 monthly payments under the terms of that loan, and Boulos failed to demonstrate that plaintiff's claim for repayment of this loan accrued more than six years before plaintiff filed her complaint on November 24, 2020. However, to the extent that the claim is later found to have accrued more than six years before the complaint was filed, plaintiff's claim for any installment payments that were due before November 20, 2014, would be time-barred, but plaintiff would not be foreclosed from seeking recovery for any installments due on or after November 14, 2014.

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payments, and a claim related to that loan would have accrued at that time. This argument conflates the nature of an on-demand or able-to-pay loan **[*19]** with an installment loan. In any event, plaintiff did not allege in her complaint that the home equity loan was an on-demand or an able-to-pay loan, and Boulos did not present any evidence to that effect in support of his motion for summary disposition. Rather, according to the allegations in plaintiff's complaint, the loan was repayable in installments over a 15-year period. Because Boulos did not present any evidence contradicting this allegation, the trial court was required to accept it as true when reviewing Boulos's motion. Thus, under *Sparta State Bank, id.*, each missed installment payment gave rise to a new cause of action, so any installments due on or after November 24, 2014, would not be barred by the statute of limitations.

Defendant also argues that if plaintiff's claim initially accrued outside the limitations period, plaintiff cannot pursue recovery of any installments that came due within the limitations period because this invokes the "continuing-wrongs doctrine," which has been disavowed. The "continuing-wrongs doctrine" holds that when a claim of wrongful conduct "is of a continuing nature, the period of limitations does not begin to run on the occurrence of the first **[*20]** wrongful act; rather, the period of limitations will not begin to run until the continuing wrong is abated." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 283 Mich App 264, 280; 769 NW2d 234 (2009)*. As this Court has recognized, the continuing-wrongs doctrine has been expressly abrogated in civil rights cases and cases involving nuisance and trespass. *Id. at 285-286*. Defendant cites *Blazer Foods, 259 Mich App at 251*, in which this Court declined to apply the continuing-wrongs doctrine to a claim arising from a party's failure to adequately perform contractual obligations. That case, however, did not involve installment payments. It involved a continuing-services contract, in which the defendant allegedly breached its duty to provide training and other services for the plaintiff. *Id. at 242-243*. The continuing-wrongs doctrine is not implicated in the context of an agreement that requires installment payments. In an installment context, failure to make one installment is not a continuing wrong with respect to future installments because the future installments are not yet due. Rather, the failure to pay each installment when due is an independent wrong, giving rise to a new claim as each installment falls due. *Sparta State Bank, 197 Mich App at 587*.

Defendant also argues that plaintiff's unjust-enrichment claims are barred by the statute of limitations. Our Supreme Court **[*21]** "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)*. Where an equitable claim would provide relief that is analogous to the relief available under a similar legal claim, courts generally apply the legal claim's statute of limitations to the equitable claim as well. *Id.* A claim for unjust enrichment is the equitable counterpart of a legal claim for breach of contract. *Keywell & Rosenfeld v Bithell, 254 Mich App 300, 328; 657 NW2d 759 (2002)*. Therefore, the same six-year limitations period applies to plaintiff's unjust-enrichment claims. See *Huhtala v Travelers Ins Co, 401 Mich 118, 125; 257 NW2d 640 (1977)*; see also *MCL 600.5813* ("All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."); *MCL 600.5815* ("The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought. . . .").

To prove unjust enrichment, a plaintiff must show "(1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to plaintiff from defendant's retention of the benefit." *Bellevue Ventures, Inc v Morang—Kelly Investment, Inc, 302 Mich App 59, 64; 836 NW2d 898 (2013)*. An implied contract prevents unjust enrichment but only in the absence of an "express contract covering the same subject matter." *Id.* Plaintiff's complaint alleges that **[*22]** the loan transactions are subject to an express contract. But to the extent that she is unable to establish an express contract and she is able to rely on an unjust-enrichment theory, her claims would be subject to the same six-year limitations period applicable to the breach-of-contract claims. Accordingly, the same statute-of-limitations analyses would apply. Thus, any claim for unjust enrichment related to the home equity loan transaction would be untimely with respect to installment payments that were due before November 14, 2014. But on the present record, Boulos failed to establish that any unjust-enrichment claim related to the remaining loan transactions would be time-barred, so the trial court properly denied Boulos's motion for summary disposition as to those claims.

Plaintiff argues, and alleged in her complaint, that to the extent that any of her claims are found to be untimely filed, the doctrine of equitable estoppel precluded Boulos from asserting the statute of limitations as a defense because Boulos induced plaintiff and Naim to

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believe that he would repay the loans without them having to resort to legal action. Whether plaintiff can rely on the doctrine of equitable **[*23]** estoppel to save any claims that are found to be untimely under the statute of limitations is addressed below in Section V of this opinion.

In sum, we hold that the trial court properly denied Boulos's motion for summary disposition on the basis of the statute of limitations with respect to plaintiff's claims for the gas station loan, the $33,000 loan, and the bank accounts loan. With respect to the home equity loan, any installments that became due on or after November 24, 2014, would not be barred by the statute of limitations, but plaintiff is time-barred from recovering any installments that were due before November 14, 2014, unless she can establish that Boulos should be equitably estopped from asserting the statute of limitations as a defense to recovery of those payments, as further discussed in Section V, *infra*.

IV. STATUTE OF FRAUDS

Defendant argues that the alleged loans were unenforceable under the statute of frauds. In particular, defendant relies on MCL 566.106, MCL 566.108, and MCL 566.132(1)(a).

MCL 566.106 provides:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, **[*24]** surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

MCL 566.108 provides:

> Every contract for the leasing for a longer period than 1 year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing . . . .

Additionally, MCL 566.132(1)(a) provides that an agreement "that, by its terms, is not to be performed within 1 year from the making of the agreement" is void unless it is "in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise . . . ."

First, defendant argues that the alleged gas station loan is unenforceable under MCL 566.106 because it involved a contract in which plaintiff transferred the gas station property to Boulos. Plaintiff argues that MCL 566.106 does not apply to this transaction because the agreement did not involve a sale or transfer of land, but **[*25]** rather a transfer of the corporate entity that owned the land. Defendant does not directly address this distinction, but cites Thorbahn v Walker's Estate, 269 Mich 586, 591; 257 NW 892 (1934), in which the Court stated that "[w]here a promise is entire and is partly within, and partly not within, the statute of frauds, the whole contract is unenforceable unless the requirements of the statute are complied with." In Hague v De Long, 282 Mich 330, 332-333; 276 NW 467 (1937), our Supreme Court held that a contract to transfer stock was "unquestionably" a sale of personalty not subject to the statute of frauds, even though the corporation's business assets included real estate. The Court stated that "[w]hile it may be claimed in a remote sense the stockholders own the business, nevertheless from the legal point of view all they owned and had for sale was the stock in the corporation." Id. at 333. According to plaintiff's complaint, Boulos agreed to pay $1,800,000 in exchange for plaintiff's and Naim's conveyances of "the entirety of their interest in the corporation owning the store and the limited liability company owning the real estate." Boulos did not submit any evidence to contradict this allegation. Because the promise that plaintiff seeks to enforce is a promise to pay funds for the transfer of the ownership **[*26]** interests in the corporate entities that owned the gas station business and the property on which the gas station is located, it is not within MCL 566.106 or MCL 566.108.

Defendant also argues that the alleged loan agreements were unenforceable under MCL 566.132(a) because, by their terms, they could not be performed within one year. "To determine whether an agreement comes within this section, the proper inquiry is whether the contract is capable of performance within one year of the agreement." Dumas v Auto Club Ins Ass'n, 437 Mich 521, 533; 473 NW2d 652 (1991). "The mere fact that the contract may or may not be performed within the year does not bring it within the statute. The rule is that if, by any possibility, it is capable of being completed within a year, it is not within the statute . . . ." *Id.* (quotation marks and citations omitted).

Plaintiff alleged in her complaint that the 2003 gas

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station loan for $1,800,000 was to be paid in "$10,000 monthly installment payments, until paid in full," to begin when Boulos acquired "the financial wherewithal" to pay the monthly installments. This agreement, by its terms, is not a contract "to be performed within 1 year from [its] making." Even if Boulos acquired the ability to repay the loan immediately, by the terms of the alleged agreement, **[*27]** it was to be performed over 180 months, or 15 years. Therefore, this loan is subject to the statute of frauds.

Similarly, with respect to the $200,000 home equity loan, plaintiff alleged that Boulos "promis[ed] to make the monthly payments over a period of fifteen years equal to the mortgage payment as increased by the loan[.]" Thus, according to the terms of this loan, it was required to be performed over a 15-year period. Therefore, it too is subject to the statute of frauds.

Plaintiff argues that the doctrine of partial performance is applicable to remove these agreements from the statute of frauds. However, in *Dumas*, the Court observed that the doctrine of part performance has been limited to transactions involving land, and that its past decisions had "declined to recognize that the part performance doctrine operates to remove a contract from the statute of frauds section concerning contracts not to be performed within a year." *Dumas, id. at 540-541*, citing *Ordon v Johnson, 346 Mich 38, 46; 77 NW2d 377 (1956)*, and *Whipple v Parker, 29 Mich 369 (1874)*.

Plaintiff argues, and likewise alleged in her complaint, that to the extent that any of her claims are found to be within the statute of frauds, the doctrine of equitable estoppel should preclude Boulos from asserting the statute of frauds as a **[*28]** defense. Again, whether plaintiff can rely on the doctrine of equitable estoppel to save any claims that are found to be within the statute of frauds is addressed below in Section V of this opinion.

Defendant has not demonstrated that the $33,000 loan or the bank account loans are within the statute of frauds. Plaintiff expressly alleged that the bank account loans were payable on demand. Plaintiff did not allege a specific repayment date for the $33,000 loan, but a loan with no fixed time of repayment is payable on demand. *Jackson, 484 Mich at 215, 233*. Boulos did not present any evidence to contradict these allegations by plaintiff. A loan payable on demand is not, by its terms, incapable of being performed within one year. Accordingly, Boulos failed to demonstrate that the $33,000 loan and the bank account loans were within the statute of frauds.

In sum, plaintiff's claims for repayment of the gas station loan and the home equity loan are within the statute of frauds because those contracts, by their terms, were not to be performed within one year. Thus, those alleged loans are unenforceable unless plaintiff can establish that Boulos should be equitably estopped from asserting the statute of frauds as a defense **[*29]** to recovery of those payments, as further discussed in Section V, *infra*. However, Boulos failed to demonstrate that enforcement of the $33,000 loan and the bank account loans is precluded by the statute of frauds.

V. EQUITABLE ESTOPPEL

Plaintiff argues, and similarly alleged in her complaint, that to the extent that any of her claims are found to be untimely filed, or within the statute of frauds, the doctrine of equitable estoppel precluded Boulos from asserting the statute of limitations or the statute of frauds as a defense.

The doctrine of equitable estoppel arises when

> "(1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts." [*Twp of Williamstown v Sandalwood Ranch, LLC, 325 Mich App 541, 553; 927 NW2d 262 (2018)*, quoting *Howard Twp Bd of Trustees v Waldo, 168 Mich App 565, 575; 425 NW2d 180 (1988)*.]

"Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact." *Conagra, Inc v Farmers State Bank, 237 Mich App 109, 140-141; 602 NW2d 390 (1999)*.

Under certain circumstances, equitable estoppel may apply to estop a party from asserting the statute of limitations **[*30]** as a defense. In *Doe v Racette, 313 Mich App 105, 108-109; 880 NW2d 332 (2015)*, this Court explained:

> Equitable estoppel is a judicially created "exception to the general rule which provides that statutes of limitation run without interruption[.]" *Lothian v Detroit, 414 Mich 160, 176; 324 NW2d 9 (1982)*. "It is essentially a doctrine of waiver that extends the applicable period for filing a lawsuit by precluding the defendant from raising the statute of limitations

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> as a bar." *Cincinnati Ins Co v Citizens Ins Co, 454 Mich 263, 270; 562 NW2d 648 (1997)*. "[A]bsent intentional or negligent conduct designed to induce a plaintiff to refrain from bringing a timely action," Michigan courts have been "reluctant to recognize an estoppel[.]" *Id.* (emphasis omitted). Such equitable power "has traditionally been reserved for 'unusual circumstances' such as fraud or mutual mistake" because a "court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking[.]" *Devillers v Auto Club Ins Ass'n, 473 Mich 562, 590; 702 NW2d 539 (2005)*. In the past, we have typically applied equitable estoppel in cases in which the defendant induced the plaintiff to believe the limitations period would not be enforced. See *McDonald v Farm Bureau Ins Co, 480 Mich 191, 204-205; 747 NW2d 811 (2008)* (holding that in order to invoke the equitable estoppel doctrine, the plaintiff must generally establish that "(1) defendant's acts or representations induced plaintiff to believe that the limitations period clause would **[*31]** not be enforced, (2) plaintiff justifiably relied on this belief, and (3) she was prejudiced as a result of her reliance on her belief that the clause would not be enforced").

Similarly, in an appropriate case, equitable estoppel may be used to estop a party from asserting the statute of frauds. In *Lakeside Oakland Dev, LC v H & J Beef Co, 249 Mich App 517, 526-527; 644 NW2d 765 (2002)*, this Court stated:

> In *Opdyke Investment Co v Norris Grain Co, 413 Mich 354, 365; 320 NW2d 836 (1982)*, our Supreme Court recognized that legal doctrines, including estoppel and promissory estoppel, "have developed to avoid the arbitrary and unjust results required by an overly mechanistic application of the [statute of frauds]." The statute of frauds exists for the purpose of preventing fraud or the opportunity for fraud, and not as an instrumentality to be used in the aid of fraud or prevention of justice. *Farah v Nickola, 352 Mich 513, 519; 90 NW2d 464 (1958)*. The doctrine of equitable estoppel has been applied to defeat the defense of the statute of frauds where a party has acted to his detriment in reliance on oral agreements or where application of the doctrine of equitable estoppel is necessitated by the facts. *Nygard v Nygard, 156 Mich App. 94, 100; 401 NW2d 323 (1986)*. Estoppel questions should be presented to the jury where factual issues exist regarding whether a party is estopped from raising the statute of frauds defense against a party who reasonably and justifiably **[*32]** relied on an oral agreement. *Jim-Bob, Inc v Mehling, 178 Mich App. 71, 88-89; 443 NW2d 451 (1989)*.

In *Nygard, 156 Mich App at 95-96*, the plaintiff and the defendant married while the plaintiff was pregnant with another man's child. The plaintiff alleged that she originally planned to place the child for adoption in a different state, but she decided to keep the child after the defendant proposed marriage and promised to support the child and treat the child as his own. *Id. at 96*. The defendant argued that the alleged agreement was unenforceable under the statute of frauds because it could not be performed within one year. *Id. at 99*. This Court held that the defendant's promise of support was enforceable under the doctrine of equitable or promissory estoppel. *Id. at 100*.

Preliminarily, there is no merit to defendant's argument that plaintiff cannot rely on equitable estoppel because she cannot satisfy the requirements of *MCL 600.5855*. That statute provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the **[*33]** existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

"This statutory section permits the tolling of a statutory limitations period for two years if the defendant has fraudulently concealed the existence of a claim." *Mays v Snyder, 323 Mich App 1, 39; 916 NW2d 227 (2018)*, aff'd *506 Mich 157, 954 N.W.2d 139 (2020)*. "For the fraudulent-concealment exception to apply, a plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment and prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery." *Id.* (quotation marks and citation omitted). In this case, plaintiff never argued that *MCL 600.5855* applied to toll any statutory limitations period, and she never alleged that she was unaware of any claim or that Boulos did anything to conceal the existence of any claim. The trial court properly ruled that *MCL 600.5855* has no

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application to this case. Further, contrary to what defendant argues, MCL 600.5855 has no bearing on whether plaintiff can invoke the doctrine of equitable estoppel.

The trial court found that the record was factually insufficient to determine whether plaintiff could properly invoke **[*34]** the doctrine of equitable estoppel. Plaintiff alleged in her complaint that she was entitled to invoke the doctrine of equitable estoppel because Boulos represented that he "was going through financial hardship and did not have the funds available to make payments on the debt obligations and would pay when able" and he "continuously up through early 2017 represented that he would pay all sums borrowed," which "induced [plaintiff and Naim] to believe that any applicable limitations period would not be enforced." In her affidavit, plaintiff further explained that, at Boulos's insistence, the gas station loan transaction was not reduced to writing because Boulos claimed that it would hinder his ability to borrow other money to develop his other businesses. Although Boulos argued below that plaintiff should not be permitted to rely on the doctrine of equitable estoppel to avoid the statute of limitations or the statute of frauds, Boulos filed his motion for summary disposition in lieu of filing an answer, before any discovery was conducted, and he did not submit any affidavit or other documentary evidence in support of his motion. Thus, there was no development of a factual record indicating **[*35]** what representations Boulos may have made, when he made them, or how often, or of any other circumstances that could either support or refute the application of equitable estoppel. Plaintiff's allegations in support of applying equitable estoppel were not so clearly deficient that they could not support application of equitable estoppel as a matter of law. Under these circumstances, the trial court did not err by holding that invocation of the doctrine of equitable estoppel remained "an open question . . . as it relates to Defendant's statute of frauds and statute of limitations defenses." Whether plaintiff will be able to successfully assert the doctrine of equitable estoppel to prevent defendant from asserting a defense based on the statute of limitations or the statute of frauds is an issue to be resolved on remand, after development of an appropriate factual record.

VI. SANCTIONS

Defendant argues that plaintiff's claims were frivolous, and therefore, the trial court erred by denying his request for sanctions under MCL 600.2591 and MCR 2.625. We disagree.

Generally, a trial court's finding whether an action is frivolous is reviewed for clear error. Kitchen v Kitchen, 465 Mich 654, 661; 641 NW2d 245 (2002). "A finding is clearly erroneous where, although there **[*36]** is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." Home-Owners Ins Co v Andriacchi, 320 Mich App 52, 75-76; 903 NW2d 197 (2017) (quotation marks and citation omitted).

Preliminarily, under MCR 2.625(A)(1) and MCL 600.2591(1), only a "prevailing party" is entitled to costs and sanctions. Because the trial court denied Boulos's motion for summary disposition, he was not a prevailing party. Further, defendant has not demonstrated that plaintiff's claims were frivolous under MCL 600.2591(3)(a), which provides:

> (3) "Frivolous" means that at least 1 of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.

Defendant does not contend that plaintiff initiated this action with a primary purpose to harass, embarrass, or injure Boulos, and for the reasons set forth in this opinion, defendant has not demonstrated that plaintiff's claims were without factual or legal merit. Accordingly, the trial court did not err by **[*37]** denying Boulos's motion for sanctions.

VII. PLAINTIFF'S ISSUES ON CROSS-APPEAL

Plaintiff raises three issues on cross-appeal, none of which warrant appellate relief.

Plaintiff initially asserts that that she is entitled to have factual issues related to her claims, including whether the statute of limitations or the statute of frauds apply, decided by a jury. However, she does not contend that the trial court improperly decided any disputed factual issues. Although a court is permitted to grant summary disposition under MCR 2.116(C)(7) when undisputed facts establish that a plaintiff's claim is barred by the statute of limitations or the statute of frauds, Kincaid, 300 Mich App at 522, the trial court here determined

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that there were unresolved factual issues that precluded summary disposition in favor of Boulos. When a motion for summary disposition is based on MCR 2.116(C)(7) and a jury trial has been demanded, a party is entitled to "a jury trial as to issues raised by the motion as to which there is a right to trial by jury." MCR 2.116(I)(3). In this case, however, the trial court did not preclude any disputed factual issues from being presented to and decided by a jury. Plaintiff has not demonstrated any error by the trial court or any grounds for appellate **[*38]** relief with respect to this issue.

Second, plaintiff asserts that she is entitled to amend her complaint to the extent that this Court finds that any of her claims are deficient. Whether a party should be permitted to amend a pleading is within the trial court's discretion. Kostadinovski v Harrington, 321 Mich App 736, 742-743; 909 NW2d 907 (2017). Leave to amend shall be freely given when justice so requires. MCR 2.118(A)(2). However, a motion to amend may be denied "for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co, 324 Mich App 182, 208; 920 NW2d 148 (2018) (quotation marks and citation omitted). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." Mich Head & Spine Institute, PC v Mich Assigned Claims Plan, 331 Mich App 262, 277; 951 NW2d 731 (2019) (quotation marks and citation omitted).

Plaintiff merely argues that she should be permitted to amend her complaint to cure any deficiencies found by this Court. However, she never moved to amend her complaint in the trial court and she does not offer any proposed amendment on appeal. Because Boulos's motion for summary disposition was not based on grounds in MCR 2.116(C)(8), (9), or (10), plaintiff is not required to be offered an opportunity to amend her **[*39]** complaint under MCR 2.116(I)(5). It is unclear whether plaintiff will want to amend her complaint in view of this Court's disposition of this appeal. In any event, because amendment is within the trial court's discretion, and because plaintiff does not offer any proposed amendment, if plaintiff still desires to amend her complaint on remand, she should raise the issue in an appropriate motion in the trial court.

Finally, plaintiff argues that documents submitted as Appendix D to defendant's brief on appeal should not be considered because they are not part of the lower court record. "Appeals to the Court of Appeals are heard on the original record." *MCR 7.210(A)*. "In an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced." *MCR 7.210(A)(1)*. A party may not expand the record on appeal. Sherman v Sea Ray Boats, Inc, 251 Mich App 41, 56; 649 NW2d 783 (2002). Plaintiff appears to be correct that the documents in defendant's Appendix D are not part of the lower court record. Therefore, we will not consider them. In any event, we agree that the documents are not relevant to the issues on appeal, and thus do not affect the outcome of this appeal. **[*40]** [4]

VIII. CONCLUSION

We hold that the trial court properly denied Boulos's motion for summary disposition on the basis of the statute of limitations with respect to plaintiff's claims for the gas station loan, the $33,000 loan, and the bank accounts loan. With respect to the home equity loan, any installments that became due on or after November 24, 2014, would not be barred by the statute of limitations, but plaintiff is time-barred from recovering any installments that were due before November 14, 2014, unless she can establish that Boulos is equitably estopped from asserting the statute of limitations as a defense to recovery of those payments. Further, plaintiff's claims for repayment of the gas station loan and the home equity loan are within the statute of frauds, MCL 566.132(1)(a), because those alleged contracts, by their terms, were not to be performed within one year. Thus, those alleged loans are unenforceable unless plaintiff can establish that Boulos is equitably estopped from asserting the statute of frauds as a defense to recovery of those payments. However, Boulos failed to demonstrate that enforcement of the $33,000 loan and the bank account loans is precluded by the statute of frauds. The **[*41]** trial court properly determined that the record was factually

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[4] We note that the documents pertain only to the gas station loan. Admittedly, they raise questions whether plaintiff will be able to factually support her claim that Boulos promised to pay $1,800,000 in exchange for the gas station business. However, Boulos's motion for summary disposition was not brought under MCR 2.116(C)(10) or allege that plaintiff was unable to factually support her claim. Rather, it sought summary disposition under MCR 2.116(C)(7) on the grounds that plaintiff's claims were barred by the applicable statutes of limitation and the statute of frauds. The documents in defendant's Appendix D are not relevant to these issues.

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insufficient to determine whether plaintiff can invoke the doctrine of equitable estoppel. Whether plaintiff will be able to successfully assert the doctrine of equitable estoppel to prevent defendant from asserting a defense based on the statute of limitations or the statute of frauds is an issue to be resolved on remand, after development of an appropriate factual record. The trial court did not err by denying Boulos's motion for sanctions. Plaintiff has not demonstrated that she is entitled to any additional appellate relief with respect to her issues on cross-appeal.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher P. Yates

/s/ Kathleen Jansen

/s/ Deborah A. Servitto

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EXHIBIT - 2

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As of: August 3, 2023 4:56 PM Z

Underwood v. Albery

Court of Appeals of Michigan

December 7, 2010, Decided

No. 292151

Reporter
2010 Mich. App. LEXIS 2339 *; 2010 WL 4977977

MARY LOU UNDERWOOD and GLENN R. UNDERWOOD, Plaintiffs-Appellants, v STEPHEN C. ALBERY, Personal Representative of the Estate of JOHN GLENN UNDERWOOD, Deceased, Defendant-Appellee.

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

Prior History: [*1] Oakland Probate Court. LC No. 2006-306917-CZ.

Carto v. Underwood Prop. Mgmt. Co., 2008 Mich. App. LEXIS 1231 (Mich. Ct. App., June 12, 2008)

Core Terms

summary disposition, discovery, unjust enrichment, plaintiffs', statute of limitations, probate court, equitable, documentary evidence, limitations period, decedent's estate

Judges: Before: BECKERING, P.J., and JANSEN and TALBOT, JJ.

Opinion

PER CURIAM.

Plaintiffs, Mary Lou Underwood (Mary Lou) and Glenn Underwood (Glenn), appeal by right the probate court's order granting defendant's motion for summary disposition pursuant to *MCR 2.116(C)(7)*. We affirm.

As an initial matter, we note that the instant case is related to a prior case decided by Oakland Circuit Court Judge John J. McDonald, which was decided on appeal by this Court in *Carto v Underwood Property Mgt Co*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2008 (Docket No. 272747). *Carto* involved a lawsuit in which several of Glenn's siblings, including his sister Patricia Selent, sued him for mismanagement of the family partnership in which the decedent John Glenn Underwood was also a partner. [1]

Plaintiffs first argue that the probate court's grant of summary disposition was premature because additional discovery was necessary. We disagree. We review a trial court's decision regarding discovery for an abuse of discretion. *VanVorous v Burmeister, 262 Mich App 467, 476; 687 NW2d 132 (2004)*.

A **[*2]** motion for summary disposition filed before the close of discovery is premature unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position. *Liparoto Constr, Inc v General Shale Brick, Inc, 284 Mich App 25, 33-34; 772 NW2d 801 (2009)*. However, "'[i]f a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence.'" *Davis v Detroit, 269 Mich App 376, 379-380; 711 NW2d 462 (2006)*, quoting *Bellows v Delaware McDonald's Corp, 206 Mich App 555*, 561; *522 NW2d 707 (1994)*. "Mere conjecture does not entitle a party to discovery, because such discovery would be no more than a fishing expedition." *Davis, 269 Mich App at 380*.

As plaintiffs did before the probate court, they argue that there is an outstanding issue relating to the assets in the decedent's estate on which discovery has yet to be completed. Specifically, plaintiffs reference the need for additional discovery concerning how Selent used the

[1] Patricia Selent served as plenary guardian of the decedent John Glenn Underwood during the decedent's life.

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funds in the decedent's estate as the decedent's guardian. However, the way in which the funds **[*3]** from the decedent's estate were appropriated is unrelated and irrelevant to whether plaintiffs are entitled to additional compensation for the care services they provided to the decedent. Further, plaintiffs fail to explain how further discovery will yield support for their position that their claims are not barred by res judicata and the statute of limitations. Thus, plaintiffs have failed to assert an evidentiary basis to support their claim that further discovery stands a fair chance of revealing the existence of additional support for their claim.

Next, plaintiffs argue that their claim is not barred by the statute of limitations contained in MCL 600.5807(8). We disagree. Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a claim is barred by the statute of limitations. We review de novo a trial court's decision on a motion for summary disposition. Ardt v Titan Ins Co, 233 Mich App 685, 688; 593 NW2d 215 (1999). In reviewing a motion under subrule (C)(7), a court accepts as true the plaintiff's well-pleaded allegations of fact, construing them in the plaintiff's favor. Hartley v Mazda Motor Corp, 239 Mich App 596, 600; 609 NW2d 203 (2000). The court **[*4]** must consider affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties to determine whether a genuine issue of material fact exists. *Id*. If no facts are in dispute, whether the claim is barred is a question of law. Dewey v Tabor, 226 Mich App 189, 192; 572 NW2d 715 (1997).

In its decision on defendant's motion for summary disposition, the probate court concluded that plaintiffs' claim was time-barred because the six-year statute of limitations had run. Specifically, the probate court found that plaintiffs had filed their complaint on October 18, 2006, but that the statute of limitations period had expired as of May 8, 2004, six years after plaintiffs had ceased caring for the decedent.

The limitations period for breach of contract actions is six years. MCL 600.5807(8). This six-year period commences when the claim accrues, and "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. Accrual occurs on the date of the breach, not the date the breach is discovered. Michigan Millers Mut Ins Co v West Detroit Bldg Co, Inc, 196 Mich App 367, 372 n 1; 494 NW2d 1 (1992).

Plaintiffs' **[*5]** complaint alleges one count of unjust enrichment. Although Mary Lou submitted an amended complaint that added a count for compensation under MCL 700.5315(1), the amended complaint was stricken pursuant to a court order granting plaintiffs' motion to strike. Thus, plaintiffs allege only that there was an implied contract and that the decedent's estate will be unjustly enriched if they are not compensated. As alleged in the complaint, Glenn's and Mary Lou's care for the decedent continued until May 7, 1998, when the decedent moved to a group home. Thus, plaintiffs claim regarding compensation for the decedent's care accrued on May 8, 1998, the date they ceased caring for the decedent.

The equitable theory of unjust enrichment is based on the theory that the law will imply a contract in order to prevent the unjust enrichment of another party. Belle Isle Grill Corp v Detroit, 256 Mich App 463, 478; 666 NW2d 271 (2003). However, a contract to prevent unjust enrichment will be implied "only if there is no express contract covering the same subject matter." *Id*. When there is an express contract covering the same subject matter, summary disposition of the unjust enrichment claim is properly **[*6]** granted. Id. at 479. Plaintiffs argue that there was not an express agreement for their care of the decedent, despite the record evidence establishing the existence of an agreement with Selent that Glenn would be paid $ 26 a day for the decedent's care. Because there appears to have been an express agreement, summary disposition of the unjust enrichment claim was properly granted. *Id*.

Moreover, even assuming arguendo that there was not an express contract, plaintiffs' claim of unjust enrichment was time-barred. A claim for unjust enrichment is the equitable counterpart of a legal claim for breach of contract. Keywell & Rosenfeld v Bithell, 254 Mich App 300, 328; 657 NW2d 759 (2002). Our Supreme 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). "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.'" *Id*., quoting Lothian v Detroit, 414 Mich 160, 169; 324 NW2d 9 (1982).

In an instance **[*7]** where an equitable claim would provide relief that is analogous to the relief available under a similar legal claim, courts generally apply the legal claim's statute of limitations to the equitable claim as well. *Id*. We therefore conclude that the same six-

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year period of limitations applies to the unjust enrichment claim in this case. See *Huhtala v Travelers Ins Co, 401 Mich 118, 125; 257 NW2d 640 (1977)*. Because plaintiffs did not file their claim by May 8, 2004, six years after their caregiver services ceased, their claim is time-barred by *MCL 600.5807(8)*.

Plaintiffs also argue that the period of limitations was tolled by the allegedly wrongful actions of Selent, the decedent's guardian. Plaintiffs' claims regarding Selent's actions are the subject of a separate matter, which Glenn has appealed in Docket No. 291852. Further, as the probate court correctly noted, the alleged breaches of Selent's fiduciary duty as guardian have no relevance to plaintiffs' claim for compensation because plaintiffs presumably would be entitled to a set amount of compensation regardless of Selent's actions with regard to the decedent's estate. We cannot conclude that the period of limitations was tolled **[*8]** for the reasons asserted by plaintiffs.

Plaintiffs also argue that the probate court erred by granting summary disposition on the ground that their claim was barred by res judicata. In light of our holding that plaintiffs' claim was time-barred by the applicable period of limitations, we need not address this argument. At any rate, however, we conclude that the probate court did not err in this regard. The previous litigation in *Carto* was decided on the merits between the same parties or their privies, see *Viele v DCMA, 167 Mich App 571, 580; 423 NW2d 270 (1988)* (observing that a party in privity is someone "so identified in interest with another that he or she represents the same legal right"), and involved strikingly similar issues. Plaintiffs' instant claim-which arises out of the same transactional facts-could have, and should have, been litigated in that matter. The probate court correctly determined that the instant action was additionally barred by the doctrine of res judicata. *Adair v Michigan, 470 Mich 105, 123-124; 680 NW2d 386 (2004)*; *ANR Pipeline Co v Dep't of Treasury, 266 Mich App 190, 212-213; 699 NW2d 707 (2005)*.

Lastly, plaintiffs argue that summary disposition was improperly **[*9]** granted under *MCR 2.116(C)(7)* because defendant failed to support his motion with sufficient documentary evidence. We disagree. In deciding a motion brought pursuant to subrule (C)(7), a court should consider all affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. *MCR 2.116(G)(5)*; *Holmes v Michigan Capital Medical Ctr, 242 Mich App 703, 706; 620 NW2d 319 (2000)*. If the pleadings or documentary evidence reveal no genuine issue of material fact, the court must decide as a matter of law whether the claim is barred. *Id. A* review of the record establishes that defendant properly supported his motion with documentary evidence. The facts establishing that plaintiffs' claim was barred are not in dispute, and even accepting as true the plaintiffs' allegations (including the allegation that there was not an express contract regarding the decedent's care), plaintiffs have failed to establish any genuine issue of material fact that would preclude dismissal of their claim under *MCR 2.116(C)(7)*. Summary disposition was properly granted for defendant.

Affirmed. As the prevailing party, defendant may tax costs pursuant to *MCR 7.219*.

/s/ **[*10]** Jane M. Beckering

/s/ Kathleen Jansen

/s/ Michael J. Talbot

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EXHIBIT - 3

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ROMEO INV. v. MICHIGAN CONSOL. GAS CO.

Court of Appeals of Michigan

May 1, 2007, Decided

No. 260320

Reporter
2007 Mich. App. LEXIS 1190 *; 2007 WL 1264008

ROMEO INVESTMENT LIMITED, Plaintiff-Appellant, v MICHIGAN CONSOLIDATED GAS COMPANY, Defendant-Appellee. and WASHINGTON 10 STORAGE COMPANY and DTE ENERGY COMPANY, Defendants.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Macomb Circuit Court. LC No. 03-005493-CH.

Core Terms

unjust enrichment, rescission, constructive trust, limitations period, lease agreement, accrues, statute of limitations, conversion, trespass, cause of action, discovery rule, trial court, lease, royalty payment, royalties, summary disposition, partial, argues, breach of contract claim, fraudulent concealment, equitable claim, misrepresentation, time-barred, breach of contract action, six years, six-year, tolled, oil, installment contract, periodic payments

Judges: Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

Opinion

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order granting partial summary disposition in favor of defendant Michigan Consolidated Gas Company (defendant) [1] under MCR 2.116(C)(7) and (C)(8). We affirm the dismissal of the rescission, fraud, and trespass claims in their entirety. We further affirm the partial dismissal of the breach of contract action, leaving intact claims for breach of contract arising after December 3, 1997. Finally, we reverse the partial dismissal of the unjust enrichment, conversion, and constructive trust claims, in that, those claims should have been dismissed in their entirety.

[*2] Plaintiff and defendant executed an oil and gas lease in May 1976, pursuant to which defendant was granted a leasehold interest for the purpose of exploration, drilling, and extraction of subterranean oil and gas. The lease agreement remained in effect through 1998. As part of the agreement, plaintiff was granted a royalty interest in one-eighth (1/8) of the oil and gas ultimately produced, and plaintiff chose to accept payment in the form of quarterly or monthly royalty payments. A lease addendum provided as follows regarding the amount of payment:

> The price used by lessee to determine royalty payments to lessor for gas produced from the lands covered herein and sold or used off the premises covered hereby shall be the highest price per MCF [2] paid by [defendant] or its affiliated [c]ompanies at the wellhead for products of like quality and quantity at the time gas is first produced and sold or used off the premises, unless and until a higher price is paid for gas sold under the contract containing such price, in which event such higher price shall be used to determine royalty payments to lessor.

[*3] Over the years, defendant regularly paid plaintiff periodic royalties until the lease ended in1998. The crux

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[1] Defendants Washington 10 Storage Company and DTE Energy Company were dismissed from this action in early 2004. Our reference to "defendant" pertains solely to Michigan Consolidated Gas Company.

[2] MCF means "one thousand cubic feet."

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of plaintiff's complaint was the assertion that defendant had systematically underpaid plaintiff over the entire 22-year lease period from 1976 until 1998 in violation of the above-quoted language from the lease addendum. Plaintiff's position was that defendant was essentially paying a higher price in royalties to Shell Oil Company, which price, under the lease agreement, and specifically the addendum, should have also been paid to plaintiff. Plaintiff's lawsuit was not filed until December 4, 2003. Plaintiff repeatedly argues that it did not become aware of the underpayment until December 2001, at which time it received information indicating a short fall in payments over the years. Plaintiff vigorously contends that it could not have known of the underpayment, nor have even suspected underpayment, until it received a letter from former Mich Con employee John Odinga in December 2001 that suggested the possible underpayment. Plaintiff's first amended complaint contained two counts of rescission and single counts of trespass, breach of contract, fraud, conversion, constructive **[*4]** trust, and unjust enrichment.

On defendant's motion for summary disposition, the trial court found that the claims for fraud, rescission, conversion, breach of contract, unjust enrichment, and constructive trust were all subject to a six-year statute of limitations. The court concluded that the trespass claim was subject to a three-year statute of limitations. With respect to rescission and fraud, the court ruled that those causes of action accrued in 1976 when the lease agreement was executed. The trial court decided not to apply the discovery rule to any of the seven claims. The fraud claim, the first rescission count, and the trespass action were all dismissed as time-barred, with the court additionally finding that the second rescission count failed to state a claim on which relief could be granted. With regard to the remaining four counts, the trial court ruled that, because periodic payments were made under the lease agreement throughout the life of the lease, each time payment was made, allegedly in a deficient amount, a cause of action accrued at that point in time. Considering that the complaint was filed on December 4, 2003, and given that the breach of contract, conversion, **[*5]** unjust enrichment, and constructive trust claims were subject to a six-year statute of limitations, any deficient payments made after December 3, 1997, could still be litigated in the lawsuit, but any claims under those theories relative to payments made on or before that date were time-barred. Plaintiff appealed by leave granted.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood, 461 Mich. 109, 118*; *597 N.W.2d 817 (1999)*. [3] We review de novo the applicability of a statute. *Adams Outdoor Advertising, Inc v Holland, 463 Mich. 675, 681*; *625 NW2d 377 (2001)*. We similarly review de novo all other questions of law. *Fraser Twp v Linwood-Bay Sportsman's Club, 270 Mich. App. 289, 293*; *715 N.W.2d 89 (2006)*. Whether the period of limitations was tolled and when the period of limitation sended are questions of law. *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute, 266 Mich App 39, 46*; *698 N.W.2d 900 (2005)*.

[*6] In addition to the issues raised in the application, this Court's order granting leave to appeal directed the parties to address whether plaintiff's claims were subject to the provisions of Article 2 of the Uniform Commercial Code (UCC), *MCL 440.2101 et seq*. Because both parties have taken the position that the UCC is inapplicable and because defendant never argued its application below, we decline to address the issue any further and accept the parties' positions for purposes of this appeal only, without independently determining the correctness or soundness of their arguments.

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[3] *MCR 2.116(C)(7)* provides for summary disposition when a claim is barred by the statute of limitations. 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. *Horace v City of Pontiac, 456 Mich. 744, 749*; *575 N.W.2d 762 (1998)*. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Sewell v Southfield Public Schools, 456 Mich. 670, 674*; *576 N.W.2d 153 (1998)*. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. *Herman v Detroit, 261 Mich. App. 141, 143-144*; *680 N.W.2d 71 (2004)*. 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. *Huron Tool & Engineering Co v Precision Consulting Services, Inc, 209 Mich. App. 365, 377*; *532 N.W.2d 541 (1995)*. If a factual dispute exists, however, summary disposition is not appropriate. *Id.*

MCR 2.116(C)(8) provides for summary disposition where " [t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under *MCR 2.116(C)(8)* tests the legal sufficiency of a complaint. *Beaudrie v Henderson, 465 Mich. 124, 129*; *631 N.W.2d 308 (2001)*. The trial court may only consider the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express,454 Mich. 373, 380-381*; *563 N.W.2d 23 (1997)*.

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We shall begin our substantive analysis by addressing some preliminary matters. First, we consider the discovery rule. In general, "the period of limitations runs from the time the claim accrues." MCL 600.5827. Furthermore, a "claim accrues at the time provided in [MCL 600.5829] to [MCL 600.5838], and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827 **[*7]** . In Moll v Abbott Laboratories, 444 Mich. 1, 12; 506 N.W.2d 816 (1993), our Supreme Court stated that the term "wrong" as used in the general accrual statute, MCL 600.5827, "specified the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which the defendant breached his duty." However, the *Moll* Court additionally noted that "our concern about barring a plaintiff's cause of action prematurely has led to our adoption of the discovery rule under proper circumstances." Moll, supra at 12. Pursuant to the discovery rule, "the plaintiff's claim accrues when the plaintiff discovers, or through the exercise of reasonable diligence, should have discovered, the two later occurring elements: (1) an injury, and (2) the causal connection between plaintiff's injury and the defendant's breach." Id. at 16. Rejecting an argument that a plaintiff should first know the "likely cause" of an injury, the Supreme Court ruled, "Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action[,]" thereby triggering the commencement **[*8]** of the applicable limitations period. Id. at 23-24.

The discovery rule is not a general rule of application; rather, its use has been limited to specific situations, such as in, for example, products liability actions. Lemmerman v Fealk, 449 Mich 56, 66; 534 N.W.2d 695 (1995); see also Chase v Sabin, 445 Mich. 190, 196-197; 516 N.W.2d 60 (1994). We affirm the trial court's decision not to apply the discovery rule to any of the claims raised by plaintiff. This case, at its core, is a breach of contract action for failure to pay the full amount under the lease agreement, regardless of the various labels placed on the numerous causes of action. In Johnston v Livonia, 177 Mich. App. 200, 208; 441 N.W.2d 41 (1989), this Court stated, "Simply put, this Court is not bound by plaintiff's choice of labels for her action because this would exalt form over substance." That being said, "[a] breach of contract claim accrues on the date of the breach, *not the date the breach is discovered*." Michigan Millers Mut Ins Co v West Detroit Bldg Co, Inc, 196 Mich. App. 367, 372 n 1; **[*9]** 494 NW2d 1 (1992) (emphasis added); see also Adams v Detroit, 232 Mich. App. 701, 706; 591 NW2d 67 (1998) (using the same quote from Michigan Millers, supra, and also noting that a party "need not know of the invasion of a legal right in order for the claim to accrue"). Because this case is essentially a contract action, and given the circumstances involved, we decline to hold that the trial court erred in rejecting application of the discovery rule. [4]

The next matter concerns fraudulent concealment under MCL 600.5855. [5] Plaintiff argues that the various limitation periods applicable in this case were tolled until December 2001 by operation of MCL 600.5855 **[*10]** . We disagree.

As an initial matter, we note that this issue is not preserved for appellate review because it was not raisedbefore and decided by the trial court. Fast Air, Inc v Knight, 235 Mich. App. 541, 549; 599 N.W.2d 489 (1999). Nonetheless, even if this matter were properly preserved, plaintiff has failed to sufficiently allege fraudulent concealment by defendant.

Under MCL 600.5855 **[*11]** , the statute of limitations is tolled when a party conceals the fact that the plaintiff has a cause of action. Sills v Oakland Gen Hosp, 220 Mich. App. 303, 310; 559 NW2d 348 (1996). "The plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment and must prove that the defendant committed affirmative acts of misrepresentation that were designed to prevent subsequent discovery." Phinney v Perlmutter, 222 Mich. App. 513, 562-563; 564 N.W.2d 532 (1997). "Mere silence is insufficient" to constitute fraudulent concealment of a claim. Sills, supra at 310.

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[4] To the extent that there may exist case law arguably supporting application of the discovery rule to a claim of rescission, we have found that the rescission claims are properly dismissed under MCR 2.116(C)(8) for the reasons stated below.

[5] MCL 600.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

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Although plaintiff pleaded a claim of *fraudulent inducement* in its complaint, nowhere did plaintiff's complaint contain allegations that defendant had *fraudulently concealed* the existence of any of plaintiff's causes of action. Thus, plaintiff failed to plead sufficient facts to show fraudulent concealment in this case. *Phinny, supra at 563*. Nor has plaintiff cited any record evidence to support its contention that defendant fraudulently concealed the alleged underpayments or **[*12]** otherwise acted to conceal the factual bases for plaintiff's claims. In fact, plaintiff argues on appeal only that defendant's silence was sufficient to invoke the fraudulent concealment statute and to toll the applicable limitation periods. However, as noted above, mere silence is insufficient to invoke the tolling provision of *MCL 600.5855*. *Sills, supra at 310*. Quite simply, plaintiff is not entitled to avail itself of the fraudulent concealment tolling provision of *MCL 600.5855* in this case.

We now examine the various causes of action. The claims that the trial court summarily dismissed, except for one, were dismissed on the basis that they were time-barred. We hold that a number of the claims are also properly disposed of pursuant to *MCR 2.116(C)(8)*. See *Wickings v Arctic Enterprises, Inc, 244 Mich. App. 125, 150*; *624 N.W.2d 197 (2000)* (we may, ordinarily, affirm an order granting summary disposition on alternative grounds or reasoning); see also *Messenger v Ingham Co Prosecutor, 232 Mich. App. 633, 643*; *591 N.W.2d 393 (1998)*. **[*13]** Indeed, some of the claims that were dismissed only in part, should have been dismissed in total for failure to state a claim, and this includes the claims for conversion, unjust enrichment, and constructive trust. [6]

The two rescission claims, as alleged in the complaint and which included rescission based on mistake and rescission based on failure to act as a prudent operator, failed to state causes of action as a matter of law. With respect to the claim of rescission based on mistake, such an action cannot be maintained except when there is mutual mistake or unilateral mistake induced by fraud. *Goodwin, Inc v Orson Coe Pontiac, Inc, 392 Mich. 195, 218*; **[*14]** *220 N.W.2d 664 (1974)*; *Windham v Morris, 370 Mich. 188, 193*; *121 N.W.2d 479 (1963)*; *Kruger v Agnor, 321 Mich. 131, 135-136*; *32 N.W.2d 365 (1948)*; *Trembert v Mott,271 Mich. 683, 692*; *261 NW 109 (1935)*. Here, the mistake-based rescission count alludes to mistake on the part of plaintiff but not defendant; therefore, mutual mistake is not alleged. Further, in the context of unilateral mistake, there is no language in the count alleging fraudulent activity. Moreover, contractual mistake relates to a belief that is not consistent or in accord with the facts. *Lenawee Co Bd of Health v Messerly, 417 Mich. 17, 24*; *331 N.W.2d 203 (1982)*. "The erroneous belief of one or both of the parties must relate to a fact in existence at the time the contract is executed." *Id.*; see also *Gortney v Norfolk & Western R Co, 216 Mich. App. 535, 542*; *549 N.W.2d 612 (1996)* (mistake must concern existing facts). Contentions related to the occurrence or nonoccurrence of future events cannot serve as a basis to rescind because of mistake. *Alibri v Detroit/Wayne Co Stadium Auth, 254 Mich. App. 545, 563*; **[*15]** *658 N.W.2d 167 (2002)*, rev'd on other grounds *470 Mich. 895 (2004)*. Plaintiff's complaint speaks of its mistaken belief that defendant would make proper payment in the future in accord with the contract; there is no allegation regarding a mistake concerning existing facts. Accordingly, the mistake-based rescission counts fails to state a cause of action.

With regard to the claim of rescission based on failure to act as a prudent operator, plaintiff is apparently suggesting that rescission of the lease agreement can be based on negligence, with the negligence being the failure to pay the full amount of the royalties. We are unaware of any authority supporting such a cause of action, nor does plaintiff cite supporting authority; therefore, and limiting ourselves to the manner in which plaintiff framed the allegations in the count, we conclude that plaintiff failed to state a claim on which relief can be granted.

We also conclude that plaintiff's trespass claim fails to state a cause of action and was therefore subject to dismissal under *MCR 2.116(C)(8)*. Additionally, the statute of limitations barred the action in light of the fact that **[*16]** we are not employing the discovery rule. In the complaint, plaintiff alleged that the lease agreement and addendum were null and void because plaintiff mistakenly believed that defendant would properly calculate the royalties. Therefore, the theory goes, plaintiff owned at all times one-hundred percent of the oil and gas interests underlying the land, and thus defendant's operations on the land constituted a

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[6] While an argument under *MCR 2.116(C)(8)* was only made and addressed in connection with the second count for rescission, we may overlook the preservation deficiency if consideration of the issue is necessary to a proper determination of the appeal or if a question of law is involved. *Steward v Panek, 251 Mich. App. 546, 554*; *652 N.W.2d 232 (2002)*.

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trespass.

First, we note that this claim is simply a reformulation of the mistake-based rescission claim that we have already rejected. Accordingly, plaintiff cannot proceed with its trespass claim on the basis that the lease agreement was null and void. Furthermore, "[r]ecovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion . . . onto land over which the plaintiff has a right of exclusive possession." *Adams v Cleveland-Cliffs Iron Co, 237 Mich. App. 51, 67*; *602 N.W.2d 215 (1999)*. A trespass claim cannot be sustained when there is no evidence of any unauthorized entry onto the land of another. *Gelman Sciences, Inc v Dow Chemical Co, 202 Mich. App. 250, 253*; *508 N.W.2d 142 (1993)*. **[*17]** We conclude that the allegations that defendant did not fully pay royalties due under the lease agreement, which agreement authorized defendant to enter plaintiff's land under a separate granting clause, did not negate said clause or the authorization to enter the land, but simply gave rise to a breach of contract action subject to the applicable statute of limitations. As such, plaintiff has failed to state a cause of action for trespass.

Moreover, the parties agree that the period of limitations for trespass is three years, *MCL 600.5805(10)*. Because we are not applying the discovery rule, the claim accrued at the latest in 1998 when the lease period ended. Because the action was not filed until December 2003, the trespass claim was time-barred.

With respect to plaintiff's conversion claim, although the trial court allowed the claim to survive in part under a statute of limitations analysis, we hold that the claim should have been dismissed in its entirety under *MCR 2.116(C)(8)*. In *Foremost Ins Co v Allstate Ins Co, 439 Mich 378, 391*; *486 N.W.2d 600 (1992)*, our Supreme Court stated:

> In the civil **[*18]** context, conversion is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein. In general, it is viewed as an intentional tort in the sense that the converter's actions are willful, although the tort can be committed unwittingly if unaware of the plaintiff's outstanding property interest.

Here, plaintiff's complaint did not allege that defendant exerted dominion over plaintiff's personal property; rather, defendant was merely accused of failing to pay all of the royalties due under the contract. Plaintiff did not allege that the oil and gas were wrongfully converted, but instead alleged that royalty payments were not made and that this, the retention of the payments, constituted the conversion. In other words, there was conversion of the royalty payments. This is analogous to stating that, anytime someone fails to pay under a contract, the breaching party's retention of the funds or payment equates to conversion of those funds. As framed in plaintiff's complaint, this is simply not a case of conversion. Plaintiff's complaint fails to allege a cause of action for conversion.

We next address **[*19]** the cause of action for fraud, which is framed in a manner indicating intentional misrepresentation and fraud in the inducement, both arising out of the lease transaction that occurred in 1976. Claims for fraud are subject to the six-year period of limitations contained in *MCL 600.5813*. *Badon v Gen Motors Corp, 188 Mich. App. 430, 435*; *470 N.W.2d 436 (1991)*; *Kwasny v Driessen, 42 Mich. App. 442, 446*; *202 N.W.2d 443 (1972)*. A claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." *MCL 600.5827*. Our Supreme Court has specifically held that the common-law discovery rule does not apply to claims of fraud or misrepresentation. *Boyle v Gen Motors Corp, 468 Mich. 226, 227, 231-232*; *661 N.W.2d 557 (2003)*. Therefore, plaintiff's reliance on the letter from Odinga in 2001 relative to a discovery argument is misplaced. Plaintiff's complaint focused solely on misrepresentations and fraud at the time the lease agreement was executed, which, according to plaintiff, induced it into executing **[*20]** the agreement. There are no allegations that each payment over the course of the lease period constituted a misrepresentation of the highest price being paid to others in royalties. Therefore, plaintiff's claim, as structured in the complaint, accrued in 1976. Accordingly, the fraud claim was time-barred regardless of the date, consistent with *Boyle, supra*, that plaintiff discovered the fraud or misrepresentation.

We now address the breach of contract claim. Plaintiff argues that the trial court erred in granting partial summary disposition of its claim for breach of contract, improperly limiting the scope of the claim to acts or omissions that occurred after December 3, 1997. We disagree.

The trial court determined that the lease agreement, which required regular monthly or quarterly royalty payments to plaintiff, was analogous to an installment contract. An installment contract is defined as "'[a] contract requiring or authorizing the delivery of goods in

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separate lots, or payments in separate increments, to be separately accepted.'" *Twichel v MIC Gen Ins Corp, 469 Mich. 524, 532 n 5*; *676 N.W.2d 616 (2004)*, quoting Black's Law **[*21]** Dictionary (7th ed) (emphasis deleted). This Court has previously determined that certain types of contracts requiring regular or periodic payments are similar to or analogous to installment contracts. *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co, 234 Mich. App. 550, 562-563*; *595 NW2d 176 (1999)*; *Adams, supra at 704-705*; *Harris v Allen Park, 193 Mich. App. 103, 107*; *483 NW2d 434 (1992)*. Under such contracts requiring regular periodic payments, a separate and distinct breach of contract claim accrues with each allegedly deficient payment. *H J Tucker, supra at 562-563*. [7] "[E]very periodic payment made that is alleged to be less than the amount due . . . constitutes a continuing breach of contract and the limitation period runs from the due date of each payment." *Harris, supra at 107*; see also *H J Tucker, supra at 563*. The lease agreement in this case required defendant to make regular royalty payments to plaintiff on either a monthly or quarterly basis. Therefore, although not technically an installment contract in the strictest sense **[*22]** of the term, the lease agreement was in the nature of an installment contract. Each allegedly deficient royalty payment made to plaintiff constituted a separate and discrete breach of the lease agreement.

The period of limitations for actions alleging breach of contract is six years. *MCL 600.5807(8)*; *Blazer Foods, Inc v Restaurant Properties, Inc, 259 Mich. App. 241, 245*; *673 NW2d 805 (2003)*. As indicated above, the discovery rule is inapplicable in contract actions. Thus, under *MCL 600.5827*, the breach of contract claim accrued "at the time the wrong upon which the claim is based was done regardless of the time when damage results." Therefore, for a contract requiring separate periodic payments, the period of limitations begins to run at the time of each individual breach. *H J Tucker, supra at 563*; **[*23]** *Harris, supra at 107*. The six-year period of limitations began to run separately at the time of each alleged underpayment in this case.

Plaintiff argues, however, that defendant was under a "continuing obligation" until the lease was terminated in 1998 to pay all past-dueroyalties. Plaintiff thus argues that all claims for breach of contract accrued in 1998 at the earliest, when the alleged "continuing obligation" finally ended. Plaintiff contends that its claim was therefore timely because defendant remained in breach of this "continuing obligation" to correct past underpayments until 1998.

This argument is functionally identical to the "continuing wrongs" argument rejected in *Blazer Foods, supra.* The "continuing wrong" doctrine provides that a claim based on the defendant's wrongful conduct will re-accrue each day that the wrongful conduct is continued. *Blazer Foods, supra at 246, 248*. The statute of limitations will not commence until the wrong is abated. *Id. at 246*. Continual tortious acts must be shown, not continuing harmful effects from an original completed act. *Id.* Application of the **[*24]** "continuing wrong" doctrine has been rejected in the context of claims for breach of contract. *Id. at 251* ("Plaintiffs have identified no cases extending the continuing wrong or continuing services theories to a situation in which a party to a contract fails to perform adequately under the contract."). Accordingly, plaintiff cannot rely on its "continuing obligation" theory in this instance because the "continuing wrong" doctrine does not apply to extend the period of limitations in a breach of contract action.

The trial court properly bifurcated plaintiff's breach of contract claim, separating it into (1) claims for alleged underpayments that occurred more than six years before this action was filed, and (2) claims for alleged underpayments that occurred within the six years immediately preceding the filing of this action. The court properly dismissed as time-barred those claims that related to any alleged underpayments that occurred more than six years before this action was filed. Partial summary disposition under *MCR 2.116(C)(7)* was properly granted.

With respect to the claim for unjust enrichment, we conclude that the entire claim should **[*25]** have been dismissed because, in part, it was time-barred, and, in part, there was a failure to state a claim because of the existence of an express contract.

A claim for unjust enrichment is the equitable counterpart of a legal claim for breach of contract. Our Supreme 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 N.W.2d 596 (1995)*. "If legal limitations periods did not apply to analogous equitable suits, 'a plaintiff [could] dodge the bar set up by a limitations statutes imply by resorting to an alternate form of relief provided by equity.'" *Id.*, quoting

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[7] *MCL 600.5836* provides that "claims on an installment contract accrue as each installment falls due."

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Lothian v Detroit, 414 Mich. 160, 169; 324 N.W.2d 9 (1982). Thus, when an equitable claim would provide relief that is analogous to the relief available under a similar legal claim, courts typically apply the legal claim's statute of limitations to the equitable claim as well. *Id*. Laches, however, as opposed to an analogous statute of limitations, will control if "compelling equities" are established. Id. at 170. Not finding **[*26]** compelling equities here, we choose to apply the same six-year period of limitations to the unjust enrichment claim as that applicable to plaintiff's breach of contract claim. See Huhtala v Travelers Ins Co, 401 Mich. 118, 125; 257 N.W.2d 640 (1977) ("We are of the opinion that the time for bringing an action for promissory estoppel is governed by the contract statute of limitations, six years, and that plaintiff s' action was therefore timely commenced.").

While this ruling would leave open a diminished claim for unjust enrichment arising after December 3, 1997 (within six years of the complaint), any potentially surviving claim must also succumb given the law on unjust enrichment. The equitable claim of unjust enrichment is based on the theory that the law will imply a contract in order to prevent the unjust enrichment of another party. Belle Isle Grill Corp v Detroit, 256 Mich. App. 463, 478; 666 N.W.2d 271 (2003). However, a contract to prevent unjust enrichment will be implied "only if there is no express contract covering the same subject matter." *Id*. When there is an express contract covering the same subject **[*27]** matter, summary disposition of the unjust enrichment claim is properly granted. Id. at 479. The express provisions of a lease agreement constitute an express contract within the meaning of this rule. Considering that the breach of contract claim can be pursued as likewise limited by the statute of limitations as reflected in the trialcourt's ruling, any accompanying claim for unjust enrichment covering the same subject matter and that same time period, i.e., after December 3, 1997, must fail because there is no legally cognizable right to recovery. [8]

[*28] With respect to the claim for a constructive trust, we conclude that the entire constructive trust claim should have been dismissed. Plaintiff argues that the trial court erred in granting partial summary disposition under MCR 2.116(C)(7) of its constructive trust claim, improperly limiting the scope of the claim to acts or omissions that occurred after December 3, 1997.

Plaintiff argues that because defendant owed it a fiduciary duty, a constructive trust arose over the allegedly unpaid past-due royalties. A court may impose a constructive trust when necessary to do equity or avoid unjust enrichment. Kammer Asphalt Paving Co, Inc v East China Twp Schools, 443 Mich. 176, 188; 504 N.W.2d 635 (1993). However, an independent action for equitable relief will not lie where there is a full, complete, and adequate remedy at law, absent a showing that there is some feature of the case peculiarly within the province of the court of equity. ECCO, Ltd v Balimoy Mfg Co, Inc, 179 Mich. App. 748, 751; 446 N.W.2d 546 (1989); Basinger v Provident Life & Accident Ins Co, 67 Mich. App. 1, 5-6 n 11; **[*29]** 239 N.W.2d 735 (1976). When a plaintiff has set forth both legal and equitable claims seeking identical relief and covering the same subject matter, the proper course is generally dismissal of the equitable claim. See Slusher v Frome, 364 Mich. 110, 111-112; 110 N.W.2d 672 (1961).

For the reasons set forth above regarding plaintiff's equitable claim of unjust enrichment, we impose a six-year statute of limitations on the constructive trust claim, which effectively bars recovery under that theory relative to deficient royalty payments made on or before December 3, 1997. With respect to constructive trust claims after said date, plaintiff has an adequate remedy at law in the form of the breach of contract action. Accordingly, the entire constructive trust claim is dismissed.

In sum, we affirm the dismissal of the rescission, fraud, and trespass claims in their entirety. We further affirm the partial dismissal of the breach of contract action, leaving intact claims for breach of contract arising after December 3, 1997. Finally, we reverse the partial dismissal of the unjust enrichment, conversion, and

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[8] We have acknowledged the general rule that a claim for unjust enrichment cannot survive when there exists an express contract covering the same subject matter. However, we note that case law also provides that if the contract is void or unenforceable, the rule does not apply. See Biagini v Mocnik, 369 Mich. 657, 659-660; 120 N.W.2d 827 (1963) (recovery in quantum meruit allowed where the plaintiff performed under an express contract that is not enforceable because of a statute that bars recovery under terms of the contract); Ordon v Johnson, 346 Mich. 38, 48-49; 77 N.W.2d 377 (1956); VanderHoef v Parker Bros Co, Ltd, 267 Mich. 672, 680-681; 255 NW 449 (1934). Any contract action arising after December 3, 1997, can be pursued; therefore, the contract is not void or unenforceable for that time period. Although the contract is unenforceable for the period on or before December 3, 1997, this is because of the statute of limitations, which we find equally applicable here to plaintiff's unjust enrichment claim.

constructive trust claims, in that, those **[*30]** claims should have been dismissed in their entirety. Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper

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EXHIBIT - 4

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

JAMES HEOS,
individually and as representative
of a class of similarly-situated
persons and entities,

Plaintiff/Appellee,
v.

CITY OF EAST LANSING,
a municipal corporation,

Defendant/Appellant.

Court of Appeals Case No: 361138

Ingham County Circuit Court Case
No. 20-199-CZ
Hon. Wanda M. Stokes

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PLAINTIFF/APPELLEE'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON APPEAL

Plaintiff/Appellee James Heos ("Plaintiff"), individually and on behalf of a certified class of similarly-situated persons and entities, by his attorneys, hereby moves the Court, pursuant to MCR 7.211 for leave to submit the Supplemental Brief on Appeal (the "Supplemental Brief") attached hereto as Exhibit 1. In support of the Motion, Plaintiff states as follows:

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1. This Court held oral argument on this appeal on March 14, 2023. For the Court's ready reference, the transcript of the argument is attached to the Supplemental Brief as Exhibit A. As of the filing of this Motion, the Court has not yet issued its Opinion.

2. At the March 14 argument, it appeared from the panel's questions and comments that the Court may be poised to rule as follows: (1) that the Headlee statute of limitations issue in this case is controlled by *Morgan v. City of Grand Rapids*, 267 Mich. App. 513; 705 N.W. 2d 387 (2005), because the LBWL is "primarily liable" to pay the Franchise Fees at issue (Tr. at p. 21), and (2) that Plaintiff is relying upon "taxpayer standing" to assert his Headlee Amendment claims. Tr. at pp. 24-25. The Court should not make those rulings, however, because they would be wrong and would contravene established Headlee Amendment precedent and other controlling authorities.

3. Plaintiff seeks leave to submit the Supplemental Brief to demonstrate that **(1)** Plaintiff and the certified Class – and not the LBWL – are "primarily liable" to pay the Franchise Fees (*see* discussion of *Michigan Bell Telephone Co. v. Dep't of Treasury*, 229 Mich. App. 200; 581 N.W.2d 770 (1998) (recognizing that **"[o]ne may be charged with the duty of collecting a tax on behalf of government although the ultimate burden of such tax does not rest on him**") (emphasis added) (Supplemental Brief at pp. 8-9), which distinguishes this case from *Morgan*; **(2)** the Supreme Court's recent decision in *Township of Fraser v. Haney*, 509 Mich. 18; 983 N.W.2d 309 (2022) necessarily abrogated the accrual rule the *Morgan* court applied in finding that plaintiff Mary Morgan's Headlee Amendment claims were untimely (Supplemental Brief at pp. 10-12), and **(3)** Plaintiff and the Class are not relying upon "taxpayer standing" but rather have direct standing as persons and entities who incurred and paid the Franchise Fees. The concept of "taxpayer standing" has no application to this case. *See* discussion of *Taxpayers Allied for Constitutional Taxation v. Wayne County*, 450 Mich. 119, 124 (1995) ("*TACT*") (Supplemental Brief at pp. 12-14).

4. This supplemental brief is particularly warranted because the Court itself questioned the effect of *Township of Fraser* on the Headlee statute of limitation issue at the March 14 oral argument. *See*

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Exhibit A to Supplemental Brief at p. 4. Neither party addressed the *Township of Fraser* case in the previous briefing.

5. Further, this case presents a number of important legal issues, and the Court's decision in the case will affect the rights of thousands of citizens in the City. Plaintiff believes that his Supplemental Brief will aid the Court in properly resolving the issues presented by the City's appeal.

6. Plaintiff has no objection to the Court allowing the City leave to file its own Supplemental Brief to address the issues discussed in Plaintiff's proposed Supplemental Brief.

WHEREFORE, Plaintiff requests that the Court grant Plaintiff leave to file the Supplemental Brief attached hereto as Exhibit 1 and to accept the Brief for filing with the Court.

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Dated: March 31, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2023, I electronically served the foregoing pleadings on all counsel of record using the court's electronic filing system.

/s/ Kim Plets

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EXHIBIT - 1

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

JAMES HEOS,
individually and as representative
of a class of similarly-situated
persons and entities,

Plaintiff/Appellee,
v.

CITY OF EAST LANSING,
a municipal corporation,

Defendant/Appellant.

Court of Appeals Case No: 361138

Ingham County Circuit Court Case
No. 20-199-CZ
Hon. Wanda M. Stokes

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PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF ON APPEAL

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I. INTRODUCTION

This Court held oral argument on this appeal on March 14, 2023. For the Court's ready reference, the transcript of the argument is attached hereto as Exhibit A. As of the filing of this Supplemental Brief, the Court has not yet issued its Opinion.

At the March 14 argument, it appeared from the panel's questions and comments that the Court may be poised to rule as follows: (1) that the Headlee statute of limitations issue in this case is controlled by *Morgan v. City of Grand Rapids*, 267 Mich. App. 513; 705 N.W. 2d 387 (2005), because the LBWL is "primarily liable" to pay the Franchise Fees at issue (Tr. at p. 21), and (2) that Plaintiff is relying upon "taxpayer standing" to assert his Headlee Amendment claims. Tr. at pp. 24-25. The Court should not make those rulings, however, because they would be wrong and would wholly contravene established Headlee Amendment precedent and other controlling authorities.

Plaintiff/Appellee James Heos ("Plaintiff") submits this supplemental brief to demonstrate that **(1)** Plaintiff and the certified Class – and ***not*** the LBWL – are "primarily liable" to pay the Franchise Fees (*see* discussion, *infra*, of *Michigan Bell Telephone Co. v. Dep't of Treasury*, 229 Mich. App. 200; 581 N.W.2d 770 (1998) (recognizing that **"[o]ne may be charged with the duty of collecting a tax on behalf of government although the ultimate burden of such tax does not rest on him**") (emphasis added), which distinguishes this case from *Morgan*; **(2)** the Supreme Court's recent decision in *Township of Fraser v. Haney*, 509 Mich. 18; 983 N.W.2d 309 (2022) necessarily abrogated the accrual rule the *Morgan* court applied in finding that plaintiff Mary Morgan's Headlee Amendment claims were untimely, and **(3)** Plaintiff and the Class are not relying upon "taxpayer standing" but rather have direct standing as persons and entities who incurred and paid the Franchise Fees. The concept of "taxpayer

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standing" has no application to this case. *See* discussion, *infra*, of *Taxpayers Allied for Constitutional Taxation v. Wayne County*, 450 Mich. 119, 124 (1995) ("*TACT*").[1]

II. THE FRANCHISE FEES ARE IMPOSED ON PLAINTIFF AND THE CLASS AND THEREFORE PLAINTIFF'S HEADLEE CLAIMS ARE TIMELY AND THEY ARE THE PROPER PARTIES TO CHALLENGE THE FRANCHISE FEES.

We cannot overstate the importance of the following: In this appeal, the Court's first order of business is to determine who bears the "legal incidence" of the Franchise Fees. This determination drives the resolution of a variety of the legal issues presented by this appeal, including the Headlee Amendment statute of limitations issue and the core Headlee issue of whether the Franchise Fees constitute unlawful taxes. There are only two possibilities: (1) the Fees are legally imposed on end-users of the LBWL's electric service in the City and are merely collected by the LBWL, or (2) the Fees are legally imposed on the LBWL, which chooses to incorporate those Fees into its overall electric charges. For the reasons set forth below, because the Franchise Agreement specifically designates the LBWL as a mere collection agent for the Franchise Fees and other provisions of the Franchise Agreement make clear that the LBWL has no legal obligation to pay the Franchise Fees, Plaintiff and other end-users of the LBWL's electric service are the actual "payers" of the Fees.

A. Where As Here, An Entity Collects Taxes From End-Users On Behalf Of The Government, the End-Users Are The Payers Of The Taxes.

'The Court's vigorous questioning of Plaintiff's counsel concerning who pays the Franchise Fee strongly suggests that the Court believes the Franchise Fees are imposed in the first instance on the LBWL, and the LBWL is obliged to pay 5% of the amounts it bills to customers regardless of whether any customer pays that money to the LBWL. That suggests a fundamental misapprehension of the "collect and remit" language and other critical provisions in the Franchise Agreement. The following

---

[1] This supplemental brief is particularly warranted because the Court itself questioned the effect of *Township of Fraser* on the Headlee statute of limitation issue at the March 14 oral argument. *See* Exhibit A at p. 4. Neither party addressed the *Township of Fraser* case in the briefing.

exchange occurred:

> JUDGE GLEICHER: I have to say, you haven't really explained it to me in a way that leads me to conclude that you're describing something that's a distinction without a difference. The plaintiff in *Morgan* represented a proposed class of cable subscribers, and she paid, under protest, the franchise fee. How is that different from this case?
>
> MR. HANLEY: Because, as the court noted, when the tax obligation falls primarily on the retailers, retailers are considered to be the taxpayers, and they cite the *Sims* case. There's a whole body of law that looks at – for example, in Michigan –
>
> JUDGE GLEICHER: But then the sentence goes on to say, the seller passes on the sales tax obligation to the buyer.
>
> MR. HANLEY: Right.
>
> JUDGE GLEICHER: But remains primarily liable to pay the tax.
>
> MR. HANLEY: Right
>
> JUDGE GLEICHER: How is that different from this case?
>
> MR. HANLEY: **The Board of Water and Light is not primarily liable to pay this tax.**
>
> JUDGE GLEICHER: **Sure it is**.
>
> MR. HANLEY: No, no, no, Your Honor. The franchise agreement was carefully crafted so that the LBWL didn't have that responsibility. For example, they said, we will not sign this unless we are a mere collection agency, because they were worried about Headlee. And then when you get into the franchise fee agreement, it says that they are to collect and remit, and that the fee –
>
> JUDGE GLEICHER: Remit is what – they are the ones paying the tax.
>
> MR. HANLEY: Collect.
>
> JUDGE GLEICHER: Like a sales tax, they collect the sales taxes like any retailer.
>
> MR. HANLEY: No. They are not. That is a major difference, Your Honor. And I'm not trying to be testy with you.
>
> JUDGE GLEICHER: No, no, no. It's fine.
>
> MR. HANLEY: This is the crux of the case, and I'm going to stand here until I satisfy you, hopefully –
>
> JUDGE GLEICHER: Well, I don't know that you will, but keep going.
>
> MR. HANLEY: Collect and remit is different than you have the responsibility to pay it. Okay. And the case law in Michigan on sales taxes is, yes, you can pass it through as a retailer, but you bear the legal incidence of the tax and are responsible for it even if you don't collect it.[2] That is the case with sales taxes.
>
> In this case, the City held them harmless and said, you only have to remit it to us to the extent that you collect it from others. [Exhibit A at pp. 20-22 (emphasis

[2] The relevant statute is the General Sales Tax Act, which provides in MCL 205.52(1): "Except as provided in section 2a, there is **levied upon and there shall be collected from all persons engaged in the business of making sales at retail**, by which ownership of tangible personal property is transferred for consideration, **an annual tax** for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act." [emphasis added]. *See* discussion *infra*.

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added).]

The foregoing exchange indicates that the Court believes that the "collect and remit" language means that the LBWL is the legal payer of the Franchise Fees. But it would be a grave error for the Court to reach that conclusion.

1. The Franchise Agreement Makes Clear That The LBWL Is Not "Primarily Liable" To Pay The Franchise Fees.

As an initial matter, in espousing her strong view that the LBWL is "primarily liable to pay this tax," Exhibit A at p. 21 ("Sure, it is"), Judge Gleicher focused only on the "remit" language to the apparent exclusion of the "collect" requirement. The "collect" language is critical, because it confirms that the LBWL does not have "primary" liability for the Franchise Agreement. *See, e.g.,* Merriam Webster Dictionary (defining the transitive verb "collect" as "**to gather or exact from a number of persons or sources**" (emphasis added) and giving the following example: to "collect taxes." Under the Franchise Agreement, the LBWL is obligated to "remit" only what it "collects." This alone is dispositive of the "legal incidence" issue.

Again, the General Sales Tax Act – which one panel member incorrectly used as an example of a "pass through" tax – provides that sales tax shall be "levied upon" and "collected from all persons engaged in the business of making sales at retail" (MCL 205.52(1)). Compare that statutory language with the Use Tax Act's imposition of use tax **on the end user** who buys goods or services from out of state: "There is levied upon and there shall be collected from **every person in this state** a specific tax, including both the local community stabilization share and the state share, for the privilege of using, storing, or consuming tangible personal property in this state at a total combined rate equal to 6% of the price of the property or services specified in section 3a or 3b. The tax levied under this act **applies to a person who acquires tangible personal property or services** that are subject to the tax levied under this act for any tax-exempt use who subsequently converts the tangible personal property or service to a taxable use, including an interim taxable use." MCL 205.93(1) (emphasis added).

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The Use Tax Act appropriately uses the same "collect and remit" language as the Franchise Agreement at issue here. For example, MCL 205.95b provides: "A seller of tangible personal property or services subject to the tax under this act has nexus in this state and shall register with the department and **collect and remit the tax levied under this act** if the seller meets either of the following conditions: (a) The seller's gross receipts from sales for storage, use, or consumption in this state to purchasers in this state exceed $100,000.00 in the previous calendar year . . ." [emphasis added.] The words "collect and remit" make sense in the Use Tax Act because the legal incidence of use tax falls upon the buyer, **NOT** the seller, who is a mere collection agent like the LBWL is in this case. The words "collect and remit" appear in the General Sales Tax Act in only one place, a section dealing with sales of advertising and promotional direct mail that may be delivered outside of Michigan:

> If the purchaser provides the seller with information indicating the jurisdictions to which the advertising and promotional direct mail is to be delivered to recipients, **the seller shall source the sale to the jurisdictions to which the advertising and promotional direct mail is to be delivered and shall collect and remit the applicable tax due.** [MCL 205.71a(1)(b) (emphasis added).]

Further, for the Court to conclude that the Franchise Fees are imposed on the LBWL, the Court would have to ignore the following undisputed evidence that supported the Circuit Court's conclusion that the Fees were imposed upon end-users in the City:

First, during the Franchise Agreement negotiations, the LBWL insisted that the Franchise Agreement be structured so that the end-users of LBWL's electric service had the legal responsibility to pay the Franchise Fees. *See* App Ex. 12 at p. 13 (November 15, 2016 LBWL Board meeting minutes) (stating that "[s]hould the Board choose to go forward with the Franchise Fee the **BWL would only be the collection agency for the City of E. Lansing**") (emphasis added).

Consistent with the LBWL's dictates, the Franchise Agreement that ultimately was executed has various provisions which make clear that the LBWL has no independent legal or contractual responsibility to pay the Franchise Fees, but rather is obliged only to collect the Fees on behalf of the

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City. Section 2 of the Franchise Agreement (App. Exh. 14) requires the LBWL to collect the Franchise Fees from its electric customers in the City and remit the Fees to the City:

> SECTION 2. FRANCHISE FEE. During the term of this franchise, or the operation of the electric system pursuant to this franchise, and to the extent allowable as a matter of law, the Grantee shall, upon acceptance of the City, **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 Grantee within the City, for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof. **Such fee will appear on the corresponding energy bills**.
>
> ***
>
> **The City shall at all times keep and save the Grantee harmless from and against all loss, costs, expense and claims associated with the collection and remittance of this franchise fee.**
>
> Either party, upon sixty (60) days written notice by the party may terminate this Ordinance granted franchise, franchise fee collection and remittance. However, **to the extent the Grantee is precluded from collecting such franchise fees remittance to City will cease**. [Emphasis added.]

Further, to the extent that there was any doubt about the LBWL's actual role here, Section 14 of the Franchise Agreement allows the LBWL to charge the City a fee for collecting and remitting the Franchise Fees. That section provides that the LBWL will receive "an administrative charge of ½ percent (0.5%) of collected franchise fees … ." *See* App. Ex. 14, p. 3.

On this issue, we ask the Court to consider the cogent ruling of Judge John Maurer of the Eaton County Circuit Court, who observed the following in invalidating the identical Franchise Fee in a separate class action against Delta Township:

> **The Township and the Board of Water and Light agreed in advance that the franchise fee would be charged directly to the Lansing Board of Water and Light customers when it agreed that such fees will appear on the corresponding energy bills**. In addition, the Board of Water and Light is not liable to pay the five dollar, or five percent – strike five dollar – five percent franchise fee if it isn't able to collect it from the residents.
>
> Finally, Section 12 of the same document states "publication and administrative costs." The Charter shall, the Charter Township shas – shall assume the cost of publication of this franchise, including an initial administration, administrative costs of $1,500 will be due to the grantee upon acceptance of this franchise for programmic (sic) impletat – implication, implementation – sorry – and consumer bill changes. Thereafter, administrative charge of one-half percent, point, or 0.5 percent of the

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collected franchise fees for quarterly billing will apply. That's on defense motion, page, exhibit A, page four.

The Township has to pay the Lansing Board of Water and Light $1,500 and an additional half percent to collect the franchise fees. The Township is asking this court to accept that the franchise fee is charged to the Board of Water and Light, not Township residents to compensate the board for the costs of the franchise. But that the Township then is going to pay the Lansing Board of Water and Light's administrations costs.

It's hard to imagine any other situation in which a fee is charged for the service or commodity rendered, but the seller of said service or commodity pays the buyer an administration fee to upset, to offset the cost of paying the bill. **Instead, this looks very much like a fee that is paid to the Township, from the Township to the Board of Water and Light for services of collecting a tax from its residents and remitting the money to the Township**. [App. Ex. 21 at pp. 37-38 (emphasis added)].

Like the agreement in Delta Township, the Franchise Agreement here has at least five provisions which confirm that the Franchise Fees are imposed on Plaintiff and other end-users of the LBWL's electric service:

1. The LBWL's obligation with respect to the Franchise Fees is only to "collect and remit" the Fees to the City [Franchise Agreement, Section 2];[3]

2. The City holds the LBWL harmless from any losses associated with the collection and remittance of the Franchise Fees [*Id.*];

3. The LBWL has no obligation to remit any Fees not collected from end-users [*Id.*];

[3] In this regard, there is a fundamental difference between a Franchise Agreement imposing upon the LBWL the obligation to "pay" the Franchise Fees to a municipality, and the obligation to "collect and remit" such Fees. Indeed, the LBWL has several Franchise Agreements with other municipalities which expressly require the LBWL to "pay" Franchise Fees instead of imposing the obligation to "collect and remit" from end-users that is found in the Franchise Agreement in this case. *See, e.g.*, LBWL Franchise Agreement with Lansing Township (Exhibit B hereto at p. 3) (requiring the LBWL to "pay" the Township a 5% Franchise Fee); LBWL Franchise Agreement with Delhi Township (Exhibit C hereto at p. 3) (requiring the LBWL to "pay" the Township a 3.5% Franchise Fee) and LBWL Franchise Agreement with Meridian Township (Exhibit D hereto at p. 5) (requiring the LBWL to "pay" to the Township a 5% Franchise Fee). Further, none of these other Franchise Agreements contain the "collect and remit" language, nor do any of these require the Franchise Fees to be set forth as a line item on the utility bills or allow the LBWL to recover a fee for collecting the Franchise Fees on behalf of the municipalities.

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4. The LBWL is required to include the Fees as a line item on its bills to end-users [*Id.*]; and

5. The City pays the LBWL a fee for collecting the Franchise Fees. [*Id.*, Section 14]

Thus, under the express terms of the Franchise Agreement, the Franchise Fees are **not** imposed on the LBWL. Instead, the Agreement appoints the LBWL as a mere collection agent which bears no responsibility to pay the Franchise Fees beyond the amount collected from its City customers. The Franchise Fees thus are imposed directly on the City's citizens who receive electric service from the LBWL.

2. Under Prevailing Law, The Legal Incidence Of The Franchise Fees Falls On The City's Inhabitants Who Purchase Their Electricity From The LBWL.

Why does this matter? Because the courts are legion in holding that where a third party is required to collect the challenged charges from end-users and remit the charges to the government, the legal incidence of the charges falls on the end-users who incur the charges. *See, e.g., U.S. v. Mississippi Tax Comm'n*, 421 U.S. 599, 608; 95 S. Ct. 1872; 44 L. Ed. 2d 404 (1975) ("where a state requires that its sales tax be passed on to the purchaser and collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser").

The U.S. Supreme Court has long recognized this basic principle of taxation. For example, the Court has held that a state tax statute that directs each vendor in the state to "add to the sales price and [to] collect from the purchaser the full amount of the tax imposed" is a statute that "imposes the legal incidence of the tax upon the purchaser" because the text of the statute indisputably provides that the tax "must be passed on to the purchaser." *First Agric. Nat'l Bank of Berkshire Cty v. State Tax Comm'n*, 392 U.S. 339, 347; 88 S.Ct. 2173; 20 L. Ed. 2d 1138 (1968) (citations omitted).

The Michigan courts have adopted the same principle. For example, in *Michigan Bell Telephone Co. v. Dep't of Treasury*, 229 Mich. App. 200; 581 N.W.2d 770 (1998), the Court recognized the Michigan's use tax is legally imposed on consumers, even though the applicable statute imposed upon retailers the burden to collect and remit the tax to the state. In reaching this result, the Court observed:

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> Contrary to the Department of Treasury's argument, however, § 7 suggests that there is no joint tax liability. Rather, § 7 specifically provides that the appropriate use taxpayer is the consumer. Indeed, the Supreme Court in *Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 527, 98 N.W.2d 753 (1959), recognized that, **although the seller is required to collect the use tax on behalf of the state, the ultimate burden of paying the tax is on the consumer or purchaser, which is the party exercising the privilege of use, storage, or consumption**. We believe that this is an important concept, because it represents one of the primary distinctions between the use tax and the sales tax, the legal incidence of which falls upon the seller only in the case of the sales tax. MCL 205.52; MSA 7.522. As the Court in *Lockwood, supra* at 527, explained:
>
> > As a practical proposition [the use tax and the sales tax] are assessed on different privileges, and the legal incidence of the tax falls in one case on the retailer and in the other on the user, storer or consumer. **The fact that the seller of the goods designed for use, storage or consumption in Michigan is required by the statute to collect on behalf of the State the amount due from the purchaser does not alter the situation. The use tax is not imposed on such seller, but, rather, on the party exercising the privilege of use, storage, or consumption, as the case may be. One may be charged with the duty of collecting a tax on behalf of government although the ultimate burden of such tax does not rest on him**. [*Michigan Bell*, 229 Mich. App. at 215-216 (emphasis added)].

There is a fundamental difference between (1) a situation where the government requires a service provider to collect a tax from its customers and remit it to the government and (2) a situation where the government imposes the tax on the service provider but allows the service provider to recoup the amount paid from its customers. On the one hand, the ability of the service provider that is legally obligated to pay the tax to the government to "pass-through" the economic incidence of the tax to its customers does not mean that the customers are the payers of the tax. On the other hand, however, where, as here, the service provider is only obligated to collect the taxes from its customers and remit them to the government, the customers bear the legal incidence of the tax. This has long been the law in Michigan. *See, e.g., Sims v. Firestone Tire & Rubber Co.*, 397 Mich. 469, 474, 245 N.W.2d 13 (1976) ("While retailers are considered to be the taxpayers, the law allows them to shift the economic burden of any tax levied to the shoulders of the consumers"); *Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 527, 98 N.W.2d 753 (1959) (recognizing that Michigan's use tax is imposed on ultimate

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purchasers and that the sellers' duty to collect the tax does not make the sellers primarily liable for the tax).

B. The Morgan Case Does Not Support A Finding That Plaintiff's Headlee Claims Are Barred By The One-Year Limitations Period Prescribed by MCL 600.308a.

Given the foregoing legal principles, it is clear that *Morgan v. City of Grand Rapids*, 267 Mich. App. 513; 705 N.W. 2d 387 does not authorize the Court to conclude that the Franchise Fees are legally imposed on the LBWL, or that Plaintiff's Headlee refund claims are barred by the Headlee statute of limitations.

Notably, the franchise fee in *Morgan* was "specifically permitted" by the federal Cable Communications Policy Act, 47 USC 521, et seq. *Morgan*, 267 Mich. App. at 514-515. The governing federal statute makes absolutely clear that the authorized franchise fee is imposed on cable providers and not end-users of cable services:

> **(a) Payment under terms of franchise.** Subject to the limitation of subsection (b**), any cable operator may be required under the terms of any franchise to pay a franchise fee**.
> **(b) Amount of fees per annum.** For any twelve-month period, the franchise fees **paid by a cable operator** with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services. For purposes of this section, the 12-month period shall be the 12-month period applicable under the franchise for accounting purposes. Nothing in this subsection shall prohibit a franchising authority and a cable operator from agreeing that franchise fees which lawfully could be collected for any such 12-month period shall be paid on a prepaid or deferred basis; except that the sum of the fees paid during the term of the franchise may not exceed the amount, including the time value of money, which would have lawfully been collected if such fees had been paid per annum. [47 USC 542(a) and (b) (emphasis added)].

Given these facts, the *Morgan* court correctly held that the cable companies were the parties that were legally obligated to pay the Franchise Fees, even though they ultimately passed through those charges to their customers. As the court noted, "when the tax obligation falls primarily on the retailer, 'retailers are considered to be the taxpayers. *Sims, supra* at 474. In this case, Comcast, as the retailer, paid the charge and merely passed the charge's burden onto plaintiff's shoulders." *Morgan*, 267 Mich. App. at 515.

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In concluding that the franchise fees in that case were imposed on the cable companies, *Morgan* makes clear that Plaintiff and the Class are the payers of the Franchise Fees imposed by the City here:

> 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**.** [267 Mich. App. at 516 (emphasis added)].

Here, under the Franchise Agreement, the City required the LBWL to include the Franchise Fees "**on the corresponding energy bills."** Franchise Agreement, Section 2. Thus, "inclusion of the charge on the bill" was a requirement of **the City**, as opposed to a unilateral act by the LBWL. In addition, in contrast to *Morgan*, the City's collection of the Franchise Fees here would not be a wrong against the LBWL because the City and the LBWL **expressly agreed** that the LBWL – as collection agent for the City -- would impose, collect and remit the Franchise Fees to the City.

In sum, 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, minus the LBWL's cut for serving as collection agent. Thus, *Morgan* is completely inapposite and should not inform the Court's resolution of any issue in this case.

C. The Accrual Rule Applied In *Morgan* Has Been Abrogated By The Michigan Supreme Court

Further, even if *Morgan* was correctly decided at the time, the "one and done" accrual rule applied by the Court in *Morgan* has been abrogated by the Supreme Court's decision in *Township of Fraser v. Haney*, 509 Mich. 18; 983 N.W.2d 309 (2022), which addressed the scope of the "continuing wrong" doctrine.

In *Fraser*, the Court held that a plaintiff's failure to timely challenge a violation of the law based

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upon the time it was first committed did not preclude that plaintiff from challenging subsequent violations of the law committed within the statutory period:

> Plaintiff has alleged a harm that has occurred every day on which defendants maintain hogs on their property. Plaintiff's action is timely under MCL 600.5813 because its complaint was initiated within six years of defendants' most recent offenses. The Court of Appeals erred by analyzing this case as a "continuing wrongs" case because plaintiff does not seek to reach back and remedy or impose monetary fines for violations that occurred outside the period of limitations. Rather, plaintiff's injunctive action seeks to remedy only present violations, which occurred within the six-year period of limitations. [*Fraser*, 509 Mich. at 21].

The Supreme Court noted that the proper accrual rule under such circumstances can be summarized as follows:

> a plaintiff's failure to timely sue on the first violation in a series does not grant a defendant immunity to keep committing wrongful acts of the same nature. **A plaintiff is free to bring a new action each time a defendant commits a new violation**. [*Id.* at 28-29 (emphasis added)]

Application of *Fraser* here precludes a finding that Plaintiff's Headlee Claims are barred by the one-year statute of limitations. It is undisputed that LBWL collects the Franchise Fees through its ongoing monthly bills to City inhabitants. Thus, each time the City imposed and the LBWL collected an unlawful Franchise Fee, the City committed a "new violation" of Headlee. As a result, *Fraser* dictates that where, as here, a defendant continues to periodically impose and collect an allegedly unlawful fee, a plaintiff is able to timely sue to recover all the fees it incurred in the statutory limitations period. Thus, to the extent that *Morgan* held that a plaintiff was forever barred from challenging an illegal tax if he or she did not sue within the statutory period following the initial imposition of the tax, the accrual rule applied by *Morgan* has been abrogated by *Fraser*.

III. THE TAXPAYER STANDING DOCTRINE IS INAPPLICABLE HERE.

At the oral argument, the Court's questioning of Plaintiff's counsel indicates that the Court may erroneously view this case as "taxpayer" case seeking relief on behalf of the "public." The following exchange occurred:

> JUDGE GLEICHER: Let me read you the footnote from Taxpayers versus

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> Wayne County, footnote 7, that the Court, this Court relied upon in Morgan. The pertinent part of that footnote says, accordingly; We note that we're a plaintiff's only basis for invoking a court's jurisdiction, is the plaintiff's status as a taxpayer seeking relief on behalf of the public, the right to bring suit expires one year after the alleged Headlee violation.
>
> MR. HANLEY: Right. And here's, with all due respect, Your Honor, where you're getting it wrong.
>
> JUDGE GLEICHER: Okay
>
> MR. HANLEY: You're viewing the word taxpayers as the person who pays the specific fee at issue. That's not what taxpayer standing is. Taxpayer standing is, I'm a taxpayer of the state, and therefore, I'm interested enough to bring a lawsuit for injunctive relief, not a refund. [Exhibit A at pp. 24-25].

TACT controls and clearly shows the Court's apparent misapprehension of the critical distinction between a "taxpayer" suing on behalf of the "public," and a person who has actually incurred and paid the charge that allegedly violates Headlee.

We start first with the *TACT* footnote Judge Gleicher referred to at oral argument, the full text of which provides:

> **In fact, the only type of Headlee claim that would accrue at the time the resolution is passed is a claim brought merely on behalf of the public, as opposed to a claim brought by a taxpayer who has been or is about to be subject to the tax.** . . . Nor, would such a plaintiff suffer damages, the requisite for a damage action. Thus, while that plaintiff has been granted standing by § 32 of the Headlee Amendment, 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**.**
>
> Accordingly, we note that **where a plaintiff's only basis for invoking a court's jurisdiction is the plaintiff's status as a taxpayer seeking relief on behalf of the public,** the right to bring suit expires one year after the alleged Headlee violation. [*TACT*, 450 Mich. at 124 n.7 (emphasis added).]

TACT expressly held that the statute of limitations on claims, like plaintiff's here, for refunds of allegedly unlawful taxes did not begin to run until the taxes were assessed. *TACT*, 450 Mich. at 123-24 ("In this case, the pertinent wrong is the imposition or actual assessment of the tax in an amount exceeding the constitutional limit"); *Id.* at 124 ("The claim for a refund could not have accrued at the time the ordinance was enacted because the wrong giving rise to the right to a refund had not yet occurred"); *Id.* ("Taxpayers may sue for a refund within one year of the date the tax was assessed").

Further, *TACT* held that the statute of limitations does not run only from the first time the tax

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is imposed, but rather provides for a one-year "look-back" and thus allows a Headlee Plaintiff to seek a refund for all unlawful taxes paid within one year of the filing of the suit:

> On the basis of the proposed class averments, which include not only individuals who have paid the tax but also "all persons who presently own real property in Wayne County" and who thus may be subject to the increased tax rate, there appear to be two actual controversies that might form the basis for declaratory relief. **The first is whether plaintiff may obtain a refund for taxes paid in the past.** The second is whether potential class members who are currently residents of Wayne County must pay the increased tax in the future.
>
> **For purposes of the first controversy, the statute of limitations would prevent the plaintiff from obtaining a judgment declaring that defendant must refund taxes paid more than one year before the date the suit was filed.** [*TACT*, 450 Mich. at 128-129 (emphasis added)]

See also Bolt v. City of Lansing, 238 Mich. App. 37, 54; 604 N.W.2d 745 (1999) ("*Bolt* II") (citing *TACT*, 450 Mich. at 125) ("***taxpayers may sue for a refund within one year of the date the tax was assessed***. Even if taxpayers cannot obtain refunds for past tax payments exceeding the constitutional limit because they did not dispute them within one year of the date the taxes were assessed, the constitutional right does not disappear because they retain the right to prevent future violations of their rights.") (emphasis added).

Such an accrual rule is consistent with the Supreme Court's recent decision in *Fraser v. Haney*, discussed above in Section II.C. Thus, each time the City imposed and collected an unlawful Franchise Fee, it committed a "new violation" of Headlee.

In sum, under *TACT* and its progeny, a claim "brought by a taxpayer who has been or is about to be subject to a tax" is (1) different than a "taxpayer" claim brought merely on behalf of the "public," and (2) is subject to a one-year statute that allows the plaintiff to recover all unlawful taxes paid within one year of the filing of the Headlee case. Plaintiff and the Class have been subject to – and indeed have paid – the Franchise Fees. Plaintiff and the Class are not suing on behalf of the general "public." Accordingly, the Headlee claims are timely to the extent they challenge Franchise Fees imposed on or after April 2, 2019.

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CONCLUSION

For all of the foregoing reasons and the reasons set forth in Plaintiff's Brief on Appeal, Plaintiff requests that the Court affirm the Circuit Court's decision granting partial summary disposition to Plaintiff and remand the case for trial on Plaintiff's Foote Act claims.

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Dated: March 31, 2023

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2023, I electronically served the foregoing pleadings on all counsel of record using the court's electronic filing system.

/s/ Kim Plets

4894-9624-4570, v. 1

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EXHIBIT A

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In The Matter Of:

Heos v.

City of East Lansing

Court of Appeals Hearing

March 14, 2023



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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

JAMES HEOS, individually
and as representative of
a class of similarly situated
persons and entities,
Plaintiff,

vs. Case No. 20-199-CZ
Hon. Wanda Stokes

CITY OF EAST LANSING,
Defendant.

Court of Appeals - Oral Argument
Taken on March 14, 2023
Commencing at or about 10:00 a.m.
Transcribed by Carolyn Grittini, CSR-3381

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JUDGE GLEICHER: Next number 4 on the docket is docket number 361105 James Heos versus City of East Lansing.

MS. GENOVICH: Good morning, Your Honros. Laura Genovich on behalf of the Appellant, the City of East Lansing. It's a pleasure to be here today, and I would request three minutes for rebuttal, please.

JUDGE GLEICHER: I will keep your time of one half hour, but you'll have to keep your rebuttal time.

MS. GENOVICH: I don't intend to take that much time, Your Honros, although there are, as the court knows, quite a few nuances and issues in this case, but I want to focus my time on the most important issues here.

And I think the most important issue to start with is timeliness. And the City's position is that Plaintiff's Headlee Amendment claim, Count I, and Counts II and III by analogy, are barred by the statute of limitations for Headlee claims under MCL 600.308(A).

And that statute provides that an action brought under Headlee shall not -- a taxpayer shall not bring or maintain an action unless the action is commenced within one year after the cause of action

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accrued. So, of course, what does that mean? Well, this court answered what that means for franchise fee Headlee cases in Morgan versus City of Grand Rapids, which is a published case.

JUDGE GLEICHER: I think you're probably right about Morgan, and I'm waiting to hear opposing counsel tell me why you and I are both wrong about Morgan. But let me ask you a separate question. Understanding that we're bound, if Morgan is correctly decided, regardless if it's correctly decided, if it's controlling in this case, we are bound by it. Do you think that in light of Haney, the more recently decided case from the Michigan Supreme Court, regarding what I'll call a semi-continuing wrong theory, that Morgan is correct, correctly decided today? Do you know which case I'm talking about?

MS. GENOVICH: Unfortunately, Your Honor, I'm not terribly familiar with that case, and I apologize for that. But I still think that Morgan, you couldn't find a case more directly on point probably for this than Morgan. And I think what's important here, and I'm certainly familiar with the idea of continuing violations, the distinction that the court in Morgan made, especially comparing it to taxpayer Allied constitutional -- TACT, right, for

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lack of a better way, the TACT versus Wayne County case, on which Plaintiff relies, is saying, this is not a case where the Plaintiff is directly paying the City for this. And so that's where Morgan said, this is a case when you're not the direct person paying it, when you're paying it to the utility company, who then pursuant to a franchise agreement turns it over; the wrong is when the municipality first imposes it on the utility, and that's the date that this court relied on in Morgan, and that's the date that bars Plaintiff's claims here. And I think Morgan remains good law and, again, could not be more on point.

The distinctions that Plaintiff attempts to make, frankly, I don't believe are correct. Plaintiff argues that he and other members of the class are more like the plaintiffs in the TACT case, where you had an ordinance increasing the amount of the real estate transfer tax, and then ten years later, somebody was involved in a real estate transaction and paid that transfer tax to the municipality and then challenged it.

Plaintiff wants to argue that they are most situated like that plaintiff, rather than situated like the plaintiff in Morgan, which again, is exactly on point. The only difference between this case and

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Morgan is the type of utility at issue, cable versus electric. Otherwise, it was a 5 percent franchise fee that the customers paid to the utility company, the utility company had an agreement with the city to remit it over to the city in that case.

So we do stand on Morgan, for Count I, as well as for the analogous Counts II and III, which also raise the exact same issue. And that sort of turns to what I call my second issue, which is that you've got these claims allegedly brought under MCL 141.91, which is a statute effectively saying what Headlee says, which is that you can't have these taxes unless they existed before, obviously, unless they've been approved by the voters.

And I wanted to draw the a Court's attention to two recent unpublished cases from this Court, one from last week and one from January. Obviously, not in our briefing because of how new they are. And I believe Plaintiff is aware of them because Plaintiffs co-counsel, Mr. Hanley, was counsel in both of these cases. They are Headlee cases, and in both cases this court held in favor of the municipality.

The first is Midwest Valve and Fitting Co, versus City of Detroit, which is Court of Appeals case number 358868, and that was dated March 9th, 2023.

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And the second is Greenfield versus City of Farmington Hills, Court of Appeals case 357579. Both very similar in that they brought up these 141.91 claims. And what's important about them is that the Court -- well, there's a few different things that are important about these cases.

One is that they recognize that assumpsit is not a cause of cause of action, which I don't think there should be any dispute about that, there's plenty of case law on that, that assumpsit has been subsumed into unjust enrichment. So those counts frankly should have been dismissed. And these recent unpublished cases further stand for that proposition.

As well, the Court questioned whether you could even bring -- and this was in the Greenfield case, the case from January -- whether there even is a private cause of action under MCL 141.91. Even if you call it unjust enrichment, what really Plaintiff is saying is not making really an independent unjust enrichment argument, but using that as a tool to argue a private cause of action under MCL 141.91, where the statute itself and no other statute or case law creates a private cause of action for that. And this Court found ultimately in that case there was simply no merit to the argument anyway because it clearly

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wasn't a tax, it was a regulatory fee, but the Court said, nothing we're seeing here should be construed to mean that we think there even is a claim under MCL 141.91.

And I think the Court had it right on that. We don't imply private causes of actions against local governments. And really all a claim under MCL 141.91 is, is a Headlee claim.

In the more recent case from last week that I mentioned, Midwest Valve, both were brought but the analysis was the same, it wasn't even in separate paragraphs, it just said, okay, we'll look at Headlee/ 141.90.

JUDGE GLEICHER: In other words, it's not unjust unless it's a Headlee violation?

MS. GENOVICH: That's exactly right.

JUDGE GLEICHER: Headlee is the catalyst for the entirety of the non-Foote Act related causes of action in this case?

MS. GENOVICH: Exactly correct. In order to state that claim or make that claim, you have to prove a Headlee violation. But the Headlee Amendment is time barred, and therefore, so, too, are the counts brought as (inaudible) claims under Counts II and III. So, Your Honor, all of those, frankly, should have

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been dismissed by the trial court as time barred.

If the Court were to get to the substance of the Headlee Amendment claim or violation of 141.91, then the City stands in a position that it was not an unlawful tax.

We make a couple of arguments in that regard that I think are thoroughly briefed, but just to hit the highlights, essentially, first -- and I think the deposition testimony, particularly of former Mayor Meadows, speaks to this. This was viewed akin to a lease; where if the city is going to allow someone to use public property, that person pays an amount for that. And let's be frank. If we have, for example, leasing it to a commercial business, and they then have subtenants or customers, you know that lease price is getting passed on to the customers. That's how business is done. And it's no different when you have utility company paying to use the rights of way. It's going to pass that cost on to its customers one way or another.

But what the deposition testimony of Mr. Meadows and city manager at the time, George Lahanas shows, is that the City wanted to be transparent about it; apparently, to its own fault now, in that you have Plaintiff arguing that there would be no problem if we

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had just not said that it was going to be passed on to the customers. Of course, it's always going to be passed on to the customers. Ann that is what the Lansing Board of Water and Light did here.

If we're talking about it as a lease of property, I don't think you even get to a Headlee Amendment analysis. Right. Where somebody's paying to use the rights of way, that cost is passed on to their customers. There's not a Headlee trigger there. But if you do get to the factors of a Headlee Amendment claim, then, again, as I think we've fairly thoroughly briefed, it's our position that the franchise fee does serve a regulatory purpose, and this is show in the language of the franchise ordinance that says it's for the use and maintenance of the use of rights of way and to offset the costs. The City spends a lot of money maintaining these rights of way in a manner that allows utilities, such as Board of Water and Light, to run their electric lines through there. Everything from tree trimming to snow removal, making sure that that electricity can be provided. When those services are not provided, it's the customers of Board and Water and Light who are detrimentally impacted.

And in the record, former Mayor Meadows

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testified that when he was out campaigning, he was hearing from people that when the trees weren't getting trimmed, there was a big ice storm back, I think it was 2014, that people's electricity was interrupted, and that was a big deal to people. And that goes to show the importance of maintaining the rights of way. If we're not doing that, you're going to have problems with your electric service.

It's not generating revenue, and this Court is well aware that a fee can raise money without being designed to raise revenue. It's what it ultimately serves, which is the regulatory purpose of maintaining those rights of way. And that amount, the record I think very clearly shows was proportionate in this case. It doesn't have to be a dollar for dollar match, but frankly, here, the amount was about 1.4 to 1.9 million dollars ranging, and there's a spreadsheet in the record that shows that range, in terms of what the City spent just on the rights of way that were used to facilitate the Board of Water and Light providing electric service, and received about 1.4 million dollars from the franchise fee. So that amount is very clearly proportionate. And again, there's a direct benefit to the customers of Board and Water and Light from something the City charge that

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franchise fee to Board of Water and Light and then maintaining the rights of way. So the argument that there's no benefit, first, a fee can generally benefit the public and particularly benefit certain people under our case law and still be lawful under Headlee.

I would also point out, and we note this in our brief as well, that plaintiffs have talked about some cases involving townships. Like Stephens versus Delta Township, which never got a decision out of this Court because they settled, but it was a trial court decision in favor of plaintiffs. This Court granted leave to appeal, apparently desiring to review that decision, and then it settled.

There isn't a case I'm aware of where an electric franchise fee like this was struck down where there's been a township involved, but even if there were, I think it's different when you're talking about a city. And that's because cities, unlike townships, have a duty and authority to maintain the roads and right of ways. But townships, that's done by the county road commission. So if you're a township saying, we have to charge this franchise fee so that we can maintain the rights of way, then you might be skeptical of that, because that's not their job. But for a city, it is their job and they do have to do.

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And that's what makes this case different from the Circuit Court opinion in Delta Township and Stephens.

And the third factor of the Headlee Amendment analysis under Bolt is voluntariness. First, this is not -- of course, Bolt's three-step process, but you don't even have to meet all three. And an example of that is the Midwest Valve opinion from last week, where this Court found that the fees in that case were not voluntary, it was permit fees to operate, they said they weren't voluntary, and it still did not violate Headlee. Because it was regulatory and proportionate, those factors outweighed the voluntariness factor.

So even if the Court were to find that electric franchise fees are not voluntary in this case, that does not mean that Plaintiffs win. You can still find that it does not violate the Headlee Amendment, it's not an unlawful tax. However, we would submit that they are voluntary. Much as the courts have found that sewer and water fees are voluntary, because that's a user, you do control the amount of electricity that you use. You do have some say in what your electric bill is. As well, there's no doubt that alternative energy, such as solar panels on residential buildings are becoming more and more

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popular. So to say now that you are compelled to have electricity in the city, I don't think is well founded. So it is voluntary, there is an element of voluntariness over how much electricity customers use. So under the factors in Bolt versus Lansing for a Headlee Amendment, we believe the trial court erred in granting Summary Disposition to Plaintiffs.

With respect to the Foote Act, again, quite a novel issue doesn't come before the Court every day. Plaintiff is not a utility. Plaintiff is a resident of East Lansing and a customer of the Board and Water and Light. Plaintiff does not have standing to bring a claim under the Foote Act, which was from the early 1900's to protect utilities who happened to provide electric service within a very narrow band of time, like 1905 to 1908. There's no case law, no statute, nothing that gives an individual standing to bring a private cause of action under the Foote Act. If anyone were to bring a Foote Act claim, it would have to the Lansing Board of Water and Light, but they are not here and they have not brought such a claim.

Plaintiff argues about giving utilities a property right. It does not give Plaintiffs a property right, and they do not have standing to assert the property right of a third party.

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Further, the record does not establish that the Board of Water and Light even had a Foote Act franchise. The City of East Lansing was established in the summer of 1907. There's nothing in the record showing that the Board of Water and Light served them with electricity during that narrow period of the end of 1907 into 1908. There's some speculation and communications, but certainly nothing defining that or establishing that in this record.

So Your Honor, those are the major points that I wanted to cover today. I'm happy to answer any questions the court has, but I think, frankly, the trial court erred in not dismissing this based on it being untimely, and even if you reach the merits, the City should prevail.

JUDGE GLEICHER: Thank you.

JUDGE MALDONADO: What services were added with the fees that were paid?

MS. GENOVICH: What services were added between the City and the Board of Water and Light?

JUDGE MALDONADO: You said the utility had to make -- had to take care of the area, the cutting of the trees, the clearing of the debris and that kind of thing. Prior to the franchise fee, post-franchise fee, what services were added with that additional

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revenue?

MS. GENOVICH: Sure. I'm not sure the record goes into detail on what services the Board of Water and Light was handling versus the City, I know in Mark Meadows' deposition, he talked about complaints about the Board of Water and Light not adequately maintaining it, so the City did have to step up to do more of that. As well, in that agreement, there was additional consideration in that Board of Water and Light do get exclusive service territory. But I'm not sure it's essential that there be new services provided, so long as the public -- not the public so much, but the customers are getting the benefit. And they are. Before that, or I should say without that, the City would have to use other general fund money to handle the right of way maintenance. So rather than using that general fund money for other public purposes, it had to devote it to the rights of way. By having now this franchise fee cover maintaining the rights of way, it frees up other general fund money to take care of other things like I'm sure the retirement pension issues that opposing counsel is going to stand up here and discuss.

JUDGE MALDONADO: So initially, the utility declined --

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MS. GENOVICH: Correct.

JUDGE MALDONADO: -- to engage in this, and then they changed their minds. Why did they change their minds?

MS. GENOVICH: I think in part because they did get exclusive service territory as part of that negotiation.

JUDGE MALDONADO: I see that they're also getting what, a .5 percent fee for collecting this fee?

MS. GENOVICH: I believe there is some, I'm not sure of the amount, but there is some administration fee there, I believe.

JUDGE MALDONADO: And so would that -- are their balance books better for collecting this fee, worse or is it exactly the same?

MS. GENOVICH: I can't speak to the Board of Water and Light, because Plaintiff didn't name them as a party, so I don't have access to what their books are, and I don't think Plaintiff has challenged necessarily anything the Board of Water and Light is keeping.

JUDGE MALDONADO: So if they're collecting a percentage of this, does that help it fall into tax or no?

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MS. GENOVICH: Well, it doesn't fall into a tax because it is regulatory. So I'm not sure that it really is dispositive of the question one way or the other if the Board of Water and Light -- we know, our utility bills have all kinds of administrative fees and things like that tacked on, and this is one more in the litany of items that the Board of Water and Light is charging for. But ultimately, it's what purpose it serves for the City, which is maintaining the rights of way, which is necessary for Board of Water and Light to provide the service and directly benefits the customers who are the plaintiffs in this case.

JUDGE MALDONADO: Thank you.

MS. GENOVICH: Thank you.

MR. HANLEY: Good morning. Because it got raised early, I'll bring it up early, but it would be a grave mistake to decide that Morgan controls the outcome of the statute of limitations. But before we get to that, I want to discuss an overarching issue that Judge Maldonado just got into a little bit.

The defining issue of this case, because it resolves a lot of the other issues, is, who bears the legal incidence of this fee. If it's the residents --

JUDGE GLEICHER: I know that's what you

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argue, and I think for the purposes of this argument, we're willing, or at least I'm willing to accept that the payers, like your client, bear the legal incidence. But I'm not sure that answers any of the questions that control the outcome. Could you put your appearance on the record?

MR. HANLEY: I'm sorry. Greg Hanley on behalf of the Plaintiff and the Certified Class.

JUDGE GLEICHER: Thanks.

MR. HANLEY: Here's why it answers it, Your Honor. Is that under Morgan, we'll start with the statute of limitations, because that was raised, the reason Morgan lost on the statute of limitations is because they weren't deemed to be the person who was responsible for paying the fee. They were therefore required to rely upon taxpayer standing, and that's different than the person who actually paid the tax, it's just anybody in the public had standing under Headlee to bring a Headlee claim challenging the tax.

JUDGE GLEICHER: How is this not a taxpayer standing case?

MR. HANLEY: Because we're not suing as members of the public, we're suing as people who were subject to and actually paid the subject tax. That's the defining characteristic. The TACT case, the TACT

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case, Your Honor, expressly says, the only claim that would arise, the only type of Headlee claim that would accrue at the time the resolution is passed is a claim brought merely on behalf of the public, as opposed to claim brought by a taxpayer who has been or is about to be subject to the tax. So where a plaintiff's only basis for invoking the court's jurisdiction is the plaintiff's status as a taxpayer seeking relief on behalf of the public, the right to bring the suit expires one year after the resolution is passed. That's why the determination that the tax is imposed on the users is what makes Morgan inapplicable. Because Morgan, there was an express finding that it was imposed on the cable companies, and therefore, you had to sue within one year of the resolution. There's no court ever, and I do a lot of Headlee Amendment cases, who have said that a person who actually suffered a harm must sue from the resolution. Otherwise, a municipality --

JUDGE GLEICHER: I have to say, you haven't really explained it to me in a way that leads me to conclude that you're describing something that's a distinction without a difference. The plaintiff in Morgan represented a proposed class of cable subscribers, and she paid, under protest, the

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franchise fee. How is that different from this case?

MR. HANLEY: Because, as the court noted, when the tax obligation falls primarily on the retailers, retailers are considered to be the taxpayers, and they cite the Sims case. There's a whole body of law that looks at -- for example, in Michigan --

JUDGE GLEICHER: But then the sentence goes on to say, the seller passes on the sales tax obligation to the buyer.

MR. HANLEY: Right.

JUDGE GLEICHER: But remains primarily liable to pay the tax.

MR. HANLEY: Right.

JUDGE GLEICHER: How is that different from this case?

MR. HANLEY: The Board of Water and Light is not primarily liable to pay this tax.

JUDGE GLEICHER: Sure, it is.

MR. HANLEY: No, no, no, Your Honor. The franchise agreement was carefully crafted so that the LBWL didn't have that responsibility. For example, they said, we will not sign this unless we are a mere collection agency, because they were worried about Headlee. And then when you get into the franchise fee

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agreement, it says that they are to collect and remit, and that the fee --

JUDGE GLEICHER: Remit is what -- they are the ones paying the tax.

MR. HANLEY: Collect.

JUDGE GLEICHER: Like a sales tax, they collect the sales tax like any retailer.

MR. HANLEY: No. They are not. That is a major difference, Your Honor. And I'm not trying to be testy with you.

JUDGE GLEICHER: No, no, no. It's fine.

MR. HANLEY: This is the crux of the case, and I'm going to stand here until I satisfy you, hopefully --

JUDGE GLEICHER: Well, I don't know that you will, but keep going.

MR. HANLEY: Collect and remit is different than you have the responsibility to pay it. Okay. And the case law in Michigan on sales taxes is, yes, you can pass it through as a retailer, but you bear the legal incidence of the tax and are responsible for it even if you don't collect it. That is the case with sales taxes.

In this case, the City held them harmless and said, you only have to remit it to us to the

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extent that you collect it from the others.

JUDGE GLEICHER: What happens if your client says, I'm not paying the 5 percent of my bill, I'm just not paying it?

MR. HANLEY: Then the Board of Water and Light would shut their electric off.

JUDGE GLEICHER: Right. Exactly. So it seems to me that the Board of Water and Light is the one on whom the burden falls.

MR. HANLEY: No, it's not. As a matter of fact, as Judge Maldonado pointed out, they get a collection fee to collect this from others. The whole deal, Your Honor, was structured to avoid what you are now saying is the reality. They had no responsibility other than to collect it and remit it if they collect it. Instead of doing this, this is the most creative method of municipal finance I've ever seen, where you deputize a public utility providing an essential service, to collect a tax that you couldn't pose directly. If they had just sent out a hundred dollar bill -- a bill for a hundred dollars, to each resident of the City of East Lansing and said, this is your contribution to maintaining our public right of ways, there's no question that's a tax. So by deputizing another entity to collect it through a contract, it's

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the same result.

It's the tax is imposed on the end user, it's collected -- in Michigan, for example, the user tax is imposed on the end user and not the retailer. And the retailer may have an obligation to try and collect it, but the ultimate responsibility for that tax is on and only on the end user.

JUDGE GLEICHER: Let me read you the footnote from Taxpayers versus Wayne County, footnote 7, that the Court, this Court relied on in Morgan. The pertinent part of that footnote says, accordingly: We note that we're a plaintiff's only basis for invoking a court's jurisdiction, is the plaintiff's status as a taxpayer seeking relief on behalf of the public, the right to bring suit expires one year after the alleged Headlee violation.

MR. HANLEY: Right. And here's, with all due respect, Your Honor, where you're getting it wrong.

JUDGE GLEICHER: Okay.

MR. HANLEY: You're viewing the word taxpayer as the person who pays the specific fee at issue. That's not what taxpayer standing is. Taxpayer standing is, I'm a taxpayer of the state, and therefore, I'm interested enough to bring a lawsuit

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for injunctive declaratory relief, not a refund.

JUDGE GLEICHER: So what is the basis for the Court's jurisdiction as to your client since they're not suing the Board of Water and Light, they're suing the City. They're suing as taxpayers. They're not suing as consumers of the Board of Water and Light; otherwise, they'd be suing the Board of Water and Light.

MR. HANLEY: They're suing as taxpayers but not taxpayers on behalf of the public. That's the critical distinction. I can't stress it enough.

JUDGE GLEICHER: So a class action of a defined class? And I haven't read the motion for class action certification if one was filed, but I would presume they were filing it as representatives of the class of taxpayers in the --

MR. HANLEY: No.

JUDGE GLEICHER: How is it different?

MR. HANLEY: The class of customers of the Board of Water and Light that were subject to the franchise fee. Taxpayer standing is a broader concept and a more limited standing because you haven't actually paid the tax. Tax says, again, the only type of Headlee claim that would accrue at the time the resolution is passed is a claim brought merely on

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behalf of the public, as opposed to a claim brought by a taxpayer who has been or is about to be subject to the tax. Okay. So when they're talking about taxpayer who has been subject to the tax, that's different than a general subject of taxpayer standing, which the Court may be familiar with.

And in Bolt, when the Bolt case got remanded, they said taxpayers may sue for a refund within one year of the date the tax was assessed. Otherwise, this passive blatant tax, that doesn't have voter approval, make it past the one-year anniversary, and you can impose that forever. No. What the cases say, TACT -- Bolt versus City of Lansing, which we call Bolt 2, which was after the remand, Brigg's Tax Service -- now, Judge Mauer in the Delta Township case, exact same case, said, you have the one-year lookback under Headlee. In other words, they could be imposing a tax and somebody says wait, this is wrong, which is kind of like what we did. They started in 2017 and we sued in 2020. What the cases say, when you understand what taxpayer means in the context, is that yeah, you don't get to go back all the way because of the resolution, but you get to go back one year. That's what the statute of limitations that the legislature has imposed. Otherwise, people who are

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actually injured by paying a fee have no remedy if they don't sue one within year of the enactment of the resolution.

Again, Morgan specifically held that those people did not bear the legal incidence of the tax, and therefore, they were relegated into the big group of just normal taxpayers. But if in that case the government had required the cable company to do what's being done here, collect and remit without any kind of liability, no liability whatsoever, and by the way, you even get a collection fee for doing it, that's a remarkably different set of facts than were at issue in Morgan, and that's what brings us into the law that says you get one year from the date of the assessment or the date of the payment. And that's what Bolt 2 says, that's what TACT says and that's what Brigg's says. And as Judge Mauer said, found exactly the same in this case and our judge found.

So once you reach the point, and this is a factual finding made by the judge that was based upon undisputed facts, that this is a tax imposed on the end users, albeit collected by a third party, then all of the Bolt factors are clearly satisfied, because they're raising revenue; they aren't allowed to impose -- and this is where the Foote Act comes in.

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Whether or not we have private rights of action under Foote, the Foote Act prevents them from charging a franchise fee to the Board of Water and Light, because the Board of Water and Light was operating in East Lansing during the period of time that the Foote Act was in place. Then in 1908, they amended the constitution to take that right away, but then in 1914, the Supreme Court held, if you are operating as of 1908, you had a permanent state granted franchise that couldn't be interfered with by local municipalities.

So they collect this money. They were maintaining -- and this goes to Judge Maldonado's question -- they were maintaining these right of ways all along, right, but now they had other pressing needs. And what the Jackson case says is when you're replacing general fund revenue with a new revenue source, that's an indicia of a tax, which this was. The franchise fee, to the extent that they're using it for right of ways -- they're not. They've told residents from the beginning that it's being used to fund pensions, but let's assume it's for the right of ways. It's covering virtually every expense of their DPW. So are we going to say that all that DPW does is maintain the right of ways that are used by the Board

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of Water and Light? And one other fact. Where is the attempt to justify the cost, which is the main thing of proportionality under Bolt, where they just picked 5 percent?

JUDGE GLEICHER: Remind me, what state -- was discovery complete?

MR. HANLEY: Yes.

JUDGE GLEICHER: That's what I thought.

MR. HANLEY: Yeah, it was complete. So if you conclude, which I think you have to, that the incidence of this fee or tax, whatever the label we end up putting on it, is on the end users, the statute of limitations argument goes away, all of the Headlee factors are satisfied, because --

JUDGE GLEICHER: I want to ask you about that. All the cases that you are relying on are federal cases, and they have to do with whether the legal incidence fell on a federal instrumentality, and those cases found that if the burden fell on the federal instrumentality, then it would be impermissible. I don't see anywhere where it says that when the legal incidence of extraction of money falls on a consumer, it creates a question of fact as to whether the extraction was a tax on a consumer.

MR. HANLEY: Well, I think -- I appreciate

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the question. The reason this comes up in the federal cases a lot is because the federal government is immune from state taxation. So when there's a tax that impacts the federal government, they have to look at, is it the federal government that bears the legal incidence, or is it some upstream person. And so the cases, the U.S. versus Mississippi Tax Commission and the First Agriculture Natural Bank case, both deal with looking at where that happens. And if it was imposed on the federal government, then it's invalid, and if it was imposed on somebody upstream, then it was fine, because it was just passed on. So the analysis, although in a different context, is equally applicable here.

JUDGE GLEICHER: I just don't see that. I don't see where it creates a tax. I just find that they're totally different and not on point with our situation.

MR. HANLEY: All right. They are indicative of who bears the legal incidence, which is what Bolt and the Headlee Amendment is all about. And if you can just deputize a third party to collect a tax for you, then there's no more clear evasion of Headlee's limitations. I mean, the whole underlying theory of the Bolt case and Headlee is, disguise

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taxes. There's a limit that people can have, that communities can have in their income taxes, and what we're doing in Bolt and its progeny is police that so that municipalities don't engage in chicanery or machinations in order to evade those limitations.

That's exactly what has been done here, is that they have found a creative way to supplement their revenue stream. This is a revenue stream that is new, that's a million and-a-half a year, that was never put to a vote, and which you have the Board of Water and Light saying, there's no way we're doing this unless you indemnify us, unless we're a collection agency and you put all of these protections in your franchise agreement. So I don't understand why it can't end up the same place as if they had billed them directly. They're just using an intermediary to end up in the same place.

JUDGE GLEICHER: Except that they could bill directly a user fee.

MR. HANLEY: No, they couldn't.

JUDGE GLEICHER: Well, we know that they can charge, a municipality can charge a user fee. If a municipality has a zoo, it can charge a user fee.

MR. HANLEY: Sure. But what are they using here? They're not using anything.

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JUDGE GLEICHER: But to say in a sweeping way that the municipality can't charge for something it provides -- let's say the municipality says, we are going to charge you X amount of dollars for every foot of land that we maintain in order to keep your electricity flowing, that we cut trees for, that we shovel snow for, whatever we do. They could pass that in the form of a user fee on to the direct user of the electricity, could they not?

MR. HANLEY: If it met the Bolt factors, it was done in a proportional way and it was for an actual service. There's no question you can have user fees, I'm not here to say you can't have user fees. But what I'm saying is here, there's nothing more quintessentially public, a public benefit, than maintaining your streets and roads, right? And in this case, only the people who get their electricity from the Board of Water and Light have to pay this.

JUDGE GLEICHER: Well, can they charge a user fee for maintaining the streets and roads? Can they charge that fee directly to the consumer, to the homeowner, let's say?

MR. HANLEY: I believe that that would be a whole different analysis than what's going on in this case, because you would have to look at all the --

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whether people are getting a direct benefit. You would have to look at what they're paying -- are they collecting enough to pay for it, or are they using it for other things. In this case, the Department of Public Works does a bunch of other stuff than maintain the wires or whatever of the -- and this fee covers virtually the entire budget of the DPW that's not covered by other sources. So you have to go through the analysis. But with all due respect, I think that the Court is getting hung up on the threshold issue of whether this is imposed on the end users, and if so, do we even engage in the analysis. And I think that the need to engage in that analysis is more important in a case like this where there has been a machination to avoid what they couldn't do directly. They just couldn't do it directly. Because this is a public type of benefit that's only being -- that's being provided to everybody in the community, that's only being funded by part of the community, and that has really been diverted -- before this case was filed, Mark Meadows, the mayor, was telling residents in writing that we're using this to pay -- to pre-fund pensions. That's not a user fee, and it's not a regulatory fee, and the way they've done it makes it an unlawful tax. And I would hope the court would

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consider that. Thank you.

JUDGE GLEICHER: Thank you.

MS. GENOVICH: Thank, Your Honros. On rebuttal, I will be brief.

Judge Gleicher, you have Morgan exactly right. The plaintiff in Morgan was not a random bystander who decided as a taxpayer she wanted to challenge this. She was paying her Comcast bill and she was paying this franchise fee on her Comcast bill. She was not paying it directly to the municipality. It's exactly the same facts that we have here. As Your Honor pointed out, if plaintiff decided not to pay the 5 percent administrative fee to Board of Water and Light, there's nothing the City could do about that. We could not go sue him to collect it. The Board of Water and Light would be the only one with any remedy, and as Plaintiff said, they probably would turn off his electricity.

Plaintiff's counsel said that they wouldn't have a remedy. That's not correct at all. There was a one-year statute of limitations. This was imposed in 2017, they started paying it in 2017. They had a year to file it. The fact that they waited three years does not mean they don't have a remedy, it means they filed late. And the Court has already -- the

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Supreme Court has already upheld that one year statute of limitations in the taxpayers versus Wayne County case. And I think the reasoning is important. That one-year statute of limitation on Headlee claims is, quote, "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." End quote.

So here, where this franchise fee is 1.4 million dollars a year, now it's three years later, you have tripled that that you have at issue. That's why the Supreme Court said a one-year statute of limitations on a Headlee claim is appropriate.

I think, Judge Gleicher, you're also correct that the City to could do a user fee, and you would do a Bolt analysis, but there's no question that a user fee is lawful, and when we do the Bolt analysis here, for the reasons I discussed earlier, it is not an unlawful tax.

I though I heard Mr. Hanley say that there had been some factual finding at the trial court, of course, these were cross motioned for Summary Disposition, so there were no fact findings.

With respect to the Foote Act, if Mr.

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Hanley, if you are right that the Foote Act bars the franchise fee, which we don't believe is the case, then the Board of Water and Light would be the one who would need to file that lawsuit to assert its property rights and not Plaintiffs.

Judge O'Brien, I think you're right as well, that we don't need to look to federal case law. These are state claims. This is a state constitutional amendment, state statutes at issue and we have binding state case law on point. We don't need to look at different standards in federal court.

And finally, despite the argument today, the City is using this money for the rights of way. That's amply supported by the record. It's not every expense of the Department of Public Works. There's a very thoughtful breakdown of that in the record of our appendix 0059 to 0063 that explains how that is done. The fact that a local politician described it in broad terms to a constituent does not change the fact that the City, because of this, was able to use these funds to improve the right of way, to maintain the right of way so that Plaintiffs, as customers, receive a direct benefit. That frees up other general fund money that the City would have to use but for this to do things like pay its pension deficit. Thank you, Your Honros.

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JUDGE GLEICHER: Thank you. Case is submitted.

(proceedings concluded).

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CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

I, CAROLYN GRITTINI, certify that this proceeding was transcribed by me on the date hereinbefore set forth; that the foregoing proceeding was recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to, either party nor interested in the event of this cause.



CAROLYN GRITTINI, CSR-3381
Notary Public,
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26:20
2023 (1)
6:25

3

357579 (1)
7:2
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361105 (1)
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4 (1)
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5 (5)
6:2;17:9;23:3;29:4;
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EXHIBIT B

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ORDINANCE NO. 40-A

AN ORDINANCE GRANTING TO THE LANSING BOARD OF WATER AND LIGHT, A MUNICIPAL UTILITY OPERATING UNDER THE LAWS OF THE STATE OF MICHIGAN, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, POWER AND AUTHORITY TO CONSTRUCT, SET, STRING, LAY, OPERATE, REPAIR, MAINTAIN AND USE ELECTRIC LINES CONSISTING OF POLES, WIRES, CABLES, PIPES, CONDUITS, MASTS, TOWERS, CROSSARMS, GUYS, BRACES, FEEDERS, TRANSMISSION WIRES, TRANSFORMERS AND OTHER ELECTRICAL APPLIANCES, ON, ALONG, OVER, UNDER, THROUGH AND ACROSS THE HIGHWAYS, STREETS, ALLEYS, BRIDGES, AND OTHER PUBLIC PLACES, AND TO CONDUCT AN ELECTRIC UTILITY BUSINESS IN THE CHARTER TOWNSHIP OF LANSING, INGHAM COUNTY, STATE OF MICHIGAN, AS NOW ESTABLISHED OR HEREAFTER ESTABLISHED FOR A PERIOD OF THIRTY (30) YEARS, ALL AS AUTHORIZED AND/OR REQUIRED BY MICH. CONST. 1963, ARTICLE VII, SECTION 29, AS AMENDED; REPEALING ORDINANCES AND/OR RESOLUTIONS, AND PORTIONS OF ORDINANCES AND/OR RESOLUTIONS, INCONSISTENT WITH THIS ORDINANCE; AND PROVIDING AN EFFECTIVE DATE HEREOF.

WHEREAS, this amended franchise grants the City of Lansing by its LANSING BOARD OF WATER AND LIGHT (Franchisee), its successors and assigns, the right, power and authority to construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, communication wires for the purpose of operating the utility, transformers, switchgears, substations, and other electrical appliances on, over, under, along and across the highways, streets, alleys, bridges, other public places, and on private property by easement, and to do a local electric business in the CHARTER TOWNSHIP OF LANSING, INGHAM COUNTY, MICHIGAN, for a period of thirty (30) years from the date of acceptance by the CHARTER TOWNSHIP OF LANSING, and acceptance of this franchise acknowledges that this franchise supersedes the franchise dated as of July 22, 1986 between the LANSING BOARD OF WATER AND LIGHT and the CHARTER TOWNSHIP OF LANSING; and

WHEREAS, the CHARTER TOWNSHIP OF LANSING desires to amend the existing franchise granted to the LANSING BOARD OF WATER AND LIGHT as of July 22, 1986, to include the ability to exercise a franchise fee; and

WHEREAS, the LANSING BOARD OF WATER AND LIGHT wishes to extend the franchise's duration for a term of thirty (30) years from the date of acceptance and make changes to the franchise language to meet current legal and municipal standards, laws and rules.

THE TOWNSHIP BOARD OF TRUSTEES FOR THE CHARTER TOWNSHIP OF LANSING HEREBY ORDAINS:

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Exhibit 19

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SECTION I. GRANT, TERM. The Charter Township of Lansing, Ingham County, Michigan, hereinafter called the "Charter Township," hereby grants the right, power and authority to the Lansing Board of Water and Light, a municipal utility operating under the laws of the State of Michigan, its successors and assigns, hereinafter called the "Grantee", to construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, communication wires for the purpose of operating the utility, transformers and other electrical appliances, padmounted equipment, substations, switchgear for the purposes of transmitting, transforming and distributing electricity on, over, under, along and across the highways, streets, alleys, bridges, other public places, and on private property by easements and to do a local electric business in the Charter Township of Lansing, Ingham County, Michigan, for a period of thirty (30) years from the date of acceptance by the Grantee.

The Grantee will, upon expiration of this franchise term or revocation of the franchise by the Charter Township, remove all facilities owned by the Grantee with the Charter Township paying the undepreciated value plus the cost of removal less the salvage value of all facilities installed thirty (30) years or less.

SECTION 2. CONSIDERATION. In consideration of the rights, power and authority hereby granted, said Grantee shall faithfully perform all things required by the terms hereof.

SECTION 3. CONDITIONS. All of Grantee's towers, masts, poles, guying and padmounted equipment and other appurtenances shall be neat and sightly, and placed on either side of the highways, streets, alleys, and bridges as not to unnecessarily interfere with the use thereof for highway, street and alley purposes. The Grantee will furnish the Charter Township with a copy of each right-of-way permit and associated sketch which is furnished to the Ingham County Road Commission or the State of Michigan at the time such request is made by the Charter Township. All of Grantee's wires carrying electricity shall be securely fastened so as not to endanger or injure persons or property in said highways, streets and alleys, and shall be done so as not to interfere with the use thereof, and when completed, the same shall be left in as good condition as when work was commenced. The Grantee shall have the right to trim trees if necessary in the conducting of such business, subject, however, to the supervision of the Charter Township. The Charter Township shall be responsible for making petitions, applications, or other means of securing funding for relocations and damages of electric transmission and distribution facilities as described in SECTION 1 when relocations are made at the request of the Charter Township or other public works agencies such as but not limited to the county, state or federal governments but only when reimbursement is available from these entities for such purposes. Requests for relocations by the Charter Township shall include adequate rights-of-way and/or easements acquired by the Charter Township in an acceptable form to the Grantee for relocations and continued access and maintenance of electric transmission and distribution facilities. Where federal, state or local funding is available to the Charter Township or the relocating agency, the Grantee will work cooperatively with the Charter Township to provide necessary documentation for eligible relocation expenses in the appropriate form necessary. To the extent relocations are made at the request of the Charter Township, regardless of the availability of reimbursement funds, the cost for relocations and any damages of electric transmission and distribution facilities shall be the sole responsibility of the Charter Township.

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SECTION 4. HOLD HARMLESS. Said Grantee shall at all times keep and save the Charter Township free and harmless from all loss, costs and damage to which it may be put by reason of construction or maintenance.

SECTION 5. RATES. The rates and rules and regulations governing the supply and use of electricity shall be the same as in the City of Lansing except that the rates shall be increased within the boundaries of the Charter Township by the amount of any taxes, license fees, franchise fees, or any other charges against the Grantee's property or its operations, or the production and/or sale of electrical energy, levied or imposed by the Charter Township. During the term of this franchise or the operation of the electric system pursuant to this franchise, the Grantee shall, upon resolution of the Charter Township Board, pay the Charter Township for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof, a franchise fee in an amount up to five percent (5%) of the revenue excluding sales tax from the retail sale of electric energy by the Grantee within the Charter Township. Similarly, the Charter Township Board may, by resolution, terminate payment of this amount. The initial franchise fee payment to the Charter Township shall be made on or before the last day of the month of April, July, October or January of the quarter (January to March, April to June, July to September, and October to December) following the approval by the Charter Township Board of a franchise fee, and shall reflect revenue based on retail sales from 30 days after the effective date of the franchise fee through the applicable quarter. Thereafter, estimated payments shall be rendered to the Charter Township quarterly, subject to a year-end reconciliation to actual retail sales revenues as of December 31. The Charter Township may request in writing from the Charter Township Board a change in the franchise fee percentage up to every 12 months with at least 45 days' notice from the date the Charter Township would like the new percentage to appear on energy bills.

SECTION 6. REVOCATION. In accordance with the requirements of Const 1963, art VII, Sec. 25 of the Michigan Constitution and MCL 460.603; MSA 22.173, this franchise shall constitute an irrevocable contract by and between the Charter Township and the Grantee once it has been approved by a majority vote of the electors of the Charter Township.

SECTION 7. COMPANY RULES. The Grantee shall have authority to promulgate such rules, regulations, terms and conditions governing the conduct of its business as shall be reasonably necessary to enable the Grantee to exercise its rights and perform its obligations under this franchise, and to assure uninterrupted service to each and all of its customers. Provided, however, that such rules, regulations, terms and conditions shall not be in conflict with the provisions hereof or of laws of the State of Michigan.

SECTION 8. EFFECTIVE DATE. This Ordinance shall take effect take effect immediately following its adoption and publication as required by law, provided however, that it shall cease and be of no effect after thirty (30) days from its adoption unless within said period the Grantee shall accept the same in writing filed with the Charter Township Clerk. Upon acceptance and publication hereof, this Ordinance shall constitute a contract between said Charter Township and said Grantee.

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SECTION 9. PUBLICATION AND ADMINISTRATIVE COSTS. The Charter Township shall assume the cost of publication of this franchise including an initial administrative cost of $1,500 will be due to the Grantee upon acceptance of this franchise for programmatic implementation and customer bill changes. Thereafter, an administrative charge of ½ percent (0.5%) of collected franchise fees for the quarterly billing will apply.

SECTION 10. SEVERABILITY. If a court of competent jurisdiction declares any provision of this Ordinance, or a statutory provision referred to or adopted by reference herein, to be unenforceable, in whole or in part, such declaration shall only affect the provision held to be unenforceable and shall not affect any other part or provision. Provided, however, that if a court of competent jurisdiction declares a penalty provision to exceed the authority of the Charter Township, the penalty shall be construed as the maximum penalty that is determined by the court to be within the authority of the Charter Township to impose.

SECTION 11. REPEAL. All ordinances and resolutions, or parts of ordinances in conflict or inconsistent with the provisions of this Ordinance are hereby repealed; provided that any violation charged before the effective date of this Ordinance under an ordinance provision repealed by this Ordinance shall continue under the ordinance provision then in effect.

John Daher, Supervisor
Charter Township of Lansing

I, Susan L. Aten, Clerk of the Charter Township of Lansing, hereby certify that the foregoing is a true copy of the original of Ordinance No. 40-A, enacted by the Charter Township of Lansing Board of Trustees at a regular meeting on March 13, 2012.

Susan L. Aten, Clerk
Charter Township of Lansing

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Resolution No. 12-4

Charter Township of Lansing, County of Ingham, State of Michigan (the "Township" or "Issuer")

A regular meeting of the Township Board of Trustees (the "Township Board") of the Township was held in the Administration Building, 3209 West Michigan Avenue, Lansing, Michigan, in the Township, on Tuesday, the 13th day of March, 2012, at 7:00 o'clock in the evening.

Present: Board Members Daher, Aten, K. Rodgers, L. Rodgers, Harris, Mitchell
Absent: Board Member Masseau

The following preamble and resolution were offered by Board Member K. Rodgers and supported by Board Member Mitchell:

WHEREAS, the Township Board of the Charter Township of Lansing has on this date approved an amended electric franchise (the "Franchise") with the Lansing Board of Water and Light (the "BWL"); and

WHEREAS, the Franchise states that the BWL "shall, upon resolution of the ... Township Board, pay the [Township] for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof, a franchise fee in an amount up to five percent (5%) of the revenue excluding sales tax from the retail sale of electric energy by the Grantee within the" Township; and

WHEREAS, the Township Board now desires to establish the franchise fee rate as provided in the Franchise.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The franchise fee rate to be charged, and paid to the Township, by the BWL pursuant to the Franchise shall be five percent (5%).

2. The Township Clerk is hereby authorized and directed to forward a certified copy of this resolution to the BWL.

3. All resolutions and parts of resolutions insofar as they conflict with the provisions of this resolution be, and the same are, hereby rescinded.

Ayes: Board Members K. Rodgers, L. Rodgers, Aten, Harris, Mitchell, Daher
Nays: None
Absent: Masseau
Motion declared adopted.

Susan L. Aten

Susan L. Aten, Township Clerk
Charter Township of Lansing

The undersigned, duly qualified and acting Township Clerk of the Charter Township of Lansing, Ingham County, Michigan hereby certifies that the foregoing is a true and complete copy of a resolution adopted by the Township Board at a regular meeting held on March 13, 2012, the original of which resolution is a part of the Township Board's minutes, and further certifies that notice of the meeting was given to the public under the Open Meetings Act, 1976, PA 267, as amended.

Susan L. Aten

Susan L. Aten, Township Clerk
Charter Township of Lansing

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ACCEPTANCE

TO THE TOWNSHIP BOARD OF THE CHARTER TOWNSHIP OF LANSING,
INGHAM COUNTY, MICHIGAN

The City of Lansing, by its Board of Water and Light, hereby accepts the franchise granted to it by your Township Board, on March 13, 2012, pursuant Ordinance No. 40-A as enacted by Township Board action, which said franchise is entitled as follows: An ordinance, granting to the Lansing Board of Water and Light, its successors and assigns, the right, power and authority to construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guy, braces, feeders, transmission and distribution wires, padmounted equipment, transformers, switchgear, substations, and other electrical appliances on, over, under, along and across the highway, streets, alleys, bridges and other public places, and to do a local electric business in the Charter Township of Lansing, Ingham County, Michigan, for a period of thirty (30) years. Acceptance of this Franchise agreement acknowledges that this agreement supersedes the Franchise agreement dated July 22, 1986 between the Lansing Board of Water and Light and the Charter Township of Lansing.

City of Lansing, by its
Board of Water and Light

J. Peter Lark., General Manager

4-9-12
Denise Griffin, Corporate Secretary

Dated: 4-9-, 2012

APPROVED
BOARD OF WATER & LIGHT
LEGAL COUNSEL
Date 3-27-12

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EXHIBIT C

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ACCEPTANCE

TO THE TOWNSHIP BOARD OF THE TOWNSHIP OF DELHI, INGHAM COUNTY, MICHIGAN.

The City of Lansing, by its Board of Water and Light hereby accepts the franchise granted to it by your Board, on the 7th day of June, 1988, to be effective August 1, 1988, which said franchise is entitled as follows:

> An ordinance granting to the Lansing Board of Water and Light, a municipal utility operating under the laws of the State of Michigan, its successors and assigns, the right, power and authority to construct, set, string, lay, operate, repair, maintain and use electric lines consisting of poles, wires, cables, pipes, conduits, masts, towers, cross arms, guys, braces, feeders, transmission wires, transformers and other electrical appliances, on, along, over, under, through and across the highways, streets, alleys, bridges, and other public places, and to conduct an electric utility business in the Township of Delhi, Ingham County, State of Michigan as now established or hereafter established for a period of thirty (30) years, all as authorized and/or required by Mich. Const. 1963, Article VII, 29, as amended.

The undersigned does also hereby request that the question of confirming said franchise be submitted to the electors of said Township, at a special or general election called and held in accordance with law.

City of Lansing, by its
Board of Water and Light

Joseph Pandy, Jr., General Manager

Mary E. Sova, Secretary

Dated: June 8, 1988

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Exhibit 20

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Board of Water and Light Franchise Ordinance

ORDINANCE NO. 82

AN ORDINANCE GRANTING TO THE LANSING BOARD OF WATER AND LIGHT, A MUNICIPAL UTILITY OPERATING UNDER THE LAWS OF THE STATE OF MICHIGAN, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, POWER AND AUTHORITY TO CONSTRUCT, SET, STRING, LAY, OPERATE, REPAIR, MAINTAIN AND USE ELECTRIC LINES CONSISTING OF POLES, WIRES, CABLES, PIPES, CONDUITS, MASTS, TOWERS, CROSS ARMS, GUYS, BRACES, FEEDERS, TRANSMISSION WIRES, TRANSFORMERS AND OTHER ELECTRICAL APPLIANCES, ON, ALONG, OVER, UNDER, THROUGH AND ACROSS THE HIGHWAYS, STREETS, ALLEYS, BRIDGES, AND OTHER PUBLIC PLACES, AND TO CONDUCT AN ELECTRIC UTILITY BUSINESS IN THE TOWNSHIP OF DELHI, INGHAM COUNTY, STATE OF MICHIGAN AS NOW ESTABLISHED OR HEREAFTER ESTABLISHED FOR A PERIOD OF THIRTY (30) YEARS, ALL AS AUTHORIZED AND/OR REQUIRED BY MICH. CONST. 1963, ARTICLE VII, 29, AS AMENDED.

THE CHARTER TOWNSHIP OF DELHI ORDAINS:

Section 1: The Township of Delhi, Ingham County, Michigan, (hereinafter called the Township or Grantor) hereby grants the right, power and authority to the Lansing Board of Water and Light, a municipal utility operating under the laws of the State of Michigan, its successors and assigns, (hereinafter called the Grantee) to construct, set, string, lay, operate, repair, maintain and use electric lines consisting of poles, wires, cables, pipes, conduits, masts, towers, cross arms, guys, braces, feeders, transmission wires, transformers and other electrical appliances on, along, over, under, through and across the highways, streets, alleys, bridges, and other public places and to conduct an electric utility business in the Charter Township of Delhi, Ingham County, Michigan, as now established or hereafter established, for a period of thirty (30) years.

Section 2: The Township grants Grantee a limited service area, which area is defined as follows:

a. Grantee may serve electric customers within the area shown on the attached map (Exhibit A) as "BWL service area, Delhi Township."

b. Grantee may serve such other customers as are approved in writing by the Township Board, upon such terms as are mutually agreed to between the Township Board and Grantee. The Township Board shall promptly act upon requests by the Grantee to serve such customers.

c. Grantee shall, upon request, provide the Township with copies of each pole permit and associated sketch that is furnished to the Ingham County Road Commission for purposes of line extensions within the Township.

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Section 3: (a) All transmission and distribution structures, lines and equipment erected by the Grantee within the Township shall be located so as not to cause unnecessary interference with the proper use of streets, alleys and other public ways and places and so as not to cause unnecessary interference with the rights of reasonable convenience of property owners who adjoin any of the said streets, alleys or other public ways and places. In accordance with sections 1 and 2 above, the Grantee may construct pole lines and locate its wires upon streets, alleys, highways and other public places within its limited service area. However, in locations where other utility pole lines and wires are present, Grantee shall locate its wires on existing poles of other utilities, where they are reasonably available for use by Grantee. In the event that Grantee cannot reasonably locate its facilities on existing poles, Grantee may, pursuant to its agreements with other utilities, replace existing poles and locate its wires by means of joint use of poles with other utilities. The Grantee shall bear the cost for any work necessary to make such poles ready for joint use. In the event Grantee is unable to locate its wires on existing or replacement poles, Grantee shall construct its facilities on private rights-of-way or shall construct its facilities underground; provided, that the Township Board may grant a variance from these requirements upon a showing of practical difficulty or unnecessary hardship.

(b) All poles and other devices to be erected under this Ordinance and franchise at or on street crossings, highway crossings or railroad crossings shall be in full compliance as to height and construction as required by the laws of the State of Michigan, and shall be under the supervision of the Township Board, which shall have the power to order said Grantee, when reasonably necessary, to change the location of any such pole or other devices, which it shall from time to time, by resolution determine to be in the best interests of said Township. In the event of Grantee's failure to do so in a reasonable length of time, said Township Board may cause the same to be done at the expense of the Grantee and the expense thereof shall be paid by the Grantee to said Township on demand. Where appropriate, Grantee shall only be required to change the location of such poles upon receiving permission from the Ingham County Road Commission.

Section 4: (a) Said Grantee shall at all times keep and save the Township free, and harmless from all loss, costs and damage to which it may be put by reason of the negligent construction and maintenance of the poles, towers, masts, wires and other structures and appliances, the erection and maintenance of which is hereby authorized.

(b) Said Grantee shall make due provisions, upon forty-eight (48) hours notice in writing or resolution of the Township Board, to raise its wires or otherwise, for the passage of any barn, building or other structure on or over any street, highway or public place, occupied by the wires,poles or other devices and apparatus of said Grantee. A reasonable cost to the Grantee for raising its wires, apparatus or devices for the passage of any such barn, building or other structure shall be paid by the person securing such permission before such expense is incurred.

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Section 5: The rates, rules and regulations governing the supply and use of electricity shall be the same as in the City of Lansing except that rates shall be increased within the boundaries of the Grantor by the amount of any taxes, license fees, franchise fees, or any other charges against the Grantee's property or its operation, or the production and/or sale of electrical energy, levied or imposed by the Grantor. During the term of this franchise or the operation of the electric system pursuant to this franchise, the Grantee shall upon resolution of the Township Board pay the Township for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof a franchise fee in an amount of three and one-half percent (3 1/2%) of the revenue from the retail sale of electric energy by the Grantee within the Township. Similarly, the Township Board may, by resolution, terminate payment of this amount. Said amount is at this time equal on a percentage basis to the amount on which the Grantee calculates its return on equity to the City of Lansing. In the event the percentage which is paid to the City of Lansing is increased, such increase shall be similarly applied to payments required hereunder.

Section 6: The lines of said Grantee, as originally constructed, may be extended in accordance with the foregoing provisions, provided that it shall not be required to extend its said lines unless the estimated revenue to be derived from such extensions, shall be sufficient to provide an adequate return upon its investment as determined by Grantee's rules and regulations for electric service.

Section 7: This Ordinance shall cease and be of no effect unless the Grantee shall accept the same in writing filed with the Township Clerk, subject to confirmation by a majority of the electors of said Township voting thereon at a regular or special township election to be held in the manner provided by law. Upon acceptance hereof by said Grantee and confirmation by said electors, this Ordinance and franchise shall constitute an irrevocable contract by and between the Township of Delhi, Ingham County, Michigan and the Grantee. If the Ordinance and franchise is not confirmed by said electors it shall remain revocable at the will of the Township.

Section 8: The Grantee will, upon revocation of the franchise by Grantor remove all facilities owned by the Grantee with the Grantor paying the undepreciated value plus the cost of removal less the salvage value of all facilities installed thirty (30) years or less.

Section 9: If any section or provision of this Ordinance is declared to be invalid for any reason whatsoever, said section or provision shall be deemed separable and shall not affect the validity of the remaining sections or provisions of this Ordinance.

Section 10: All portions of Ordinances adopted prior to this effective date that are in conflict herewith are hereby repealed insofar as the conflicting portions thereof are concerned.

Section 11: This Ordinance shall become effective on 6-15-88.

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CHARTER TOWNSHIP OF DELHI

By _____
RICHARD B. BACON, Supervisor

By _____
Clerk

I, Virginia Farr, Clerk of the Charter Township of Delhi, Ingham County, Michigan, hereby certify that the foregoing is a complete Ordinance as adopted by the Township Board at their Regular meeting held on June 7, 1988.

_____
Clerk
Charter Township of Delhi

I hereby certify that a summary of the foregoing was published in the Ingham County News, a newspaper of general circulation within the Township on June 15, 1988.

_____
VIRGINIA FARR, Clerk
Charter Township of Delhi

Delhi

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RESOLUTION OF THE BOARD OF TRUSTEES OF
DELHI CHARTER TOWNSHIP, INGHAM COUNTY, MICHIGAN

At a regular meeting of the Board of Trustees held on the 7th day of June, A.D., 1988.

PRESENT: Members Farr, Feier, Frangie, Veltema, Sweet, Bacon

ABSENT: Members Bacon

The following Resolution was offered by Member Farr and supported by Member Veltema.

WHEREAS, the Charter Township of Delhi did on the 7th day of June, A.D., 1988 grant to the Lansing Board of Water & Light a franchise to provide electricity to portions of the Township identified therein; and,

WHEREAS, said Ordinance (Section 5) provides for the payment of a franchise fee equal to 3½% of the revenue from the retail sale of electric energy within the Township; and,

WHEREAS, the Township desires to obtain said franchise fee.

NOW THEREFORE be it RESOLVED as follows:

1. That the Charter Township of Delhi, Ingham County, Michigan herewith requests and requires payment of a franchise fee from the Lansing Board of Water & Light in the amount of 3½% of the revenue from the retail sale of electric energy by the Board of Water & Light within the Township.

2. That the Township Clerk shall be and is hereby directed to forward a copy of this Resolution to the Lansing Board of Water & Light and the Township Treasurer shall receive payments of said franchise fee and place same within the general fund of the Township unless otherwise directed by the Board.

AYES: Veltema, Frangie, Sweet, Farr, Feier, Goulet

NAYS: None

ABSENT: Bacon

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EXHIBIT D

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CHARTER TOWNSHIP OF MERIDIAN ELECTRIC UTILITY FRANCHISE FOR LANSING BOARD OF WATER AND LIGHT

This Agreement is entered into by and between Charter Township of Meridian Michigan, a Michigan charter township, 5151 Marsh Road, Okemos, Michigan, 48864, hereinafter referred to as "Township", and by the Board of Water and Light of the City of Lansing, a Michigan municipal utility, 123 West Ottawa, Lansing, Michigan, 48933, hereinafter referred to as "Franchisee".

In consideration of the faithful performance and strict observance by the Franchisee of all the terms, provisions, conditions, obligations, requirements and reservations set forth herein or provided for in any Township ordinances, as amended, and in consideration of the grant to the Franchisee of an electric utility Franchise, the parties mutually agree as follows:

1. Definitions. For purposes of this Agreement, the following terms, phrases, words, and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words in the singular number include the plural number. The word "shall" is always mandatory and not merely directory.

a. "Township" is Charter Township of Meridian.

b. "Franchisee" is the Board of Water and Light, of the City of Lansing.

c. "Franchise" or "Franchise Agreement" shall mean this Agreement.

d. "Franchise fee" is a fee paid by the Franchisee to the Township, as computed under this Franchise Agreement, for the privileges and benefits enjoyed by the Franchisee under this Franchise.

e. "Township Board" is the Township Board of Charter Township of Meridian.

f. "Person" is any person, firm, partnership, association, corporation, company or organization of any kind.

2. Grant of Nonexclusive Authority. The Township hereby grants to Franchisee the nonexclusive Franchise and right to transact an electric utility business and further to construct, install, erect, operate, maintain, reconstruct, replace, remove or repair in, upon, along, across, above, over, under, and from the streets, alleys, avenues, highways, sidewalks, bridges, viaducts, public ways, public places, easements and rights-of-way now laid out or dedicated and all extensions thereof in the Township, necessary poles, wires, cables, transformers, underground conduits, manholes, and other electric fixtures for the sole purpose of the maintenance and operation in the Township of an electric transmission and distribution system, all in strict compliance with the laws, ordinances and regulations of the United States of America, the State of Michigan and the Township, as now existing or as hereafter adopted or amended. The right to use and occupy said public places for the purposes herein set forth shall not be

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Exhibit 21

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exclusive, and the Township reserves the right to grant a similar use of said public places to any person in any period of this Franchise. Franchisee hereby warrants that it has examined all of the provisions of this Franchise Agreement. Franchisee agrees that it shall at all times during the life of this Franchise be subject to all lawful exercise of the police power of the Township and to such reasonable regulations as the Township and/or its departments or commissions shall hereafter provide. The police power of the Township shall be exercised through the adoption and amendment of ordinances and regulations.

3. Length of the Franchise. The term of this Franchise shall be for thirty 30 years from the effective date hereof.

4. Service Area. The Township grants Franchisee a limited service area within the Township. The service area is defined as follows:

a. Franchisee may serve electric customers within the area shown on the attached map (Exhibit A) as "existing service area."

b. Franchisee may serve such other customers within the area shown on the attached map (Exhibit A) as "expanded service area."

c. Franchisee may serve such other customers as are approved in writing by the Township Board, upon such terms as are mutually agreed to between the Township Board and Franchisee, but such terms shall be consistent with this Agreement. The Township Board shall promptly act upon requests by the Franchisee to serve such customers.

5. Effective Date. Upon acceptance in writing by the Franchisee, this Franchise Agreement shall constitute a contract. This Franchise and the rights, privileges and authority hereby granted shall be effective upon its publication, which publication shall be within fifteen (15) days after its adoption by the Township Board.

6. Rights Reserved to the Township. In addition to such other rights reserved by this Franchise Agreement or provided by law or ordinance, the Township and Franchisee agree that:

a. Submission to electors. The Franchise provided by this Franchise Agreement shall be submitted to the electors of the Township pursuant to 1909 PA 266. Franchisee shall reimburse the Township for the incremental cost of placing the question before the electors in a general election. In the event that the Franchise is confirmed by said electors, this Franchise shall be irrevocable. In the event that the electors shall not confirm the Franchise, the Franchise shall be deemed to be revocable at will, by the Township Board.

b. Township rules and ordinances. The right is hereby reserved to the Township to adopt, in addition to the provisions herein contained and existing applicable ordinances, such additional regulations and ordinances as it shall find necessary in the exercise of its police power, provided that such regulations, by ordinance or otherwise, shall not be in conflict with the laws of the State of Michigan, or the rights and privileges granted hereunder.

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c. Procedure after termination or revocation. At the expiration of the term for which this Franchise is granted or upon the termination or revocation as provided herein, the Township may order, in writing, Franchisee to remove any and all portions of its electric distribution system located within the Township. However, upon removal the Township or a successor utility shall pay Franchisee the original cost, less depreciation, less the salvage cost, plus removal cost of all facilities installed thirty (30) years or less.

d. Use of System by Township. The Township shall have the right, during the life of this Franchise, where aerial construction exists, of maintaining upon the poles of the Franchisee within the Township limits, wire and pole fixtures necessary or convenient for any public purpose, such wires and fixtures to be constructed and maintained to the satisfaction of Franchisee and in accordance with its specifications and charges imposed by the Franchisee uniformly on other municipalities and utilities. At the direction of the Township Board, Franchisee shall permit any other utility with which it has a joint pole use agreement, including without limitation any electric, telephone or cable television utility, to maintain upon the poles of the Franchisee within the Township limits wire and pole fixtures, necessary or convenient to their operations, to be constructed and maintained to the satisfaction of the Franchisee and in accordance with its specifications and charges.

7. Approval of Transfer. The Franchisee shall not sell or transfer its plant or system within the Township to another, nor transfer its rights under this Franchise to another, without the Township Board's prior written approval, provided that such approval shall not be unreasonably withheld. Further, no such sale or transfer shall be effective until the vendee, assignee, or lessee has filed in the office of the Township Clerk an instrument, duly executed, reciting the fact of such sale, assignment or lease, accepting the terms of this Franchise, and agreeing to perform all the conditions hereof. Nothing in this provision shall be construed to prohibit the Franchisee from sale of existing service facilities to its customers pursuant to its rates, rules and regulations, or pursuant to joint pole use agreements with other utilities.

8. Indemnification of Township. The Franchisee shall indemnify and hold harmless the Township at all times during the term of this Franchise Agreement and specifically shall pay all damages, penalties, and expenses that the Township may be legally required to pay as a result of any claims, suits, actions or liability that may arise in any way from the grant of the Franchise or the Franchisee's operations hereunder. Such damages and penalties shall include, but not be limited to, damages arising out of the installation, operation, or maintenance of the electric system pursuant to this Franchise Agreement, whether or not any act or omission complained of was authorized, allowed or prohibited by this Franchise, and shall also include such part of the cost of repair or replacement of streets, alleys, bridges, and other public places and ways as shall arise from construction or maintenance of the Franchisee's electric system. If any claim, action or suit as described above shall be filed against the Township either independently or jointly with the Franchisee or any other person, the Franchisee shall upon notice to it by the Township defend and save harmless the Township, allowing the Township to retain and employ attorneys of its own choosing, which attorneys shall be subject to final approval by the Franchisee. In the event of a final judgment or settlement against the Township, either independently or jointly

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with the Franchisee or any other person, the Franchisee shall promptly pay the Township's portion of such judgment or settlement and all costs, and hold the Township harmless therefrom.

9. Conditions on Street Occupancy.

a. Use. All transmission and distribution structures, lines and equipment erected by the Franchisee within the Township shall be so located as to cause minimum interference with the proper use of streets, alleys and other public ways and places and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the said streets, alleys or other public ways and places. In accordance with paragraph 2 above, the Franchisee may construct pole lines and locate its wires upon streets, alleys, highways and other public places within its service area. However, in locations where other utility pole lines and wires are present, Franchisee shall locate its wires on existing poles of other utilities, where they are reasonably available for use by Franchisee. In the event that Franchisee cannot reasonably locate its facilities on existing poles, Franchisee may, pursuant to its agreements with other utilities, replace existing poles and locate its wires by means of joint use of poles with other utilities. The Franchisee shall bear the cost for any work necessary to make such poles ready for joint use. In the event Franchisee is unable to locate its wires on existing or replacement poles, Franchisee shall construct its facilities on private rights-of-way or shall construct its facilities underground; provided, that the Township Board may grant Franchisee a variance from this requirement upon a showing of practical difficulties or unnecessary hardship not caused by the actions of Franchisee.

b. Restoration. In case Franchisee causes any disturbance of pavement, sidewalk, driveway or other surfacing, the Franchisee shall, at its own cost or expense, promptly replace and restore all paving, sidewalk, driveway or surface of any street or alley disturbed, in as good condition as before said work was commenced.

c. Relocation. In event that at any time during the period of this Franchise the Township or other authorized public authority shall lawfully elect to alter or change the grade of any street, alley or other public way, the Franchisee, upon reasonable notice by the Township, shall promptly remove, re-lay and relocate its poles, wires, cable and other electric fixtures at its own expense.

d. Placement of fixtures. The Franchisee shall not place poles or other fixtures where the same will interfere with any existing gas lamp, telephone wire or conduit, water hydrant or water main, and all such poles and other fixtures shall be placed in such a manner so as not to interfere with the usual travel on streets, alleys and public ways.

e. Temporary removal of wire for building moving. The Franchisee shall, on the request of any person holding a building moving permit issued by the appropriate public authority, temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal, raising or lowering of wires shall be paid by the person requesting the same, and the Franchisee shall have the authority to require such payment

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in advance. The Franchisee shall be given not less than forty-eight (48) hours advance notice to arrange for such temporary wire changes.

f. Tree trimming. The Franchisee shall have the authority to trim trees upon and overhanging streets, alleys, sidewalks and public places of the Township so as to prevent the branches of such trees from coming in contact with the wire and cables of the Franchisee, all trimming to be done under the supervision and direction of the County Road Commission and at the expense of the Franchisee.

10. Franchise fee. During the term of this Franchise, or the operation of the electric system pursuant to this Franchise, the Franchisee shall pay to the Township for the use of its streets, public places and other facilities as well as the maintenance, improvements, and supervision thereof a Franchise fee in an amount of five percent (5%) of the gross revenue, exclusive of sales tax, from the retail sale of electric energy by the Franchisee within the Township. The initial payment to the Township shall be made by January 31, 1989, and shall reflect revenue based on retail sales from 30 days after the effective date of the Franchise through December 31, 1988. Thereafter, estimated payments shall be rendered to the Township on a quarterly basis subject to a year-end reconciliation to actual retail sales revenues as of December 31. The Franchise fee shall be paid in addition to any other payment owed to the Township by the Franchisee. In addition, the Franchise fee shall be billed in accordance with the Franchisee's rates, rules and regulations. For purposes of this section, retail sales are sales, furnishing or delivery of electric energy pursuant to Franchisee's approved retail rates, and excluding sales to other departments of the Board of Water and Light and bulk power sales for resale or redistribution to other utilities and/or to Michigan State University. Any other bulk power sale transacted within the limits of the Township will be considered retail revenue subject to payment of a Franchise fee under the provisions of this Franchise. This section shall not be severable from the remainder of the Franchise Agreement, and in the event that the Franchise fee so provided is determined to be void or unenforceable for any reason, then this Franchise Agreement shall likewise be void in its entirety. The Township and the Franchisee covenant not to challenge the legality of the Franchise fee.

11. Service Standards. The Franchisee shall maintain and operate its plant and system and render efficient service in accordance with its rules and regulations and such rules or regulations that are, or may be, adopted by the Township Board not in conflict with those of the Franchisee.

a. Meter Accuracy. The Franchisee, shall maintain meter accuracy in accordance with good utility practice.

b. Notice of Interruption for Repairs. Whenever it is necessary to shut off or interrupt service for the purpose of making repairs, adjustment, or installations, the Franchisee shall do so at such time as will cause the least amount of inconvenience to its customers, and unless such repairs are unforeseen and immediately necessary, it shall give reasonable notice thereof to the customers.

12. Company Rules. The Franchisee shall have the authority to promulgate such rules, regulations, terms and conditions governing the conduct of its business as shall be reasonably necessary to enable the Franchisee to exercise its

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rights and perform its obligations under this Franchise, and to assure reliable service to each and all of its customers. Provided, however, that such rules, regulations, terms and conditions shall not be in conflict with the provisions hereof or of laws of the State of Michigan.

13. Preferential or Discriminatory Practices Prohibited. The Franchisee shall not discriminate, as to rates, charges, services, facilities, rules, or regulations, provided that nothing in this Franchise shall be deemed to prohibit the establishment of a graduated scale of charges and classified rate schedules to which any customer coming within such classification would be entitled.

14. Rates. Rates charged by the Franchisee for service hereunder shall be in accordance with rates promulgated by its governing body. Except as provided in paragraph 10 above, The Franchisee shall at all times charge and collect rates and charges within the Township not to exceed the rates and charges of current application for similar classes of customers within the City of Lansing.

15. Records and Reports. The Township shall have access at all reasonable hours to all the Franchisee's plans, contracts, and engineering, accounting, financial, statistical, customer and service records relating to the property and the operation of the Franchisee within the Township which are not otherwise privileged or exempt from disclosure and to all other records required to be kept hereunder. The following records and reports shall be filed with the Township Clerk and in the local office of the Franchisee.

a. Company Rules and Regulations. Copies of such rules, regulations, terms and conditions adopted by it for the conduct of its business.

b. Gross Operating Revenue. An annual summary report showing revenues received by the Franchisee from the sale of electric energy within the Township during the preceding year and such other information as the Township shall request with respect to properties and expenses related to the Franchisee's service within the Township.

16. Publication Costs. The Franchisee shall assume the cost of publication of this Franchise. A bill for publication costs shall be presented to the Franchisee by the Township Treasurer upon the Franchisee's acceptance of this Agreement and shall be paid at that time.

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WITNESSES: CHARTER TOWNSHIP OF MERIDIAN

Susan D. Elder

By: Carlene L. Webster
Carlene L. Webster, Supervisor
Dated: Feb. 2, 1988

Anna F. Kelley

By: Virginia L. White, Clerk
Virginia L. White, Clerk
Dated: February 2, 1988

WITNESSES: BOARD OF WATER & LIGHT of the City of Lansing

Linda A. Monge

By: Joseph Pandy, Jr.
Joseph Pandy, Jr., General Manager
Dated: 2/4/88

Rosemary Sullivan

By: Mary E. Sova
Mary E. Sova, Secretary
Dated: 2/4/88

APPROVED AS TO FORM:
By: William K. Fahey
William K. Fahey
Township Attorney

APPROVED AS TO FORM:
By: Lawrence H. Wilhite
Lawrence H. Wilhite
Board Legal Counsel

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