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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/Appellant,
v.

CITY OF EAST LANSING,
a municipal corporation,

Defendant/Appellee.

Supreme Court Case No. 165763

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

Gregory D. Hanley (P51204)
Jamie Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan
48073
(248) 544-1500
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Brandon M. H. Schumacher (P82930)
Foster Swift Collins & Smith, PC
313 S. Washington Square
Lansing, MI 48933
(517) 371-8155
Counsel for Defendant/Appellee

INDEX OF EXHIBITS

PLAINTIFF/APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS APPLICATION FOR LEAVE TO APPEAL

Exhibit Letter:

A. Michigan Supreme Court Order Dated April 25, 2024.

B. February 27, 2017 Email from the City's outside counsel to LBWL's Counsel with draft of the proposed Franchise Agreement.

C. May 15, 2017 Email from LBWL Counsel to City's outside counsel with a revised draft of the proposed Franchise Agreement.

D. On March 15, 2017, Email from the City's outside counsel to LBWL's Counsel with draft of the proposed Franchise Agreement.

E. LBWL Rules and Regulations for Electrical Service ("Terms of Service").

F. City of Lansing Charter

G. LBWL Utility System Revenue Bonds Statement.

H. LBWL's Rate Schedules FY 2023-2024

I. *Dixon-Brown v Covenant Cemetery Servs,* 2022 Mich. App. LEXIS 837 (2022)

J. *Ganson v Detroit Pub Sch*; 2021 Mich. App. LEXIS 419 (2021)

K. *Estate of Tyner v O'Bey*, 2021 Mich. App. LEXIS 4052 (2021)

L. *Carey v Foley & Lardner, LLP*, 2016 Mich. App. LEXIS 1499 (2016)

M. Senate Journal for HB 705

N. House Journal for HB 705

O. *Gottesman v. City of Harper Woods*, Michigan Supreme Court Case No. 160806 Order dated September 29, 2021

P. *Hyde Park Coop. v. City of Detroit*, 2012 Mich. App. LEXIS 1408 (2012)

Q. *Kincaid v. City of Flint*, No. 337972, 2020 Mich. App. LEXIS 2948 (2020)

R. *Logan v. Township of West Bloomfield*, 2020 Mich. App. LEXIS 1247 (2020)

S. *Logan v Charter Twp of West Bloomfield*, 2018 Mich. App. LEXIS 89 (2018)

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EXHIBIT A

Order

Michigan Supreme Court
Lansing, Michigan

April 25, 2024

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

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165763

JAMES HEOS, Individually and on Behalf of All Others Similarly Situated,
Plaintiff-Appellant,

v

SC: 165763
COA: 361138
Ingham CC: 20-000199-CZ

CITY OF EAST LANSING,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the April 13, 2023 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing: (1) the criteria for determining when a pass-through fee imposed by a local government on a business or utility should be considered a tax paid by a customer; (2) whether, in the context of a utility rate, a utility customer may challenge an improper pass-through fee as an improper rate in an action against the utility; (3) if so, what effect, if any, the availability of that challenge has on the analysis and governing timelines for a customer pursuing recovery from a local government of an improper fee paid to the utility; (4) what authority provides the plaintiff with standing to pursue recovery of an improper tax under MCL 141.91; and (5) whether there is case law supporting the plaintiff's argument that the six-year period in MCL 600.5813 applies to his MCL 141.91 claims, and if there is any case law supporting a different period of limitations.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

CLEMENT, C.J., not participating due to a potential interest in the controversy.

s0320

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 25, 2024

Clerk

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EXHIBIT B

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Gregory Hanley

From: Brandie Ekren <IMCEAEX-_O=LBWL_OU=FIRST+20ADMINISTRATIVE+20GROUP_CN=RECIPIENTS_CN=BFE@namprd09.prod.outlook.com>
Sent: Monday, February 27, 2017 1:58 PM
To: Peter H. Ellsworth (PEllsworth@dickinson-wright.com)
Cc: George Stojic; 'dbeckerleg@secrestwardle.com'; George Lahanas; 'mmeadows@cityofeastlansing.com'; George Stojic; Dick Peffley
Subject: FW: Lansing Board of Water and Light Electric Franchise Ordinance
Attachments: Ordinance - Lansing Board of Water and Light Electric Franchise.pdf

Hi Derk,

Thank you for sending. Have you been working with Mr. Ellsworth on this as we discussed? TO the extent he has not received, I am sending along in copy here.

I am sending him along a copy for review and feedback.

I am also including George Stojic and Dick Peffley. Unfortunately, I don't anticipate being able to give constructive feedback ahead of your meeting tomorrow.

Consistent with our previously discussed collaborative plans, I respectively reserve the option to provide feedback thereafter if necessary.

Brandie

Brandie F. Ekren
General Counsel
Lansing Board of Water & Light
1201 S. Washington Ave.
Lansing, MI 48910
Office: (517) 702-6725
bfe@lbwl.com

From: Beckerleg, Derk [mailto:dbeckerleg@secrestwardle.com]
Sent: Monday, February 27, 2017 1:50 PM

To: Brandie Ekren
Cc: George Lahanas - City of E. Lansing; George Lahanas; Mark Meadows
Subject: Lansing Board of Water and Light Electric Franchise Ordinance

Hi Brandie. Attached please find a proposed Electric Franchise Ordinance providing that the Lansing Board of Water and Light is authorized to provide electricity and electric service in the defined service area in the City of East Lansing as shown on Exhibit A and also providing that BWL will pay a 5% franchise fee to the City of East Lansing. I will provide you with a copy of Exhibit A as soon as I receive it from the City. The City Council will be holding First Reading of the proposed Ordinance tomorrow and the Public Hearing on the proposed Ordinance is tentatively scheduled for Tuesday, March 21,2017.
Thanks, Derk.

SECREST

SW

WARDLE

Derk W. Beckerleg
Attorney at Law
2600 Troy Center Drive
P.O. Box 5025
Troy, MI 48007-5025
Direct Dial: (248) 539-2808
Main: (248) 851-9500 x2635
Fax: (248) 248-1223
dbeckerleg@secrestwardle.com
www.secrestwardle.com

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable laws. If you are not the intended recipient, employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the message to us via e-mail. Internet communications are not guaranteed to be secure or error-free. Information can arrive late or incomplete, be intercepted, corrupted, lost, destroyed, or contain viruses. Therefore, we do not accept responsibility for any errors or omissions that are in this message or any attachment. If verification is required, please request a copy. Thank you.

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Introduced:
Public Hearing:
Adopted:
Effective:

CITY OF EAST LANSING

ORDINANCE NO. _____

LANSING BOARD OF WATER AND LIGHT ELECTRIC FRANCHISE ORDINANCE

AN ORDINANCE, granting to LANSING BOARD OF WATER AND LIGHT, its successors and assigns, the right, power and authority to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business in the defined service area in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years.

THE CITY OF EAST LANSING ORDAINS:

SECTION 1. GRANT, TERM. The CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, hereinafter City, hereby grants the right, power and authority to the Lansing Board of Water and Light, a municipally owned utility, its successors and assigns, hereinafter called the "Grantee," to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances, hereinafter referred to collectively as electric lines, for the purpose of, in the defined service area, transmitting, transforming and distributing electricity on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business and have an exclusive franchise to provide electricity and electric service in the defined service area only, in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years, with said defined service area being shown and depicted on Exhibit A, which is attached hereto and incorporated herein by reference. In the event that the Lansing Board of Water and Light is currently providing electricity and electric service to customers not shown in the defined service area on Exhibit A, the Lansing Board of Water and Light during the term of this franchise, shall be permitted to continue to provide electricity and electric service to said customers.

SECTION 2. FRANCHISE FEE. During the term of this Franchise to provide electricity and electric service to the defined service area in the City of East Lansing, the Grantee shall pay to

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the City of East Lansing for the use of the streets, public place and other facilities as well as the maintenance, improvements and supervision thereof, an annual franchise fee in the amount of five percent (5%) of the revenue excluding sales tax from the retail sale of electricity and electric service by the Grantee in the defined service area of the City of East Lansing, with the fiscal year for purposes of determining the annual franchise fee to commence on July 1, 2017, with the new fiscal years commencing on July 1st for each year thereafter, with the first franchise fee to be paid by the Grantee to the City of East Lansing on October 1, 2017, with the Grantee to pay the franchise fees to the City of East Lansing on a quarterly basis thereafter.

SECTION 3. CONSIDERATION. In consideration of the rights, power and authority hereby granted, said Grantee shall faithfully perform all things required by the terms hereof.

SECTION 4. CONDITIONS. Except in cases of emergency, no work requiring any excavation in, opening in or tunneling under any highway, street, alley, bridge, waterway or other public place shall be commenced by said Grantee without first obtaining a permit for said work from the City. Except in cases of emergency, no work requiring the obstruction of any portion of any right of way for longer than one day shall be commenced by Grantee without first obtaining a right of way permit from the City. In cases of emergency, the required permits shall be obtained as soon as practicable after commencement of the work. No highway, street, alley, bridge, waterway or other public place used by said Grantee shall be obstructed longer than necessary during the work of construction or repair, and shall be restored to the same order and condition as when said work was commenced. All of Grantee's structures and equipment shall be so placed on either side of the highways as not to unnecessarily interfere with the use thereof for highway purposes. All of Grantee's wires carrying electricity shall be securely fastened so as not to endanger or injure persons or property in said highways. The Grantee shall have the right to trim trees if necessary in the conducting of such business, subject, however, to the supervision and reasonable control of the City's Department of Public Works and Environmental Services or its successor.

SECTION 5. HOLD HARMLESS. Said Grantee shall at all times keep and save the City free and harmless from all loss, costs and expense to which it may be subject by reason of the electric lines hereby authorized. In case any action is commenced against the City on account of the permission herein given, said Grantee shall, upon notice, defend the City and save it free and harmless from all loss, cost and damage arising out of the electric lines. Provided, however, that Grantee's obligations under this Section 5 shall not apply to any loss, cost, damage or claims arising solely out of the negligence of the City, its employees or its contractors. Furthermore, in the event that any loss, cost, damage or claims arise out of the joint negligence of the City, its employees or its contractors, Grantee's obligations under this Section 5 shall not apply to the proportional extent of the negligence of the City, its employees or its contractors.

SECTION 6. EXTENSIONS. Said Grantee shall construct and extend its electric distribution system within the defined service are of said City, and shall furnish electric service to applicants residing in the defined service area in accordance with applicable laws, rules and regulations.

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SECTION 7. FRANCHISE NOT EXCLUSIVE. The rights, power and authority herein granted, are not exclusive as to providing electricity and electric service in the entire City of East Lansing.

SECTION 8. RATES. Said Grantee shall be entitled to charge the inhabitants of the defined service area in the City for electricity and electric service furnished therein, the rates as approved by the Michigan Public Service Commission, to which Commission or its successors authority and jurisdiction to fix and regulate electric rates and rules regulating such service in the defined service area of said City, are hereby granted for the term of this franchise. Such rates and rules shall be subject to review and change at any time upon petition therefor being made by either said City, acting by its City Council, or by said Grantee.

SECTION 9. REVOCATION. The franchise granted by this ordinance is subject to revocation at the will of the City Council or Grantee and upon sixty (60) days' written notice by the party desiring such revocation.

SECTION 10. RIGHT OF REGULATION. The Grantee shall be and remain subject to all charter provisions, ordinances, rules and regulations of the City now in effect, or which are subsequently adopted for the regulation of land uses or for the protection of the health, safety and general welfare of the public; provided, however, that nothing herein shall be construed as a waiver by Grantee of its existing or future rights under State or Federal law.

SECTION 11. USE OF STREETS. The franchise granted by this ordinance to allow Grantee to provide electricity and electric service in the defined service area in the City is subject to the right of the City to use, control, and regulate the use of its streets, alleys, bridges, and public places and the space above and beneath them. The Grantee and its contractors and subcontractors shall, at Grantee's own cost and expense, relocate or remove Grantee's facilities from streets, alleys, bridges, and public places whenever (i) the use of such streets, alleys, bridges, and public places by the public for the installation or repair of public improvements, such as, but not limited to, drains, sewers, water mains or pipes, road construction, grading or repair, or (ii) the vacation of any street or public right of way, necessitates such relocation or removal; provided, however, that nothing herein shall be construed as a waiver by Grantee of any of its existing or future rights under state or Federal law. Nothing herein shall restrict or impair Grantee's rights under any statutes or laws regarding the vacation or relocation of public streets. Grantee shall permit joint use of, or attachment to, its poles and other appurtenances located within the streets, alleys and other public places of Grantor in accordance with the rules and regulations of the Michigan Public Service Commission and the Federal Communication Commission, as applicable.

SECTION 12. MICHIGAN PUBLIC SERVICE COMMISSION, JURISDICTION. Said Grantee shall, as to all other conditions and elements of service not herein fixed that fall within the jurisdiction of the Michigan Public Service Commission, be and remain subject to the rules and regulations of the Michigan Public Service Commission or its successors, applicable to electric service in the defined service area of the City.

SECTION 13. EFFECTIVE DATE. This ordinance shall take effect upon the day after the date of publication thereof; provided, however, it shall cease and be of no effect after thirty days from its adoption unless within said period the Grantee shall accept the same in writing filed with the City Clerk. Upon acceptance and publication hereof, this ordinance shall constitute a contract between said City and said Grantee.

We certify that the foregoing Franchise Ordinance was duly enacted by the City Council on the ____ day of _____, 2017.

_____
Mark S. Meadows, Mayor

_____
Marie Wicks, City Clerk

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ACCEPTANCE

TO THE CITY COUNCIL OF THE CITY OF EAST LANSING, INGHAM COUNTY, MICHIGAN:

The LANSING BOARD OF WATER AND LIGHT hereby accepts the franchise granted to it by your City Council on the ____ day of _____, 2017, which said franchise is entitled as follows:

> AN ORDINANCE, granting to LANSING BOARD OF WATER AND LIGHT, its successors and assigns, the right, power and authority to in the defined service area construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business in the defined service area in the CITY OF EAST LANSING, INGHAM COUNTY, MICHIGAN, for a period of thirty years.

LANSING BOARD OF WATER AND LIGHT

By:_____

Dated: _____, 2017

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EXHIBIT C

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Gregory Hanley

From: Brandie Ekren <IMCEAEX-_O=LBWL_OU=FIRST+20ADMINISTRATIVE+20GROUP_CN=RECIPIENTS_CN=BFE@namprd09.prod.outlook.com>
Sent: Monday, May 15, 2017 3:29 PM
To: 'Beckerleg, Derk'
Cc: Peter H. Ellsworth (PEllsworth@dickinson-wright.com); George Stojic; Dick Peffley; George Lahanas - City of E. Lansing; Mark Matus; Yolanda Bennett
Subject: RE: Ordinance - Lansing Board of Water and Light Electric Franchise ekren edit5 15 17.docx
Attachments: Ordinance - Lansing Board of Water and Light Electric Franchise ekren edit5 15 17 3 27.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Revised attached with redlines as discussed via phone.
Thanks
Brandie

From: Beckerleg, Derk [mailto:dbeckerleg@secrestwardle.com]
Sent: Monday, May 15, 2017 3:02 PM
To: Brandie Ekren
Cc: Peter H. Ellsworth (PEllsworth@dickinson-wright.com); George Stojic; Dick Peffley; George Lahanas - City of E. Lansing; Mark Matus; Yolanda Bennett
Subject: RE: Ordinance - Lansing Board of Water and Light Electric Franchise ekren edit5 15 17.docx

Hi Brandie. Thanks for the providing the revised Ordinance so promptly, it is greatly appreciated. I've reviewed the proposed Ordinance and your revisions to the same and I'm fine with the revised Ordinance if you could make the following two revisions: 1) the last sentence of Section 2 which reads: "Such fee will appear on the corresponding energy bills" should be deleted, as that sentence is duplicative, as said language is contained in the immediately preceding sentence (I'm fine with the language, it just doesn't need to be repeated a second time) 2) in the first line of the last paragraph of Section 2, the words "franchise and" should be added before the words "franchise fee collection and remittance", to make it clear that upon 60 days written notice either party can terminate the collection and payment of the franchise fee, as well as the franchise itself.
With those two suggested revisions, I believe that the proposed Electric Franchise Ordinance would be ready for submission to BWL's Board at its May 24, 2017 meeting.
Thanks again for all of your assistance and help with this matter, Derk.

From: Brandie Ekren [mailto:Brandie.Ekren@LBWL.COM]
Sent: Monday, May 15, 2017 2:15 PM
To: Beckerleg, Derk <dbeckerleg@secrestwardle.com>
Cc: Peter H. Ellsworth (PEllsworth@dickinson-wright.com) <PEllsworth@dickinson-wright.com>; George Stojic <George.Stojic@LBWL.COM>; Dick Peffley <Dick.Peffley@LBWL.COM>; George Lahanas - City of E. Lansing <glahana@cityofeastlansing.com>; Mark Matus <Mark.Matus@LBWL.COM>; Yolanda Bennett <Yolanda.Bennett@LBWL.COM>
Subject: Ordinance - Lansing Board of Water and Light Electric Franchise ekren edit5 15 17.docx

Derk,

Attached is an updated draft.

I redlined the latest additions. The fiscal year language works operationally and is clear.

The termination of the franchise language is limited to the exclusivity component. I assumed that is what you intended. If that is not the case, give me a ring to discuss.

Brandie

Brandie F. Ekren
General Counsel
Lansing Board of Water & Light
1201 S. Washington Ave.
Lansing, MI 48910
Office: (517) 702-6725
***NEW EMAIL: Brandie.Ekren@lbwl.com**



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DRAFT Transmitted by Lansing Board of Water & Light on Monday, May 15, 2017 (3:30pm)

Introduced:
Public Hearing:
Adopted:
Effective:

CITY OF EAST LANSING

ORDINANCE NO. _____

LANSING BOARD OF WATER AND LIGHT ELECTRIC FRANCHISE ORDINANCE

AN ORDINANCE, granting to LANSING BOARD OF WATER AND LIGHT, its successors and assigns, the right, power and authority to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business in the defined service area in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years.

THE CITY OF EAST LANSING ORDAINS:

SECTION 1. GRANT, TERM. The CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, hereinafter City, hereby affirms the right, power and authority to the Lansing Board of Water and Light, a municipally owned utility, its successors and assigns, hereinafter called the "Grantee," to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances, hereinafter referred to collectively as electric lines, for the purpose of, in the defined service area, transmitting, transforming and distributing electricity on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business and have an exclusive franchise to provide electricity and electric service in the defined service area only, in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years, with said defined service area being shown and depicted on Exhibit A, which is attached hereto and incorporated herein by reference.

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. ~~Such fee will appear on the corresponding energy bills.~~

The fiscal year for purposes of determining the annual franchise fee to commence on July 1, 2017, with the new fiscal years commencing on July 1st for each year thereafter, with the first franchise fee to be paid by the Grantee to the City of East Lansing on October 1, 2017, with the Grantee to pay the franchise fees to the City of East Lansing on a quarterly basis thereafter.

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, ~~e~~franchise fee collection and remittance. However, to the extent the Grantee is precluded from collecting such franchise fees remittance to City will cease.

SECTION 3. CONSIDERATION. In consideration of the rights, power and authority hereby affirmed, said Grantee shall faithfully perform all things required by the terms hereof.

SECTION 4. CONDITIONS. All of Grantee's towers, masts, and poles shall be so placed on either side of the highways, streets, alleys and bridges as not to unnecessarily interfere with the use thereof for highway, street, alley and bridge purposes. 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, alleys, and bridges. All work performed by said Grantee in said highways, street[s], alleys, and bridges shall be done so as to minimize interference 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 cut or trim trees if necessary in the conducting of such business.

Said lines and appurtenances shall be constructed so as to interfere as little as possible with the proper lawful use of the streets, alleys, and public places. The installation of all poles, conduits, and appurtenances shall be according to industry standards and shall be subject to such reasonable regulations as shall be prescribed by said City from time to time.

SECTION 5. HOLD HARMLESS. Said Grantee shall at all times keep and save the City free and harmless from all loss, costs and expense to which it may be subject by reason of construction or maintenance. Provided, however, that Grantee's obligations under this Section 5 shall not apply to any loss, cost, damage or claims arising out of the negligence of the City, its employees or its contractors. Grantor shall indemnify, hold harmless and defend the Grantee from any and all claims, losses or litigation which result from the Grantee's compliance with this Ordinance. However, Grantor is not responsible for Grantee's negligent or intentional misconduct associated with the provision of utility services.

SECTION 6. EXTENSIONS. Said Grantee shall construct and extend its electric distribution system within the defined service are of said City, and shall furnish electric service to applicants residing in the defined service area in accordance with applicable laws, rules and regulations.

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SECTION 7. NONEXCLUSIVE FRANCHISE . Certain rights, power and authority herein granted, are exclusive as to providing electricity and electric service in certain areas of the City of East Lansing as described in Exhibit A. Otherwise, with respect to jurisdiction of East Lansing, this remains a nonexclusive franchise.

The exclusive right to service certain areas of the City of East Lansing as described in Exhibit A is a condition concurrent to the collection and remittance of the Franchise Fee described in Section 2. As such either party may terminate the exclusive right to serve upon 60 days prior written notice. Therefore, to the extent either shall cease, both ceases.

SECTION 8. 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 City 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 City or otherwise incurred by Grantee as a result of this Ordinance.

Section 10. SERVICE AREA. To the extent permitted by law, Grantee shall furnish electric service to all customers requesting such service within Grantee's service area or the non-exclusive area.

Section 11. FOOTE ACT FRANCHISE. Nothing herein shall be construed as either party rendering an opinion or position of the Grantee's vested franchise rights under the Foote Act, 1905 PA 264. The City does not waive any right to contest, and the Grantee does not relinquish any right to assert.

Section 12. GRANTEE 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 13. EFFECTIVE DATE. This ordinance shall take effect upon the day after the date of publication thereof; provided, however, it shall cease and be of no effect after thirty days from its adoption unless within said period the Grantee shall accept the same in writing filed with the City Clerk. Upon acceptance and publication hereof, this ordinance shall constitute a contract between said City and said Grantee.

Section 14. PUBLICATION AND ADMINISTRATIVE COSTS. The City shall assume the cost of publication of this franchise. A BWL administrative charge of ½ percent (0.5%) of collected franchise fees for the quarterly billing will apply.

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Section 15. SEVERABILITY. If any provision of this franchise is to any extent illegal, otherwise invalid, or incapable of being enforced, such provision shall be excluded to the extent of such invalidity or unenforceability; all other provisions hereof shall remain in full force and effect.

We certify that the foregoing Franchise Ordinance was duly enacted by the City Council on the ____ day of _____, 2017.

_____ _____

Mark S. Meadows, Mayor Marie Wicks, City Clerk

ACCEPTANCE

TO THE CITY COUNCIL OF THE CITY OF EAST LANSING, INGHAM COUNTY, MICHIGAN:

The LANSING BOARD OF WATER AND LIGHT hereby accepts the franchise granted to it by your City Council on the ____ day of _____, 2017, which said franchise is entitled as follows:

> AN ORDINANCE, granting to LANSING BOARD OF WATER AND LIGHT, its successors and assigns, the right, power and authority to in the defined service area construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business in the defined service area in the CITY OF EAST LANSING, INGHAM COUNTY, MICHIGAN, for a period of thirty years.

LANSING BOARD OF WATER AND LIGHT

By:_____

Dated: _____, 2017

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EXHIBIT D

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Gregory Hanley

From: Brandie Ekren <IMCEAEX-_O=LBWL_OU=FIRST+20ADMINISTRATIVE+20GROUP_CN=RECIPIENTS_CN=BFE@namprd09.prod.outlook.com>
Sent: Wednesday, March 15, 2017 4:10 PM
To: George Stojic; Mark Matus
Cc: Dick Peffley
Subject: FW: Revised Lansing Board of Water and Light Electric Franchise Ordinance
Attachments: Ordinance - Lansing Board of Water and Light Electric Franchise.pdf

FYI
Brandie

From: Beckerleg, Derk [mailto:dbeckerleg@secrestwardle.com]
Sent: Wednesday, March 15, 2017 10:20 AM
To: Mark Meadows; George Lahanas - City of E. Lansing; George Lahanas; Brandie Ekren; PEllsworth@dickinson-wright.com
Subject: Revised Lansing Board of Water and Light Electric Franchise Ordinance

Hello Everybody. Per my March 3, 2017 telephone conference with Peter Ellsworth and MCL 460.6(1) and MCL 460.10 y (11), both of which statutes provide that the Public Service Commission does not have the power and/or jurisdiction to regulate a municipally owned utility, such as, the Lansing Board of Water and Light, attached please find a revised Lansing Board of Water and Light Electric Franchise Ordinance, which I believe the East Lansing City Council will be considering at a public hearing at its March 21,2017 meeting. The revised Ordinance eliminates the references to the Public Service Commission that were contained in the previous draft of the Ordinance and specifically contains the following revisions: 1) Section 8 was revised to provide that the rates for electricity and electrical service are to be established by the Lansing Board of Water and Light's Board of Commissioners 2) Section 11 was revised to provide that BWL shall permit joint use of and/or attachment to its poles located within the City's streets, alleys and other public places in accordance with "applicable law" instead of in accordance with the rules and regulations of the Public Service Commission 3) Section 12 pertaining to "Michigan Public Service Commission, Jurisdiction" was deleted and existing Section 13 "Effective Date" was renumbered to Section 12.
Thanks, Derk.

SECREST
SW
WARDLE

Derk W. Beckerleg
Attorney at Law
2600 Troy Center Drive
P.O. Box 5025
Troy, MI 48007-5025
Direct Dial: (248) 539-2808
Main: (248) 851-9500 x2635
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Introduced:
Public Hearing:
Adopted:
Effective:

CITY OF EAST LANSING

ORDINANCE NO. _____

LANSING BOARD OF WATER AND LIGHT ELECTRIC FRANCHISE ORDINANCE

AN ORDINANCE, granting to LANSING BOARD OF WATER AND LIGHT, its successors and assigns, the right, power and authority to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business in the defined service area in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years.

THE CITY OF EAST LANSING ORDAINS:

SECTION 1. GRANT, TERM. The CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, hereinafter City, hereby grants the right, power and authority to the Lansing Board of Water and Light, a municipally owned utility, its successors and assigns, hereinafter called the "Grantee," to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances, hereinafter referred to collectively as electric lines, for the purpose of, in the defined service area, transmitting, transforming and distributing electricity on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business and have an exclusive franchise to provide electricity and electric service in the defined service area only, in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years, with said defined service area being shown and depicted on Exhibit A, which is attached hereto and incorporated herein by reference. In the event that the Lansing Board of Water and Light is currently providing electricity and electric service to customers not shown in the defined service area on Exhibit A, the Lansing Board of Water and Light during the term of this franchise, shall be permitted to continue to provide electricity and electric service to said customers.

SECTION 2. FRANCHISE FEE. During the term of this Franchise to provide electricity and electric service to the defined service area in the City of East Lansing, the Grantee shall pay to

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the City of East Lansing for the use of the streets, public place and other facilities as well as the maintenance, improvements and supervision thereof, an annual franchise fee in the amount of five percent (5%) of the revenue excluding sales tax from the retail sale of electricity and electric service by the Grantee in the defined service area of the City of East Lansing, with the fiscal year for purposes of determining the annual franchise fee to commence on July 1, 2017, with the new fiscal years commencing on July 1st for each year thereafter, with the first franchise fee to be paid by the Grantee to the City of East Lansing on October 1, 2017, with the Grantee to pay the franchise fees to the City of East Lansing on a quarterly basis thereafter.

SECTION 3. CONSIDERATION. In consideration of the rights, power and authority hereby granted, said Grantee shall faithfully perform all things required by the terms hereof.

SECTION 4. CONDITIONS. Except in cases of emergency, no work requiring any excavation in, opening in or tunneling under any highway, street, alley, bridge, waterway or other public place shall be commenced by said Grantee without first obtaining a permit for said work from the City. Except in cases of emergency, no work requiring the obstruction of any portion of any right of way for longer than one day shall be commenced by Grantee without first obtaining a right of way permit from the City. In cases of emergency, the required permits shall be obtained as soon as practicable after commencement of the work. No highway, street, alley, bridge, waterway or other public place used by said Grantee shall be obstructed longer than necessary during the work of construction or repair, and shall be restored to the same order and condition as when said work was commenced. All of Grantee's structures and equipment shall be so placed on either side of the highways as not to unnecessarily interfere with the use thereof for highway purposes. All of Grantee's wires carrying electricity shall be securely fastened so as not to endanger or injure persons or property in said highways. The Grantee shall have the right to trim trees if necessary in the conducting of such business, subject, however, to the supervision and reasonable control of the City's Department of Public Works and Environmental Services or its successor.

SECTION 5. HOLD HARMLESS. Said Grantee shall at all times keep and save the City free and harmless from all loss, costs and expense to which it may be subject by reason of the electric lines hereby authorized. In case any action is commenced against the City on account of the permission herein given, said Grantee shall, upon notice, defend the City and save it free and harmless from all loss, cost and damage arising out of the electric lines. Provided, however, that Grantee's obligations under this Section 5 shall not apply to any loss, cost, damage or claims arising solely out of the negligence of the City, its employees or its contractors. Furthermore, in the event that any loss, cost, damage or claims arise out of the joint negligence of the City, its employees or its contractors, Grantee's obligations under this Section 5 shall not apply to the proportional extent of the negligence of the City, its employees or its contractors.

SECTION 6. EXTENSIONS. Said Grantee shall construct and extend its electric distribution system within the defined service are of said City, and shall furnish electric service to applicants residing in the defined service area in accordance with applicable laws, rules and regulations.

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SECTION 7. FRANCHISE NOT EXCLUSIVE. The rights, power and authority herein granted, are not exclusive as to providing electricity and electric service in the entire City of East Lansing.

SECTION 8. RATES. Said Grantee shall be entitled to charge the inhabitants of the defined service area in the City for electricity and electric service furnished therein, the rates as established and approved by the Lansing Board of Water and Light's Board of Commissioners, to which Lansing Board of Water and Light's Board of Commissioners or its successors authority and jurisdiction to fix and regulate electric rates for such service in the defined service area of said City, are hereby granted for the term of this franchise. Such rates shall be subject to review and change at any time upon petition therefor being made by either said City, acting by its City Council, or by said Grantee.

SECTION 9. REVOCATION. The franchise granted by this ordinance is subject to revocation at the will of the City Council or Grantee and upon sixty (60) days' written notice by the party desiring such revocation.

SECTION 10. RIGHT OF REGULATION. The Grantee shall be and remain subject to all charter provisions, ordinances, rules and regulations of the City now in effect, or which are subsequently adopted for the regulation of land uses or for the protection of the health, safety and general welfare of the public; provided, however, that nothing herein shall be construed as a waiver by Grantee of its existing or future rights under State or Federal law.

SECTION 11. USE OF STREETS. The franchise granted by this ordinance to allow Grantee to provide electricity and electric service in the defined service area in the City is subject to the right of the City to use, control, and regulate the use of its streets, alleys, bridges, and public places and the space above and beneath them. The Grantee and its contractors and subcontractors shall, at Grantee's own cost and expense, relocate or remove Grantee's facilities from streets, alleys, bridges, and public places whenever (i) the use of such streets, alleys, bridges, and public places by the public for the installation or repair of public improvements, such as, but not limited to, drains, sewers, water mains or pipes, road construction, grading or repair, or (ii) the vacation of any street or public right of way, necessitates such relocation or removal; provided, however, that nothing herein shall be construed as a waiver by Grantee of any of its existing or future rights under state or Federal law. Nothing herein shall restrict or impair Grantee's rights under any statutes or laws regarding the vacation or relocation of public streets. Grantee shall permit joint use of, or attachment to, its poles and other appurtenances located within the streets, alleys and other public places of Grantor in accordance with applicable law and the rules and regulations of the Federal Communication Commission, as applicable.

SECTION 12. EFFECTIVE DATE. This ordinance shall take effect upon the day after the date of publication thereof; provided, however, it shall cease and be of no effect after thirty days from its adoption unless within said period the Grantee shall accept the same in writing filed with the City Clerk. Upon acceptance and publication hereof, this ordinance shall constitute a contract between said City and said Grantee.

We certify that the foregoing Franchise Ordinance was duly enacted by the City Council on the ____ day of _____, 2017.

_____
Mark S. Meadows, Mayor

_____
Marie Wicks, City Clerk

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ACCEPTANCE

TO THE CITY COUNCIL OF THE CITY OF EAST LANSING, INGHAM COUNTY, MICHIGAN:

The LANSING BOARD OF WATER AND LIGHT hereby accepts the franchise granted to it by your City Council on the ____ day of _____, 2017, which said franchise is entitled as follows:

> AN ORDINANCE, granting to LANSING BOARD OF WATER AND LIGHT, its successors and assigns, the right, power and authority to in the defined service area construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business in the defined service area in the CITY OF EAST LANSING, INGHAM COUNTY, MICHIGAN, for a period of thirty years.

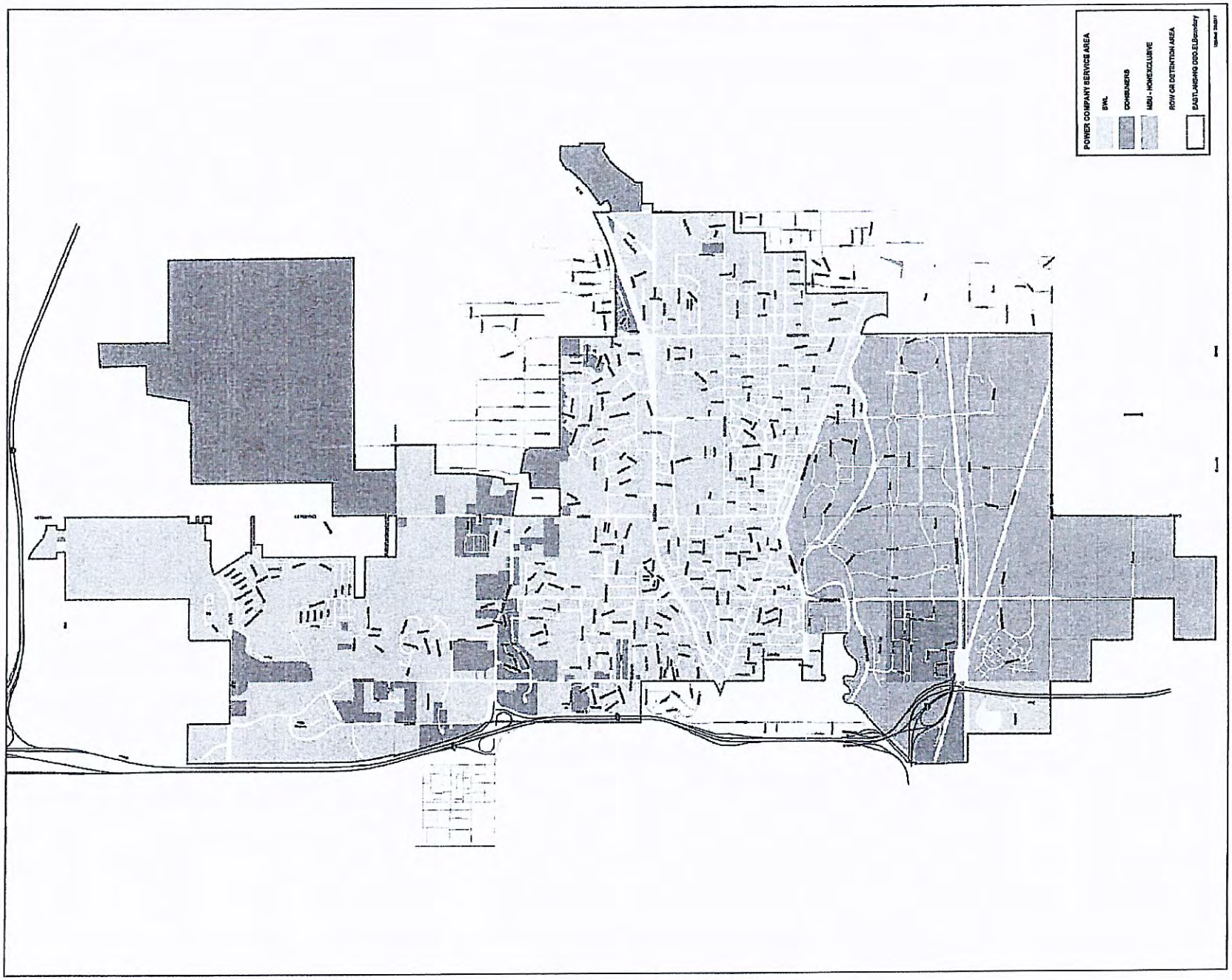
LANSING BOARD OF WATER AND LIGHT

By:_____

Dated: _____, 2017

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EXHIBIT E

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RULES and REGULATIONS for ELECTRIC SERVICE

LANSING BWL℠

Hometown People. Hometown Power.

Board Approval: 05/25/2021
Effective: 07/01/2021

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KILO (k) - Prefix meaning one thousand.

KILOVOLT AMPERE (kVA) – Unit of apparent Electrical Power which at 100% Power Factor is equivalent to one Kilowatt.

KILOWATT (kW) - 1,000 watts of Electrical Power equivalent to about 11/3 Horsepower.

KILOWATT-HOUR (kWh) - Unit of electrical energy equivalent to the use of one Kilowatt for one hour.

LOAD - The amount of Power or Kilovolt amperes delivered at a given point.

MAIN LINE TRENCH - A Trench in which Primary Voltage Distribution Lines are installed.

MOBILE HOME COURT - A parcel or tract of land upon which three (3) or more mobile homes are located and occupied on a continuous non-recreational basis. The mobile home court must be of a permanent nature with improved streets and with individual water and sewer connection to each lot.

MULTI-DWELLING STRUCTURE - A building containing three (3) or more Dwelling Units, including, but not limited to, apartments, condominiums or senior housing projects.

PERSON - Any individual, corporation, partnership, company, limited liability corporation, organization, or governmental entity.

POWER - Energy per unit of time.

POWER FACTOR (P.F.) - Ratio of Kilowatt Power to Kilovolt Ampere apparent Power, expressed in %.

PREMISES - A building and its grounds.

PRIMARY VOLTAGE - Nominal voltage of 601 Volts to 15,000 Volts.

RATE - The unit prices as established by the BWL's rate-making body and the quantities to which they apply as specified in the Rate Schedule.

RATE SCHEDULE - A filed statement of the electric Rate for a particular classification of service and the terms and conditions governing its application as are established by the BWL's rate-making body. Rate Schedules can be found on the BWL's website at https://www.lbwl.com/customers/services/electric.

RESIDENCE (also residential) - Includes one family, two family and Multi-Dwelling Structures containing three (3) or more individual Dwelling Units, but not including High-Rise Housing Structures.

RISER POLE - Pole where the transition takes place between underground and overhead Facilities. This may be Primary or Secondary Voltage.

SECONDARY VOLTAGE - A nominal voltage of 600 Volts or less.

SERVICE ENTRANCE CONDUCTORS - The Customer-owned conductors located between the Customer's main disconnecting device and the termination of the BWL's service conductors.

SERVICE LIMITER - Device used to minimize electric consumption by way of restricting amperage.

SERVICE LOCATION - The point at which the BWL has agreed to deliver Electric Power to the Customer.

TRANSMISSION SYSTEM - That portion of the BWL's system which delivers Electric Power with a nominal voltage of 138,000 Volts.

TRENCH - A cut in the ground in which cables, pipes, etc. are installed.

VOLT - Unit of electrical force.

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RULE 2. GENERAL PROVISIONS

2.1 GENERAL PROVISIONS

A. Copies of the BWL Rate Schedules for Electric Service are open to public inspection at the BWL offices and are available on the BWL website at https://www.lbwl.com/customers/services/electric or upon request. Application for original, modifying service, or demolition of a service should be submitted to BWL Utility Services by e-mailing utilityservices@lbwl.com, or by calling (517) 702-6700 during normal business hours, or at 1232 Haco Drive, Lansing, Michigan 48912.

B. Any Person receiving or agreeing to receive Electric Service from BWL Facilities is deemed a Customer of the BWL, subject to its Rates and these Rules and Regulations and responsible for the service used whether such service is provided under a signed agreement or not.

C. Electric Service will not be supplied to new or remodeled buildings until such installations have been inspected and approved by the appropriate inspection authority and are in accordance with these Rules and Regulations.

D. Prior to purchasing equipment or installation of wiring, the Customer should contact the BWL's Customer Projects Department to determine the characteristics of the Electric Service available at the Premises, since all voltages may not be available. The Customer Projects Department will inform the Customer of the BWL requirements, which must be fulfilled by the Customer to receive Electric Service.

E. No rights, title, or interest in Facilities provided by the BWL will pass to any person as a result of any deposit or contribution made under these Rules and Regulations, unless otherwise specified herein or by contract. Deposits or contributions made by Customers toward Facilities will not be refundable unless expressly provided in these Rules and Regulations.

F. The BWL may disconnect Electric Service to any Customer for any breach of the BWL's Rules and Regulations, policies, procedures, and practices, or in accordance with law. The Customer must pay a reconnection fee in accordance with Rule 16 to cover the costs of restoring Electric Service that has been disconnected for any breach of the BWL's Rules and Regulations, policies, procedures, and practices, or in accordance with law. The BWL may charge a reconnection fee in accordance with Rule 16 for each utility reconnected.

G. This document is intended to cover most situations where standardized policies, procedures, and practices have been established. No officer, agent, or employee of the BWL has authority to waive or modify the provisions of this document unless specifically authorized to do so by the Board of Commissioners. At any time, the Board of Commissioners may temporarily or permanently revise, modify, or suspend any portion of this document.

H. As a condition for the provision of service, BWL must have a recorded easement on the Customer's Premises suitable for ingress, egress, installation, and maintenance, including, but not limited to, tree trimming or removal, restoration, replacement, construction, and relocation of the electric distribution system and any other equipment reasonably related to the provision of service (including, but not limited to, Advanced Metering Infrastructure such as collectors, repeaters, and vertical mounting structures), and other Facilities including any street lighting cables and distribution equipment as designed by the BWL for present and future service.

2.2 COLLECTION, USE, AND PRIVACY OF CUSTOMER INFORMATION

A. The BWL collects Customer Information for the primary purpose of providing electric, water, chilled water, or steam services ("Utility Services"). Examples include:

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4.6 IMPROPER USE AND TAMPERING

A. A Person or Customer that uses Electric Power without making proper application for Electric Service is responsible for all charges for Electric Service. The amount of such charges will be determined by the BWL either by an actual meter read or by estimated consumption for the time Electric Power was used.

B. The BWL may disconnect service without notice if a Person or Customer uses Electric Power without proper application for service or Electric Service connection. In the case of such disconnection of service, the BWL will restore service only when the Person requesting reconnection is or becomes a Customer, has paid the tampering fee and reconnection fee in accordance with Rule 16, and has made appropriate restitution for stolen service and damaged equipment.

C. The BWL may disconnect service without notice, if it determines the meter or wiring on a Premises has been tampered with or altered in any manner. If the BWL disconnects service for this reason, the BWL will restore service only when the Person requesting reconnection is or becomes a Customer, paid the tampering fee and reconnection fee in accordance with Rule 16, made appropriate restitution for stolen service and damaged equipment, and made arrangements for an outdoor meter installation or other metering changes as may be required by the BWL.

4.7 DISCONNECTION OF SERVICE

A. Service may be voluntarily or involuntarily disconnected. The Customer or their representative should be present when service is disconnected because the Customer is responsible for confirming service disconnection. The Customer must take all necessary measures to verify disconnection and secure Customer-owned equipment in the event of electric service disconnection.

B. If service disconnection is not effective, the Customer is responsible for notifying the BWL as soon as possible. The Customer is also responsible for all electric service consumption registered, and damages due to an ineffective disconnection. Service may be disconnected in the following circumstances:

1. Customer Request

    a. Service may be disconnected per the Customer's request. When a Customer who is not the owner of the building requests a disconnection of service, the service will transfer to the owner until the owner requests disconnection or a new tenant assumes responsibility.

    b. A request for temporary disconnection of service for purposes such as winterization or seasonal occupancy is subject to a reconnection fee in accordance with Rule 16 to cover the costs of restoring service.

    c. Service may be permanently disconnected for demolition purposes by submitting a Demolition Service Request form signed by the property owner. Permanent disconnection is completed at the cost of labor and material required to complete the disconnection.

2. Noncompliance

    a. Service may be involuntarily disconnected for noncompliance with BWL Rules and Regulations.

    b. Service may be involuntarily disconnected for noncompliance with Municipal, State, or Federal law.

    c. Service may be involuntarily disconnected by issuance of a court order.

3. Other

   a. Service may be disconnected if the BWL no longer provides services to the applicable jurisdiction or territory.

   b. Service may be disconnected if an alternative is available to the Customer subject to the BWL's approval.

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RULE 7. BILLS AND PAYMENTS

7.1 RESPONSIBILITY FOR PAYMENT OF BILLS

A. Each Customer is responsible for paying all utility bills as rendered on or before the due date shown on the bill. The Customer remains responsible for payment of the bills until the Customer orders service to be disconnected and the BWL has had reasonable time to secure a final meter reading. Bills are rendered on approximately a monthly basis. Bills are mailed to Customers approximately twenty-one (21) days before the due date shown on the bill. The Customer must pay the amount due on or before the due date on the bill. Failure on the part of the Customer, through no fault of the BWL, to receive the bill does not entitle the Customer to pay the bill after the due date. Unpaid amounts will incur a five percent (5%) late fee on the current period charges. If a bill remains unpaid after issuance of a five (5) day written shut-off notice, the BWL has the right to disconnect service.

B. In extenuating circumstances, a Customer will be afforded the opportunity to make payment arrangements. In accordance with Michigan law, the BWL will not shut off Electric Service to an eligible Customer for non-payment on delinquent accounts from November 1 through April 15. An "eligible Customer" is defined as a senior citizen 65 years of age or older, or a low-income Customer who is currently enrolled in the Winter Protection Payment Plan.

C. Service to a Customer will not be disconnected for nonpayment of a disputed bill pending the result of a hearing timely requested by a Customer. Service may be disconnected for nonpayment of sums billed that are not in dispute.

D. A prospective Customer account may not be established for a Service Location if a delinquent Customer account holder resides at the same Service Location as the prospective Customer, unless the prospective Customer agrees to pay a deposit in accordance with Rule 16.

E. If a Customer has any delinquent BWL account(s) at any address, a new service request cannot be added until the delinquent account(s) is paid in full.

F. The BWL may also require individual Customers to enter into a written "Billing Service Agreement," ensuring the Customer is responsible for all services used.

G. When a Customer dies, a family member may place service in their name or the deceased Customer's account may be placed in the name of the Estate if a written request is made by the personal representative with supporting documentation.

H. When an occupant has lived with a residential Customer within the last 3 years, currently resides with the Customer, and the Customer has a delinquent account that remains unpaid, is not in dispute, and accrued during shared residency, the occupant is also considered responsible for the unpaid bill when seeking to put the delinquent account into their own name.

I. The BWL will make billing history available to Customers at no charge, provided the information is currently stored on an active database. Customer requests for billing history that is no longer on an active database will be subject to payment of hourly fees based on the average burdened hourly wage of the BWL employee assigned to perform the research and compilation of the data.

J. The BWL will charge a non-sufficient funds fee in accordance with Rule 16 for returned checks.

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EXHIBIT F

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City of Lansing
City Charter

The Charter of the City of Lansing was adopted by the voters of Lansing on August 8, 1978 and is included in full including amendments adopted in 1993, 1994, 2012, 2013, 2014, and 2015.

Prepared by:
Lansing City Clerk's Office
Chris Swope, City Clerk

over the operation of those City utility services assigned to it in accordance with the provisions of this Charter.

.2 No other board, commission or committee shall exercise any administrative, appointive or policy making authority except as permitted by this Charter or required by State law.

.3 Notwithstanding any other provision of this Charter, the Board of Water and Light shall be subject to the emergency powers provided the Mayor by city ordinance and state law and shall include administrative and executive authority.

Chapter 2. BOARD OF WATER AND LIGHT

5-201 Board Of Water And Light

The Board of Water and Light, hereinafter known as the Board, shall have the full and exclusive management of the water, heat, steam and electric services and such additional utility services of the City of Lansing as may be agreed upon by the Board and City Council. The board shall be responsible to the Mayor and the City Council for the provision of these services in a manner consistent with the best practices.

5-202 Director, Internal Auditor, Secretary

.1 The Board shall appoint a Director who shall be responsible to the Board for carrying out the duties assigned by the Board and shall serve at its pleasure.

.2 The Board shall appoint an Internal Auditor who shall report directly to the Board. The Internal Auditor shall serve at the pleasure of the Board.

.3 The Board shall appoint its own Secretary who shall be responsible to the Board and shall serve at its pleasure.

5-203 Powers Of The Board

.1 The Board shall make all contracts pertaining to the conduct of the Board of Water and Light business and shall have the authority to settle litigation involving the Board of Water and Light.

.2 The Board shall have the power to acquire property, both real and personal, and interests in property in the name of the City for purposes of the Board of Water and Light.

.3 The Board shall have the power to sell real property and interests in real property not needed for the operation of the Board of Water and Light, subject to the approval of six City Council Members and subject to the limitations on the sale of real property by the City contained in this Charter.

.4 The Board shall adopt policies and procedures to assure fairness in procuring personal property and services and disposing of personal property. These policies and procedures of the Board shall parallel the policies and procedures adopted by the Council for the purchase and sale of personal property and services unless the Board makes a specific finding that a City policy or procedure is not consistent with the best practices for public utility operation.

.5 The Board shall prepare and adopt its annual budget by June I of each year, and implement it with whatever modifications the Board may adopt from time to time. The budget and any amendments shall be filed with the City Clerk within 10 days after adoption.

.6 The Board shall submit to the Mayor, prior to October 1 of each year, its capital improvements plan for the next six years pursuant to Section 7-109.

.7 In the best interest of the City, the Board and other agencies of the City are encouraged to cooperate on projects deemed to be beneficial and to utilize each other's services.

.8 The Board of Water and Light may utilize the streets, alleys, bridges and other public places of the City for the furnishing of public utility services. In the exercise of this right, the Board of Water and Light shall furnish timely information about proposed uses to the officials of the City and to the agencies which will be most directly affected by the use.

.9 The Board may conduct whatever audits of the activities it deems appropriate and shall compensate the City for the cost of that portion of the annual audit of the City which covers the Board of Water and Light.

.10 The Board may provide for the pensioning of any employee of the Board of Water and Light or the surviving spouse or dependent of any deceased employee.

.11 The Board, except as otherwise provided in this Charter, shall be responsible for and have authority over the compensation, benefits, bonding, conditions of employment, and labor management activities for all employees of the Board of Water and Light.

5-204 Withdrawal Of Funds

.1 The funds and revenues of the Board of Water and Light shall be deposited in the City Treasury and shall be credited only to the funds and accounts of the Board of Water and Light. They shall not be withdrawn or used for any other purpose whatsoever. The Board shall have and exercise full control over all of the funds of the Board of Water and Light in the City Treasury.

.2 All warrants drawn for the payment of money under the authority of the Board shall be signed by the Secretary of the Board and countersigned by the City Controller.

.3 Whenever warrants are issued and there is no money for the payment of the warrant, the City Treasurer shall, upon presentation of the, warrant, stamp the date of presentation on the face of the warrant, together with a statement that the warrant will bear interest thereafter at the rate of 6 percent per year. The interest shall cease after notice has been given to the holder, in the manner determined by the Board, that there is sufficient money of the Board of Water and Light on hand to pay the warrant with interest. Warrants of the Board of Water and Light are not general obligations of the City.

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.4 The Council may provide by ordinance procedures for the disbursement of monies of the Board of Water and Light by check issued by the Secretary of the Board in accordance with the ordinance.

5-205 Rates

.1 The Board may fix just and reasonable rates and other charges as it may deem advisable for services furnished by the Board of Water and Light.

.2 The Board shall conduct a public hearing at least 30 days prior to the effective date of any changes in rate structure. At least 45 days before the public hearing, the Board shall file with the City Clerk a statement explaining the new rates and charges together with a notice of the public hearing. Notice to the public shall be given in the same manner as is required for proposed ordinances.

5-206 Collection And Hearing Procedure

.1 Upon the request of the Board, the City Council shall provide by ordinance for the collection of unpaid charges for public utility services furnished by the Board of Water and Light and for the imposition and enforcement of liens upon property served by the Board of Water and Light.

.2 When any person fails or refuses to pay any sums due on utility bills, the service upon which the delinquency exists may be discontinued and suit may be brought for the collection of the money owed.

.3 The Board shall establish a procedure for the resolution of disputes between the Board of Water and Light and any of its customers concerning services or billing for services furnished in accordance with filed rates, rules and regulations, and established Board policies and procedures. The procedure shall incorporate the designation of an independent hearing officer. The hearing officer shall report to the Board and the Mayor the results of each hearing conducted and shall make recommendations to the Board on any hearing, which has not been resolved. The Mayor may make recommendations to the Board on each unresolved hearing. The Board shall report its final action on any unresolved dispute, together with the hearing officer's report and recommendations to the Mayor and the City Council.

5-207 Sale Or Exchange Of Facilities

The Board shall not, unless approved by the affirmative vote of three - fifths of the electors voting thereon at a regular or special City election, sell, exchange, lease, or in any way dispose of any property, easement, equipment, privilege, or asset needed to continue the operation of the Board of Water and Light. The restrictions of this section shall not apply to the sale or exchange of articles of machinery or equipment of the Board of Water and Light, which are no longer useful or which are replaced by new machinery for the operation of the Board of Water and Light, or to the exchange of property or easements for other needed property or easements.

Chapter 3. BOARD OF POLICE COMMISSIONERS

5-301 Duties

.1 The Board of Police Commissioners, hereinafter known as the Board, is established pursuant to Article 5, Chapter I of this Charter and shall have all the powers, duties and responsibilities of advisory boards in addition to the following duties:

.2 The Board shall establish administrative rules for the organization and overall administration of the department including promotional and training procedures in consultation with the Chief of Police and Mayor. These administrative rules shall not be effectuated in accordance with Section 5-105. 8 of this Charter but shall become effective upon filing with the City Clerk.

.3 The Board shall approve rules and regulations for the conduct of the members of the Department, in consultation with the Chief of Police and the Mayor.

.4 The Board in their rules shall establish a procedure for receiving and resolving any complaint concerning the operation of the department.

.5 The Board shall review and approve the departmental budget before its submission to the Mayor.

.6 The Board shall act as the final authority of the City in imposing or reviewing discipline of the department employees consistent with the terms of State law and applicable collective bargaining contracts.

.7 The Board shall render an annual report to the Mayor and City Council, which shall include a description and evaluation of the department's activities during the previous year, including the handling of crime and complaints, if any, and proposals for future plans.

5-302 Investigatory Power

Whenever necessary to carry out its assigned duties, the Board of Police Commissioners shall have the same power to subpoena witnesses, administer oaths and require the production of evidence as the City Council.

Chapter 4. BOARD OF FIRE COMMISSIONERS

5-401 Duties

.1 The Board of Fire Commissioners, hereinafter known as the Board, is established pursuant to Article 5, Chapter 1, of this Charter and shall have all the powers duties and responsibilities of advisory boards in addition to the following duties.

.2 The board shall establish administrative rules for the organization and overall administration of the Department, in consultation with the Chief of the Fire Department and the Mayor. These administrative rules shall not be effectuated in accordance with Section 5105.8 of this Charter but shall become effective upon the filing with the City Clerk.

.3 The Board shall approve rules and regulations for the conduct of the members of the Department, in consultation with the Chief of the Fire Department and the Mayor.

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EXHIBIT G

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NEW ISSUE
BOOK-ENTRY ONLY

RATINGS+:
Moody's: Aa3
S&P: AA-

In the opinion of Miller, Canfield, Paddock and Stone, P.L.C., Bond Counsel, under existing law, assuming compliance with certain covenants by the Lansing Board of Water and Light (the "Board" or the "BWL"), (i) the interest on the BWL's Utility System Revenue Bonds, Series 2019A (the "Bonds") is excludable from gross income for federal income tax purposes and (ii) the Bonds and interest thereon are exempt from all taxation by the State of Michigan (the "State") or by any taxing authority within the State except inheritance and estate taxes and taxes on gains realized from the sale, payment or other disposition thereof. See "TAX MATTERS" herein and "Appendix F – FORM OF APPROVING OPINION" for a description of certain provisions of the Internal Revenue Code of 1986, as amended (the "Code") which may affect the tax treatment of interest on the Bonds for certain Bondholders.

$319,875,000
LANSING BOARD OF WATER AND LIGHT
CITY OF LANSING, MICHIGAN
UTILITY SYSTEM REVENUE BONDS, SERIES 2019A

Hometown People. Hometown Power.

Dated: Date of Delivery **Due: July 1, as shown on the inside cover**

The Bonds will be issued to provide funds for the purposes of (i) paying costs to acquire and construct a natural gas combined cycle facility to produce electricity, and system improvements (collectively, the "Project"), (ii) paying a portion of the BWL's outstanding Utility System Revenue Bond Anticipation Notes, Series 2018 (the "Notes"), (iii) providing for the payment of capitalized interest on the Bonds, and (iv) paying costs of issuance of the Bonds. The Bonds are authorized to be issued pursuant to the Revenue Bond Act of 1933, Act No. 94, Public Acts of Michigan, 1933, as amended ("Act 94"), and an Amended and Restated Bond Resolution, as amended, as described herein.

The Bonds are secured by a statutory lien on, and payable solely from, Net Revenues, as defined herein, derived from the electric, water supply, steam and chilled water utilities of the BWL. The Bonds are not a general obligation of the City of Lansing, Michigan (the "City") and neither the full faith and credit nor the taxing power of the City is pledged to the payment of the principal of and interest on the Bonds. The Bonds do not constitute an indebtedness of the City within any constitutional, statutory or charter limitation.

The Bonds will be issued as fully registered bonds and, when issued, will be registered in the name of Cede & Co., as registered owner and nominee for The Depository Trust Company, New York, New York ("DTC"). So long as Cede & Co. is the registered owner of the Bonds, principal of and interest on the Bonds are payable by U.S. Bank National Association, as Transfer Agent, to Cede & Co., as nominee for DTC, and payment thereof will be made to purchasers by DTC direct participants or indirect participants, as described herein. Purchasers will acquire beneficial ownership interests in denominations of $5,000 or integral multiples thereof.

The Bonds will bear interest at the rates set forth on the inside cover of this Official Statement, payable semiannually on January 1 and July 1 of each year, commencing January 1, 2020. Certain of the Bonds are subject to optional and mandatory redemption prior to maturity as described herein. (See "The Bonds – Optional Redemption Prior to Maturity" and "The Bonds - Mandatory Redemption Prior to Maturity.")

The Bonds are authorized to be issued pursuant to an Amended and Restated Bond Resolution adopted by the Board on March 27, 2018, and as amended on March 26, 2019 (together, the "Bond Resolution"). The Bond Resolution also amends and restates the Amended and Restated Bond Resolution adopted on October 24, 1989 effective upon receipt of consent from fifty-one percent (51%) of holders of the Outstanding Bonds (as defined herein) and the Bonds. See "THE BONDS – The Bond Resolution." **By purchasing the Bonds, Bondholders and Beneficial Owners of the Bonds shall have consented to the Bond Resolution, such that the foregoing 51% consent requirement is met and the amendments set forth in the Bond Resolution are effective as of the date of delivery of the Bonds**. Certain amendments to the Bond Resolution related to the Reserve Account Requirement were adopted by the Board on March 26, 2019 and will also become effective as of the date of the delivery of the Bonds. See "THE BONDS – Bond Reserve Account" and "Appendix E – BOND RESOLUTION CONSOLIDATED VERSION."

The Bonds are offered when, and as if issued and received by the Underwriters, subject to the approving opinion of Bond Counsel, Miller, Canfield, Paddock and Stone, P.L.C., Lansing and Detroit, Michigan. PFM Financial Advisors LLC is serving as the financial advisor to the BWL in connection with the sale and issuance of the Bonds. Certain matters will be passed on for the Underwriters by their counsel, Dickinson Wright PLLC, Lansing, Michigan. It is expected that the Bonds will be available for delivery through the facilities of DTC in New York, New York on or about June 25, 2019.

This cover page contains certain information for quick reference only. It is not a summary of the Bonds. Investors must read the entire Official Statement to obtain information essential to the making of an informed investment decision.

J.P. Morgan **Citigroup**
BofA Merrill Lynch **Goldman Sachs & Co. LLC** **PiperJaffray**

Dated: June 13, 2019

+ See "Ratings" herein.

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Rates and Charges

The Charter provides that the BWL shall have full and exclusive management of the water supply, steam and electric utility services of the City and such other services as may be agreed upon by the BWL and the City. The Charter also provides that the BWL may, with proper notice and hearing, fix just and reasonable rates as it deems necessary for such services. The implementation of new rates takes approximately three months and does not require any local, state or federal regulatory approval. It is the policy of the BWL to review all rates annually and to set such rates so that each utility is self-supporting. Rates are set on a cost of service basis.

In 2017, the BWL Board of Commissioners approved a three-year rate strategy which took effect February 1, 2018. The three-year plan will implement gradual increases in customer charges annually on February 1 during the years 2018-2020. The goal of the revised rate strategy is to better align customer rates with BWL's expense projections. As with many other utilities, BWL's rates are providing more complete coverage of fixed costs. The minor, frequent rate adjustments are designed to minimize customer impact.

BWL currently offers the following specialty electric rates:

- Time-of-use rates for the following customers
  - Commercial
  - Industrial
  - Electric Vehicles (EVs) with separate metering – BWL encourages the adoption of EVs by offering lower rates for charging during off-peak hours. This allows BWL customers to reduce the environmental impact of their transportation choices, while also saving money.
- GreenWise Power – Customers can purchase their power from 100% renewable sources for a premium of 1.3 cents per kWh. The City of Lansing recently announced that it will enroll all of its buildings/facilities in this program, making Lansing the first city in Michigan to go completely green (for electricity usage).

Customers of the Electric Utility pay basic service and capacity charges based on customer classification and an energy charge based on kWh used. All energy charges per kWh are subject to a power supply cost recovery (PSCR) adjustment ("Energy Cost Adjustment") on a monthly basis for the cost of fuel used in supplying electricity. In addition, customers are charged monthly Environmental, Renewable Energy, and Energy Optimization Surcharges. Customers are billed monthly.

Historic rate increases are set forth in the table below. These rate increases represent average system increases or increase in base rate revenue. As such, rate increases by rate class or rate component may deviate from these percentages.

Lansing Board of Water and Light
Electric Utility
Historic System Average Electric Rate Increases

Effective Date	10/1/2012[1]	10/1/2013[1]	11/1/2014	2/1/2018[2]	2/1/2019[2]	2/1/2020[2]
Rate Increase	3.75%	3.75%	7.00%	3.00%	3.00%	3.00%

[1] 10/1/2012 and 10/1/2013 increases were both approved in January 2011 as part of an advanced rate approval strategy to support the additional debt service requirements associated with the construction of the REO Town Cogeneration facility.
[2] 2/1/2018, 2/1/2019 and 2/1/2020 increases were approved in 2017 as part of an advanced rate approval strategy to support the additional debt service requirements associated with the construction of the Delta Energy Park.
Source: Lansing Board of Water and Light

Historic and existing rates and charges by customer classification are set forth in the table on the following page.

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Lansing Board of Water and Light
Electric Utility
Historic, Existing, and Future Rates by Customer Classifications

Rate No. 1 – Residential service	10/1/12	10/1/13	11/14/14	2/18/18	2/1/19	2/1/20
Basic Service Charge/month	$7.79	$8.10	$10.00	$13.00	$16.00	$19.00
Commodity charge/kWh						
Summer Months (June-Oct)						
1st 500 kWh	$0.0879	$0.0912	$0.1197	$0.1230	$0.1235	$0.1242
over 500 kWh	$0.0929	$0.0964	$0.1252	$0.1285	$0.1290	$0.1297
Winter Months (Nov-May)						
1st 500 kWh	$0.0879	$0.0912	$0.1197	$0.1230	$0.1235	$0.1242
over 500 kWh	$0.0910	$0.0945	$0.1232	$0.1265	$0.1270	$0.1277
Electric Environmental charge/kWh	$0.0025	$0.0025	$0.0025	$0.00	$0.0006	$0.0006*
Energy Waste Reduction Surcharge/kWh	$0.001853	$0.001853	$0.001853	$0.002678	$0.002678	$0.002678*
Renewable Energy Plan Surcharge/Month	$2.50	$2.50	$0.75	$0.00	$0.00	$0.00*
Rate No. 3-General Secondary Voltage Service	**10/1/12**	**10/1/13**	**11/1/14**	**2/1/18**	**2/1/19**	**2/1/20**
Basic Service Charge/month	$18.66	$19.38	$24.00	$28.00	32.00	36.00
Commodity charge/kWh						
Summer Months (June-Oct)	$0.1010	$0.1048	$0.1342	$0.1410	$0.1443	$0.1478
Winter Months (Nov-May)	$0.0975	$0.1011	$0.1303	$0.1371	$0.1404	$0.1439
Electric Environmental charge/kWh	$0.0025	$0.0025	$0.0025	$0.00	$0.0006	$0.0006
Energy Waste Reduction Surcharge/month	$6.58	$6.58	$6.58	$9.51	$9.51	$9.51
Renewable Energy Plan Surcharge/Month						
per kWh	$0.0030	$0.0030	$0.0024	$0.00	$0.00	$0.00
Minimum charge/month	$3.50	$3.50	$2.80	$0.00	$0.00	$0.00
Maximum charge/month	$15.00	$15.00	$12.00	$0.00	$0.00	$0.00
Rate No. 4-Large General Secondary Voltage Service	**10/1/12**	**10/1/13**	**11/1/14**	**2/1/18**	**2/1/19**	**2/1/20**
Secondary voltage with billing demand of 15 kw or more						
Basic Service Charge/month	$39.80	$41.33	$50.00	$100.00	$150.00	$200.00
Capacity Charge / kW of max Demand	$10.58	$10.99	$11.76	$14.00	$17.25	$20.50
Commodity charge/kWh						
Summer Months (June-Oct)	$0.0592	$0.0613	$0.0877	$0.0861	$0.0789	$0.0717
Winter Months (Nov-May)	$0.0551	$0.0571	$0.0832	$0.0861	$0.0744	$0.0672
Reactive Power/kvar	$0.00095	$0.0099	$0.0106	$0.0106	$0.0106	$0.0106
Electric Environmental charge/kWh	$0.0025	$0.0025	$0.0025	$0.00	$0.0006	$0.0006
Energy Waste Reduction Surcharge/month	$65.78	$65.78	$65.78	$95.05	$95.05	$95.05
Renewable Energy Plan Surcharge per kWh	$0.003	$0.003	$0.0024	$0.00	$0.00	$0.00
Minimum charge/month	$3.50	$3.50	$2.80	$0.00	$0.00	$0.00
Maximum charge/month	$15.00	$15.00	$12.00	$0.00	$0.00	$0.00
Rate No. 5 Primary Service	**10/1/12**	**10/1/13**	**11/1/14**	**2/1/18**	**2/1/19**	**2/1/20**
With billing demand of 100kW or more						
Basic Service Charge/month	$99.53	$103.36	$125.00	$190.00	$255.00	$320.00
Capacity Charge						
Per kW on peak Billing Demand	$8.58	$8.91	$9.53	$11.50	$13.70	$16.25
Per kW on maximum Oemand	$2.84	$2.95	$3.16	$4.50	$5.50	$6.20
Commodity charge/kWh						
Summer Months (June-Oct)						
On peak	$0.0534	$0.0553	$0.0813	$0.0782	$0.0730	$0.0678
Off-peak	$0.04.94	$0.0512	$0.0769	$0.0738	$0.0686	$0.0634
Winter Months (Nov-May)						
On peak	$0.0513	$0.0531	$0.0789	$0.0758	$0.0706	$0.0654
Off-peak	$0.0494	$0.0512	$0.0769	$0.0738	$0.0686	$0.0634
Reactive Power/kvar	$0.0095	$0.0099	$0.0106	$0.0106	$0.0106	$0.0106
Electric Environmental charge/kWh	$0.0025	$0.0025	$0.0025	$0.00	$0.0006	$0.0006
Energy Waste Reduction Surcharge/delivery point	$461.20	$461.20	$461.20	$666.43	$666.43	$666.43
Renewable Energy Plan Surcharge/delivery point	$160.00	$160.00	$160.00	$0.00	$0.00	$0.00

* Subject to change.

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In addition to the above rates and charges, the Electric Utility has separate rate schedules for large capacity service, traffic lights, street lighting, security lighting and municipal water pumping.

Based on rates and charges currently in effect, the following table provides an estimate of the total monthly payments a residential customer of the Electric Utility would make at various usage levels.

Lansing Board of Water and Light
Electric Utility
Total Estimated Monthly Billing

kWh Usage Per Month	Basic Service Charge	Energy Charge	Total Estimated Monthly Billing
250	$16.00	$30.86	$46.86
500	$16.00	$61.75	$77.75
750	$16.00	$93.71	$109.71
1,000	$16.00	$125.67	$141.67

Source: Lansing Board of Water and Light

Electric Sales

The following table sets forth the sales and percent of sales by customer classification for the fiscal years ended June 30, 2014 through 2018. Sales are shown in MWh.

Lansing Board of Water and Light
Electric Utility
Amount in MWh and Percent of Sales by Customer Classification
Fiscal Years Ended June 30, 2014 Through 2018

	Fiscal Year Ended June 30				
Classification	2014	2015	2016	2017	2018
Residential	571,413	554,360	552,593	573,534	556,294
Commercial	1,151,058	1,140,878	1,131,488	1,156,655	1,133,090
Industrial	395,960	366,790	388,541	404,848	367,530
Wholesale [1]	664,545	710,848	601,474	758,182	554,654
Other	37,903	35,611	35,061	34,361	32,212
Total	2,820,879	2,808,487	2,709,157	2,927,580	2,643,780
Classification					
Residential	20.26%	19.74%	20.40%	19.59%	21.04%
Commercial	40.80	40.62	41.77	39.51	42.86
Industrial	14.04	13.06	14.34	13.83	13.90
Wholesale [1]	23.56	25.31	22.20	25.90	20.98
Other	1.34	1.27	1.29	1.17	1.22
Total	100.00%	100.00%	100.00%	100.00%	100.00%

[1] Includes sales to MPPA Power Pool participants.
Source: Lansing Board of Water and Light

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Electric Revenues

Electric rates and charges have historically accounted for approximately 80% of gross System revenues. The following table sets forth amount and percent of electric revenues by customer classification for the fiscal years ended June 30, 2014 through 2018.

Lansing Board of Water and Light
Electric Utility
Amount and Percent of Revenues by Customer Classification
Fiscal Years Ended June 30, 2014 through 2018

	Fiscal Year Ended June 30				
Classification	2014	2015	2016	2017	2018
Residential	$75,342,990	$78,506,198	$81,756,039	$82,442,118	$80,819,134
Commercial	130,685,946	136,104,421	141,572,563	141,794,161	137,408,227
Industrial	37,528,235	37,755,775	40,501,600	41,338,384	37,908,882
Wholesale	31,821,390	28,169,851	24,756,062	31,969,934	21,846,410
Other	13,775,903	14,511,660	14,659,504	15,380,580	15,278,754
Total	$289,154,464	$295,047,904	$303,245,766	$312,925,177	$293,261,407
Classification					
Residential	26.06%	26.61%	26.96%	26.35%	27.56%
Commercial	45.20	46.13	46.69	45.31	46.85
Industrial	12.98	12.79	13.36	13.21	12.93
Wholesale	11.00	9.55	8.16	10.22	7.45
Other	4.76	4.92	4.83	4.91	5.21
Total	100.00%	100.00%	100.00%	100.00%	100.00%

Source: Lansing Board of Water and Light

THE WATER UTILITY

General

The Water Utility component of the System was established in 1885 and currently serves more than 56,000 customers. Water is obtained from 124 wells averaging 400 feet in depth with a total hydraulic capacity of approximately 68.3 million gallons per day ("MGD"). During the fiscal year ended June 30, 2018, the average and maximum daily flows were approximately 20.47 MGD and 28.9 MGD, respectively. The Water Utility has two water conditioning plants that soften water in a process that reduces hardness from about 450 parts per million to 85-100 parts per million. The two conditioning plants are interconnected and have a combined capacity of 50 MGD. Water is fluoridated and virtually all water is supplied through meters. The distribution system has 805 miles of mains, most of which are six inches or more in diameter. The Water Utility has four covered reservoirs with a combined capacity of 24 million gallons.

Lead Service Replacement & Regulation

The EPA's Lead and Copper Rule took effect in 1991 with the intent of reducing public exposure to lead in drinking water. In 2018, the State of Michigan promulgated a more stringent rule, effectively reducing the lead action level below the federal standard. The Water Utility has maintained compliance with the rule by maintaining corrosion control and systematically removing lead services lines.

The BWL's uses a corrosion control additive to inhibit lead found in the water distribution system and household plumbing from leaching into drinking water. Even though this additive has been effective in achieving compliance with the rule, the BWL began a project to remove all 13,500 lead service lines (approximate) from its distribution system in 2004. The BWL completed the removal of all active lead service lines in December of 2016.

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EXHIBIT H

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LANSING BWL

Hometown People. Hometown Power.

Rate Schedules Fiscal Year 2023-2024

Effective November 1, 2023

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Electric Residential Rates

LANSING BWL

Hometown People. Hometown Power.

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Hometown People. Hometown Power.

STANDARD RESIDENTIAL ELECTRIC SERVICE
RATE CODE: RES1

Availability - This rate is available to any Lansing Board of Water & Light ("BWL") customer of a single-family dwelling or multifamily dwelling of four units or less when the entire electric service requirements are supplied at one Premises through one meter. Service to appurtenant buildings may be taken through the same meter.

Beginning with the November 2023 Billing Month, all Residential customers will be enrolled in this Residential Time of Use ("TOU") rate and will continue to be enrolled for at least twelve (12) months.

Service under this rate is not available when a portion of the dwelling or an appurtenant building is used for commercial, industrial, or resale purposes unless the wiring is so arranged that service for residential and non-residential purposes are metered separately on separate Accounts.

Nature of Service - The service is alternating current, 60 hertz, single phase, 120/240 nominal volts.

Monthly Rate - Shall be computed in accordance with the following charges:

	11/1/2023	
Basic Service Charge	$20.50	Per month
Commodity Charge		
Off-Peak Summer	$0.1314	Per kWh for all Off-Peak kWh between June 1 and September 30
On-Peak Summer	$0.1445	Per kWh for all On-Peak kWh between June 1 and September 30
Off-Peak Winter	$0.1314	Per kWh for all Off-Peak kWh between October 1 and May 31
On-Peak Winter	$0.1445	Per kWh for all On-Peak kWh between October 1 and May 31

Minimum Bill - The Minimum Bill is the Basic Service Charge included in the Monthly Rate.

Schedule of On-Peak and Off-Peak Hours - The following schedule shall apply Monday through Friday, including weekday U.S. Holidays when applicable. Saturday and Sunday are Off-Peak. Designated NERC/MISO weekday holidays, as shown in the Rules and Regulations, will be considered Off-Peak.

A) On-Peak Hours: 1:00PM to 8:00PM
B) Off-Peak Hours: 8:00PM to 1:00PM

Surcharges and Riders - Service under this rate is subject to surcharges and riders as defined on a separate surcharge or rider schedule.

Fee and Tax Adjustment - Any taxes, assessments, franchise fees, or any other charges or fees levied by a governmental entity or political subdivision upon BWL property, operations, or the production, distribution or sale of electric power, will be in addition to the rates set forth herein.

Rules and Regulations - Service under this rate is subject to the BWL Rules and Regulations for Electric Service hereby incorporated by reference.

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EXHIBIT I

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Caution
As of: June 6, 2024 5:52 PM Z

Dixon-Brown v. Covenant Cemetery Servs.

Court of Appeals of Michigan

February 10, 2022, Decided

No. 355476

Reporter
2022 Mich. App. LEXIS 837 *; 2022 WL 413904

DIANE DIXON-BROWN and REBECCA THOMAS, Plaintiffs-Appellants, v COVENANT CEMETERY SERVICES, 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]** Washtenaw Circuit Court. LC No. 19-001376-CK.

Dixon-Brown v. Covenant Cemetery Servs., 2021 Mich. App. LEXIS 2010 (Mich. Ct. App., Mar. 30, 2021)

Core Terms

cemetery, burial, accrue, fraudulent concealment, limitations period, buried, records, summary disposition, plaintiffs', headstone, three-year, statute of limitations, funeral home, grave

Counsel: For DIXON-BROWN DIANE, Plaintiff - Appellant: SHAREECE MCCAULEY.

For COVENANT CEMETERY SERVICES, Defendant - Appellee: LANFEAR R CARL JR; ANTHONY F CAFFREY III.

Judges: Before: GLEICHER, C.J., and SERVITTO and LETICA, JJ.

Opinion

PER CURIAM.

Plaintiffs, Diane Dixon-Brown (Diane) and Rebecca Thomas (Rebecca), appeal as of right the trial court's order granting summary disposition to defendant, Covenant Cemetery Services, and dismissing plaintiffs' complaint. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In 2001, Isaac Dixon (Isaac) died of a heroin overdose. Isaac's children, LaJuana Dixon-Trice (LaJuana) and Pierre Dixon (Pierre), were minors at the time of his death. Consequently, Isaac's sisters, plaintiffs in this case, organized and paid for Isaac's interment. After Isaac's death, plaintiffs made a deposit of $1,942[1] to James H. Cole Home for Funerals (the funeral home) to organize Isaac's funeral and burial, and paid $425.14 to Simpson Granite for a headstone. Plaintiffs, as well as Isaac's children, recalled that Isaac was buried at Westlawn West Cemetery in Ypsilanti.[2] At that time, the cemetery was owned and operated by Westlawn Cemetery Association of **[*2]** Detroit (Westlawn). However, a contract between plaintiffs and defendant or the funeral home and defendant was not produced. In fact, no contract pertaining to Isaac's burial with the cemetery was ever produced, irrespective of the ownership in 2001. In approximately 2003, the subject cemetery came under new ownership, was renamed Sunset Hills Cemetery, and defendant took over the cemetery's operations.

In August 2016, for the first time since Isaac's burial, LaJuana visited the subject cemetery. She could not locate Isaac's burial site or headstone. LaJuana contacted defendant, who informed her that they had no record of Isaac's burial. Michael Butts, the president of defendant, testified that, at present—and during the time that Isaac was buried and the cemetery was operated by Westlawn—the subject cemetery performs "next in line burials." Burials at the cemetery are performed down a line in chronological order on an at-need basis, and the cemetery's records reflect the same. The cemetery identifies where individuals have been buried by reference to the date that they

[1] The funeral receipt merely indicated that the total amount of the account was $3,402, a deposit of $1,942 was paid, and the balance due was $1,460. The services paid for were not delineated, and there is no identification of the cemetery.

[2] Plaintiffs submitted affidavits in response to defendant's motion for summary disposition. However, these affidavits contained in the lower court record are not signed or notarized.

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were buried.

Butts reviewed the records defendant inherited from Westlawn as well as the additional records defendant **[*3]** has kept since, and affirmed defendant's initial conclusion that there was no record of Isaac's burial. Butts opined that Isaac was not actually buried at the subject cemetery, and noted that he did not believe there was a gap in the burial records or that the records were otherwise incomplete. Defendant's staff accounted for all of the burial plots from the time before and after Isaac's purported burial. Although the death certificate, the funeral program, and Isaac's family members[3] identified Westlawn West Cemetery as Isaac's burial place, Butts testified that it was not uncommon for families to change their mind before executing a contract with the cemetery and fail to correct the pertinent documentation.

In November 2016, plaintiffs filed a complaint in the Washtenaw Circuit Court against Westlawn alleging breach of contract, promissory estoppel, and unjust enrichment. Plaintiffs obtained a default judgment in that case. Shortly before plaintiffs obtained that judgment, in September 2017, LaJuana and Pierre filed their own action against Sunset Hills Memorial, Thumb Area Christian Fellowship,[4] Westlawn, and defendant. LaJuana and Pierre settled their claim against defendant for $10,000, **[*4]** and executed a release of claims governing themselves, their family members, successors and assigns, among others.

In December 2019, plaintiffs filed the present suit against defendant alleging breach of contract, promissory estoppel, unjust enrichment, gross negligence, intentional infliction of emotional distress, and fraudulent concealment. Defendant moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10), contending, among other things, that plaintiffs' claims were barred by the doctrine of res judicata, barred by the release of claims executed by LaJuana and Pierre, and barred by the relevant statutes of limitations. Without providing its own reasoning, the trial court granted the motion "for the reasons stated in Defendant's Motion for Summary Disposition, Brief in Support, and Reply Brief," and dismissed plaintiffs' complaint with prejudice. This appeal followed.

II. ANALYSIS

As an initial matter, we note that defendant raised a number of issues in its motion for summary disposition that could have provided a basis for the trial court's ruling that plaintiffs simply do not address on appeal. For example, in the trial court, defendant submitted that plaintiffs failed to establish the elements **[*5]** of their claims under MCR 2.116(C)(8) and (C)(10). However, on appeal, plaintiffs do not address the elements of their claims. When an appellant fails to challenge the basis of the trial court's ruling, we need not even consider granting the relief requested. *TT v KL*, 334 Mich App 413, 433; 965 NW2d 101 (2020). Nonetheless, we conclude that the statute of limitations issue is plainly dispositive of plaintiffs' claims, and therefore, we do not address their additional arguments raised on appeal or the other potential grounds for the trial court's decision.

This Court reviews de novo whether a claim is barred by a statute of limitations, as well as the proper interpretation and application of the limitations period. *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 227-228; 859 NW2d 723 (2014). Motions for summary disposition made on the basis of a statute of limitations are properly brought under MCR 2.116(C)(7). *Nucolovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). When examining whether a motion for summary disposition brought under MCR 2.116(C)(7) was properly decided, the appellate court considers "all documentary evidence and accept[s] the complaint as factually accurate unless affidavits or other documents presented specifically contradict it." *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010).

Michigan applies a six-year period of limitations for breach of contract claims. *Miller-Davis Co v Ahrens Constr, Inc*, 489 Mich 355, 370-371; 802 NW2d 33 (2011); MCL 600.5807(9). In Michigan, a claim for breach of contract accrues " 'at the time the wrong upon **[*6]** which the claim is based was done regardless of the time when damage results.' " *Scherer v Hellstrom*, 270 Mich App 458, 463; 716 NW2d 307 (2006), quoting MCL 600.5827. Because claims of promissory estoppel and unjust enrichment are "dependent on the existence of contract or contract principles," they are also governed by the same six-year period of limitations. *Huhtala v Travelers Ins Co*, 401 Mich 118, 125-126; 257 NW2d 640 (1977) (quotation marks and citation omitted). 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.").[5]

[3] In her deposition, LaJuana testified that she recalled traveling to Westlawn and that it was raining at Isaac's burial. However, it was January 2001, and records of the weather conditions that day were not examined to corroborate her testimony. Additionally, Butts was not questioned whether the cemetery had the equipment and ability to conduct gravesite burials in the winter.

[4] Thumb Area Christian Fellowship is the current owner of the subject cemetery.

[5] Although Huhtala does not specifically address unjust enrichment claims, the principles articulated in Huhtala pertaining to promissory estoppel apply equally to unjust enrichment. See *Huhtala*, 401 Mich at

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For purposes of breach of contract, promissory estoppel, and unjust enrichment,[6] the claims accrued at the time the wrong upon which the claim is based was done regardless of the time when damage results. It is undisputed that Isaac died and was buried in 2001. It was then that plaintiffs paid the funeral home to organize Isaac's funeral and burial, and purchased a headstone for Isaac's grave. Plaintiffs alleged in their complaint that the headstone was to arrive six to eight weeks after it was purchased in August 2001, but they never confirmed that the delivery **[*7]** occurred. In fact, plaintiffs made no attempt to visit Isaac's grave after the alleged burial until 2016, when they were informed that LaJuana visited the cemetery and could not locate Isaac's grave. Thus, the wrong occurred on January 20, 2001, when defendant purportedly agreed to bury Isaac in the cemetery. The fact that plaintiffs learned that Isaac's burial site could not be located in the cemetery until 2016 does not alter the accrual date for purposes of these claims. The filing of this action in 2019 was outside the period of limitations.[7]

For actions arising out of tort, MCL 600.5805 "is commonly known as the general tort statute of limitations because it is a compilation of the limitations on the general tort remedies." *Miller-Davis Co*, 489 Mich at 363-364. MCL 600.5805(2) provides a three-year period of limitations "after the time of the death or injury for all actions to recover damages for the death of a person or for injury to a person or property."[8] Plaintiffs do not dispute that, under the facts of this case, the general three-year statutory limitation period applied to their claims of gross negligence and intentional infliction of emotional distress. See *Doe v Roman Catholic Archbishop*, 264 Mich App 632, 639; 692 NW2d 398 (2004) ("Intentional infliction of emotional distress and negligence are subject to **[*8]** a three-year statute of limitation.").

Previously, a discovery-based analysis was applied to tort actions, and a claim did not accrue until a plaintiff knew or should have known that a cause of action could be alleged in a proper complaint. *Trentadue v Gorton*, 479 Mich 378, 389; 738 NW2d 664 (2007), citing *Moll v Abbott Laboratories*, 444 Mich 1, 16-17; 506 NW2d 816 (1993). However, because the Legislature comprehensively established "limitations periods, times of accrual and tolling for civil cases," the statutory scheme explicitly supersedes the common law. *Trentadue*, 479 Mich at 390. Accordingly, a claim accrues when the wrong is done regardless of the time when damage results. *Id.* at 387; *Boyle v GMC*, 468 Mich 226, 231; 661 NW2d 557 (2003). The wrong is done when the plaintiff is harmed not when the defendant acted. *Boyle*, 468 Mich at 231 n 5. Thus, the three-year limitations period for damage claims arising out of these tort claims begins to run from the time the claim accrues, and the claim accrues at the time the wrong is done. *Henry v Dow Chemical Co*, 501 Mich 965; 905 N.W.2d 601 (2018).[9]

In Trentadue, the victim was raped and murdered in November 1986 at her home, a gatehouse leased from the Mott family estate. In 2002, her murder was solved through deoxyribonucleic acid (DNA) evidence when it was learned that Jeffrey Gorton, an employee of his parent's lawn sprinkler company, had committed the crime. In 2002, the plaintiff, the personal representative of the victim's estate, **[*9]** filed a

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126. Additionally, claims of unjust enrichment are equitable in nature and involve contract liability because a contract is implied in the interests of equity. *Genesee Co Drain Commr v Genesee Co*, 321 Mich App 74, 78; 908 NW2d 313 (2017). Accordingly, a six-year period of limitations also applies to unjust enrichment.

[6] The elements of promissory estoppel include "(1) a promise (2) that the promissory should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008). The elements of unjust enrichment include (1) the receipt of a benefit by the defendant from the plaintiff and (2) it is inequitable from the defendant to retain the benefit. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991). To address the claims for breach of contract, promissory estoppel, and unjust enrichment, we assume, without deciding, that there was a contractual relationship with or promise rendered by defendant. We note that plaintiff contends that it demonstrated a factual issue regarding defendant's potential ownership interest in the cemetery at the time of Isaac's burial by presenting a page from defendant's website that was since altered by defendant. This webpage merely contained a heading "Sunset Hills & Westlawn" with the date "1999-2003." There was no representation regarding ownership or management and no correlation to the specific date of any of these activities on the webpage. Plaintiff failed to contradict Butts's testimony that defendant took over the management of the cemetery in approximately 2003.

[7] Plaintiffs contend that the trial court improperly applied the three-year limitation period applicable to torts to their contract-based claims as argued in the trial court by defendant. Indeed, defendant suggested below that the three-year limitation period applied to those claims, but clarified on appeal that the three-year period applies because plaintiffs have failed to produce any contract in this case and the gravamen of plaintiffs' complaint arises in tort. Irrespective of the limitation period that the trial court applied to plaintiffs' breach of contract claims, the claims were untimely.

[8] Plaintiffs do not allege that their gross negligence and intentional infliction of emotional distress claims fall under any exception contained in MCL 600.5805 that might provide a different limitation period.

[9] Peremptory orders of the Supreme Court constitute binding precedent when the rationale can be understood even if doing so requires examination of other opinions. *Woodring v Phoenix Ins Co*, 325 Mich App 108, 115; 923 NW2d 607 (2018); *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 166; 712 NW2d 731 (2005).

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complaint alleging negligence against the lawn sprinkler defendants for negligent hiring and monitoring and the Mott estate for negligence in allowing access to the victim's residence and failing to provide adequate security. With the exception of Gorton, the defendants moved for summary disposition, contending that the claim accrued when the victim was harmed, the third-year period of limitations had expired, and the three-year extension for the appointment of a personal representative did not save the claim because nearly 16 years had passed. However, the plaintiff alleged that the common-law discovery rule applied to toll the statute of limitations until the identity of the killer was learned. *Trentadue*, 479 Mich at 382-385. Our Supreme Court rejected the personal representative's argument, concluding that an extrastatutory discovery rule could not be applied "to allow plaintiff to bring her claims 16 years after the death of [the victim]." The Court held that when the death occurred, the wrong upon which the claim was based was done. *Id.* at 392-393.

Plaintiffs contend that the claims arose in August 2016, when they first learned that Isaac's remains were missing. However, the tort claims accrued when the wrong upon **[*10]** which the claim is based was done. *Id.* Again, Isaac was purportedly buried in the cemetery in 2001. Plaintiffs purportedly paid the funeral home[10] for the burial at that time, and paid for a headstone shortly thereafter. Plaintiffs never returned to determine whether the headstone arrived to be placed on the grave or whether the grave had otherwise been properly marked. Thus, in 2001, plaintiffs' claims accrued when they were harmed, long before 2016.

To overcome this point, plaintiffs lastly contend that the three-year limitation period for their tort-based claims should be tolled on the basis of fraudulent concealment. Fraudulent concealment can be employed as an exception to a statute of limitations and is governed by MCL 600.5855. *Doe*, 264 Mich App at 642. The 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 existence of the claim or the identity of the person who is liable for the claim, **[*11]** although the action would otherwise be barred by the period of limitations. [MCL 600.5855.]

In order to establish fraudulent concealment, a plaintiff must show an affirmative act or misrepresentation on the defendant's part designed to conceal the existence of the claim or the identity of a potential defendant. *Id.* at 642-643. Plaintiffs must "plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment." *Id.* at 643 (quotation marks and citation omitted).

In their complaint, plaintiffs alleged that defendant represented to them that it did not believe Isaac was buried at its cemetery and this caused plaintiffs to search elsewhere for Isaac's body to their monetary and emotional detriment. Plaintiffs further alleged that Butts lied when he stated to an MLive reporter that he was working to help plaintiffs.[11] The evidence in this case does not support a finding that these statements were untrue in the first instance, let alone designed to conceal the existence of plaintiffs' claims. Butts testified that he *was* attempting to assist Isaac's family, that he truly did not believe that Isaac was buried at the subject cemetery, and he detailed the investigative steps he took to reach that conclusion. **[*12]** Butts reviewed defendant's records, including the records defendant received from Westlawn after taking over operations of the cemetery; contacted the funeral home to obtain their records; contacted Sampson Granite to determine what happened with Isaac's headstone; and contacted other cemeteries in the area to determine whether they had any record of Isaac. Plaintiffs have simply failed to allege any affirmative act or misrepresentation on defendant's part that could amount to fraudulent concealment.[12]

[10] Plaintiffs did not obtain an affidavit from the funeral home addressing what the fee of $3,940 covered in 2001, and the funeral home's relationship to the cemetery at the time, if any.

[11] For the first time on appeal, plaintiffs also suggest that because Butts owns or is active with multiple corporate entities—including defendant, Sunset Hills LLC, and the Thumb Area Christian Fellowship—plaintiffs could not initially determine the proper defendant in this case. Plaintiffs provide no explanation, however, as to how Butts's involvement with multiple corporate entities itself constitutes fraudulent concealment. Moreover, it is telling that LaJuana and Pierre conducted enough due diligence to name most of the above defendants in their 2017 complaint.

[12] It is also worth noting that plaintiffs' assertions with respect to fraudulent concealment are plainly contradictory. On the one hand, plaintiffs suggest that they did not bring their suit earlier because defendant indicated it would attempt to help them in locating Isaac's remains. On the other hand, plaintiffs suggest that the idea that defendant was trying to help them at all was news to them when they discovered the MLive article in 2019. Plaintiffs further suggest that they searched elsewhere for Isaac's remains to their monetary and emotional detriment on the basis of defendant's statement to them that defendant did not believe Isaac was buried at the subject-cemetery, but at the same time suggest that they did not search elsewhere in reliance on defendant's offer to help them. Taken together, it is difficult to discern exactly what it is that plaintiffs allege constituted fraudulent concealment, or what, if anything, defendant misrepresented in the first instance.

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Moreover, and importantly, even if plaintiffs could establish fraudulent concealment, their entire fraudulent concealment argument is made in the alternative to their argument that their claims began to accrue in 2019. That is, plaintiffs allege that, if this Court concludes that their claims began to accrue in September 2016, fraudulent concealment allowed them to bring the claims in December 2019. But the fraudulent concealment statute would permit plaintiffs two years from the discovery of their cause of action to file suit. MCL 600.5855. Plaintiffs filed their suit over three years after August 2016. For all of the above reasons, plaintiffs' fraudulent concealment argument is without merit.

Affirmed. **[*13]** Defendant, the prevailing party, may tax costs.

/s/ Elizabeth L. Gleicher

/s/ Deborah A. Servitto

/s/ Anica Letica

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EXHIBIT J

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Ganson v. Detroit Pub. Sch.

Court of Appeals of Michigan

January 21, 2021, Decided

No. 351276

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

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

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

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

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

Core Terms

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

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

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

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

Opinion

PER CURIAM.

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

I. BACKGROUND

Plaintiff began working for defendant in 1985. In June 2009, defendant decided not to renew plaintiff's contract. In December 2010, the Office of Retirement Services (ORS) informed plaintiff by letter that he did not meet the eligibility requirements for an incentivized retirement because plaintiff had not worked between November 1, 2009 and May 1, 2010. In February 2011, plaintiff unsuccessfully appealed the decision of the ORS in the State of Michigan Administrative Hearing System. An administrative law judge (ALJ) found that plaintiff did not qualify for incentivized retirement benefits because plaintiff failed to prove by a preponderance of the evidence that he was employed by the defendant during the six-month period ending on May 1, 2010. The ALJ's findings of fact and conclusions of law **[*2]** were adopted by the Public School Employees' Retirement Board in September 2012.

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

In February 2018, plaintiff filed the instant case against defendant for breach of contract in the Wayne County Circuit Court. Plaintiff alleged that after his contract was not renewed in 2009, he was appointed by defendant's school board to the position of Executive Director of Student Affairs at Wayne State University. He alleged that this employment sufficed to qualify him as an employee performing out of system public education services pursuant to MCL 38.1306. Plaintiff alleged that upon retirement, he "was supposed to receive an early buyout package for the remainder of the Plaintiff's life and a multiplier for a period of six (6) years following the termination **[*3]** of his employment[.] . . .Along with the early buyout incentive, the Plaintiff was supposed to receive a multiplier that would provide the Plaintiff $100 per month for a period of six years. . . . [Plaintiff alleged that he] was informed that he would be provided with his early buyout retirement

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benefits if he worked for Detroit Public Schools for one day between the period of time between November 1, 2009 and May 1, 2010." Plaintiff pled that he had fulfilled that requirement when he "worked for Spain Elementary for three (3) days". According to the complaint, "[t]he Plaintiff was not provided with the aforementioned multiplier and thus has not received $7,200 that he was supposed to receive." Further, "[b]etween the time that the Plaintiff attempted to collect on his early retirement benefits and the time that he was entitled to receive them, he has been damaged in the amount of approximately $300,000." Relevant to this appeal, attached to the complaint was a one-page-document titled "CONTRACT FOR EXECUTIVE DIRECTOR OF THE CENTER FOR STUDENT ADVOCACY SERVICES" and that listed "PARTIES, PURPOSES, DUTIES, REPORTS, TERMS OF EMPLOYMENT, COMPENSATION AND REPRESENTATIONS" as subpoints **[*4]** 1.1 through 1.10. There was no signature page.

Defendant filed a motion to dismiss under MCR 2.116(C)(8) that argued plaintiff failed to state a claim upon which relief could be granted because plaintiff failed to attach the complete contract to the complaint as required by MCR 2.113(F)(1), and that the claim was barred by the statute of limitations and res judicata. The court granted the motion to dismiss for plaintiff's failure to attach the whole contract as required under MCR 2.113(F) and under res judicata. On appeal, plaintiff challenges the application of the statute of limitations to his claim and whether the trial court erred in dismissing his complaint under MCR 2.113(F).

II. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. [*El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019).]

"[W]hether **[*5]** a claim for unjust enrichment can be maintained is a question of law, which we [also] review de novo." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006). We also review de novo as a question of law whether an action is barred by the statute of limitations. *Parks v Niemiec*, 325 Mich App 717, 719; 926 NW2d 297 (2018).

III. ANALYSIS

Plaintiff first argues that defendant: 1) misled the court into believing that the accrual date for plaintiff's breach of contract claim was when the contract was signed, and 2) that the trial court erred in agreeing with defendant. The record does not support either assertion. To the contrary, in its brief in support of its motion to dismiss, defendant argued that the period of limitations for breach of contract claims "accrue at the time of the wrong upon which the claim is based was done regardless of the time when damage results" and that the statute of limitations began to run in this case in 2010 when plaintiff received a decision from the ORS. Defendant maintains that same theory on appeal.

The record also does not support plaintiff's assertion that the trial court agreed with defendant's statute of limitations argument. Rather, at the hearing for the motion to dismiss, the court declined to address the statute of limitations despite it having been pled and **[*6]** argued, as evidenced by the following colloquy:

> *Defendant*: The second basis, Your Honor, is even assuming that the entire contract had been filed, one, the defendant Detroit Public Schools is not a party to it.
> And even if it was filed again in it's entirety. The statute of limitations would bar the complaint.
>
> *The court*: So do we even need to address it when we know it wasn't filed completely?
>
> *Defendant*: I was just giving all of the arguments.
>
> *The Court*: I appreciate that. Yeah. And then you also have the issue of res judicata.

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

Plaintiff next argues that his breach of contract claim is not barred by the statute of limitations and continues to accrue because the defendant's failure to pay plaintiff any retirement benefits constitutes a continuing breach where each failure to pay is a new breach. This argument was not raised before the trial court and is considered waived on appeal. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (citation omitted) ("Michigan generally follows the 'raise or waive' rule of appellate review."). While this Court "may overlook preservation requirements **[*7]** when the failure to consider an issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a

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question of law and the facts necessary for its resolution have been presented," *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010), we decline review of this issue because its consideration is not necessary for a proper determination of the case. The court granted defendant summary disposition on the bases of the contract not being attached to the complaint in full and res judicata — not the statute of limitations. Consideration of this issue, even if determined to be in plaintiff's favor, would not disturb the trial court's ruling or change the end result.

Plaintiff also argues that defendant's retention of all of plaintiff's retirement benefits constitutes unjust enrichment. We disagree. "Our Supreme Court has long recognized the equitable right of restitution when a person has been unjustly enriched at the expense of another." *Morris Pumps*, 273 Mich App at 193 (quotation marks and citation omitted). "When unjust enrichment exists, the law operates to imply a contract in order to prevent it." *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 327-28; 657 NW2d 759 (2002) (quotation marks and citation omitted). "However, a contract will be implied only if there is no express **[*8]** contract covering the same subject matter." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). Like a claim of breach of contract, the statute of limitations period for a claim of unjust enrichment is six years. MCL 600.5813 ("All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."); MCL 600.5815 ("The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought...."). To prove a claim of unjust enrichment, the plaintiff must show "(1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to plaintiff from defendant's retention of the benefit." *Bellevue Ventures, Inc v Morang-Kelly Investment, Inc*, 302 Mich App 59, 64; 836 NW2d 898 (2013).

Plaintiff's claim of unjust enrichment fails for multiple reasons. The claim would first be barred by the statute of limitations. Absent a date from plaintiff as to when the breach occurred, the ALJ's findings established that plaintiff knew as early as 2010 and as late as 2011 that he was being denied incentivized retirement benefits, however, he did not file the complaint in the instant matter until over six years later in 2018. MCL 600.5813; MCL 600.5815. Second, plaintiff's reliance on the continuing wrongs doctrine to extend the statute **[*9]** of limitations for his unjust enrichment claim is of no avail where the doctrine is no longer recognized in Michigan. *Marilyn Froling Revocable Living T. v Bloomfield Hills Country Club*, 283 Mich App 264, 288; 769 NW2d 234 (2009). Third, plaintiff cannot prove the second element of an unjust enrichment claim — that defendant retained a benefit — when defendant was not the holder of plaintiff's retirement funds. While it is true that defendant received the benefit of plaintiff's labor and length of employment, defendant is not the entity responsible to pay plaintiff's retirement benefits. According to the ALJ's proposal for decision, the ORS, acting on behalf of the Public School Employees' Retirement System denied plaintiff an incentivized retirement. Thus, plaintiff's retirement benefits were retained by the Public School Employees' Retirement System, which is in turn, maintained by the state of Michigan, not the defendant. See *AFT Michigan v State of Michigan*, 497 Mich 197, 202; 866 NW2d 782 (2015) ("the Public School Employees Retirement Act (Retirement Act), MCL 38.1301 *et seq.*, . . . governs the Michigan Public School Employees' Retirement System (MPSERS).").

Plaintiff additionally argues that the trial court erred in dismissing his complaint 1) under MCR 2.113(F) because the contract was attached to the complaint, and 2) because defendant failed to assert the defense of lack of an existence **[*10]** of an agreement in its first responsive pleading. Importantly, plaintiff does not challenge the trial court's additional basis for dismissal based on res judicata.

To prevail on his claim for breach of contract, plaintiff must establish by a preponderance of the evidence that "(1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach." *Bank of Am, NA v First Am Title Ins Co*, 499 Mich 74, 100; 878 NW2d 816 (2016). "If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading .... " MCR 2.113(C)(1). "[T]he written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007).[1]

In his complaint, plaintiff referred to the contract as Exhibit E. According to the lower court record received by this Court and the certified copy of the lower court record submitted by defendant, exhibit E consisted of a letter from the Detroit Public Schools' superintendent recommending plaintiff for the position of director of student advocacy, a resolution from the Detroit Public Schools Board of Education to implement the student advocacy pilot program, and a document titled "Contract for Executive Director of the Center **[*11]** for Student Advocacy." This last document was one page, listed one section titled "Parties, Purposes, Duties, Reports, Terms of Employment, Compensation and Representations", and had

[1] MCR 2.113(F) has been redesignated MCR 2.113(C), and has been modified without substantive changes to accommodate "a statewide uniform e-Filing process," effective September 1, 2018, 501 Mich __, and again modified without substantive changes, effective August 14, 2019 and January 1, 2020. See 503 Mich. __, __.

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subsections 1.1 through 1.10. It did not contain any other sections or pages. Upon receipt of the complaint, defendant's counsel twice alerted plaintiff by e-mail that the document was only one page. At the hearing on the motion to dismiss, plaintiff's counsel could not attest before the court as to whether he attached the contract in its entirety to the complaint. The court, in receipt of extensive communications between counsel in which the defendant repeatedly asked for the entire contract and plaintiff counsel's equivocation, found that the entire contract was not attached to the complaint.

Even if the trial court erred and the plaintiff either included the entire contract or supplemented his complaint with the additional page alleged to have been omitted, his breach of contract complaint would not have survived legal scrutiny and defeat. The second page contained subsections 1.11 through 1.17 and was signed by a school board representative, interim superintendent, plaintiff, two witnesses, and a notary. **[*12]** While the additional page stated that "The relationship of the Executive Director to the School District is that of an employee", it said nothing about the incentivized benefits plaintiff claims he was promised which would form the basis of the alleged breach. Plaintiff has failed to provide proof of the promises upon which his contractual claim was based: entitlement to an early buyout and a multiplier for six(6) years post retirement. if he worked for Detroit Public Schools for one day between the period of time between November 1, 2009 and May 1, 2010. While plaintiff claims this information was conveyed to him, he offers no basis upon which to legally augment, supplement, or modify a written contract. Thus, even if the trial court erred in finding that the entire contract was not filed with the complaint and erred in affording him the opportunity to amend, the court reached the correct conclusion that the contract claim was fatally flawed.

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

"A party generally must raise the affirmative **[*13]** defense of release in his first responsive pleading or be deemed to have waived the defense." *Meridian Mut Ins Co v Mason-Dixon Lines, Inc*, 242 Mich App 645, 647; 620 NW2d 310 (2000); See MCL 2.111(F)(3) ("Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended . . ."). "[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993). According to the lower court record, defendant attached to its answer to plaintiff's complaint affirmative defenses that included: "Plaintiff has failed to plead the existence of a valid contract." and "Plaintiff has failed to attach a contract as required by Michigan law."

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Cynthia Diane Stephens

/s/ Thomas C. Cameron

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EXHIBIT K

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Estate of Tyner v. O'Bey

Court of Appeals of Michigan

July 1, 2021, Decided

No. 351784

Reporter
2021 Mich. App. LEXIS 4052 *; 2021 WL 2769820

ESTATE OF LEONARD TYNER, by ARLINDA HICKMAN, Personal Representative, Plaintiff/Counterdefendant-Appellee, and DEWAYNE BROWN, Intervenor-Appellee v SANDRA O'BEY, Defendant/Counterplaintiff-Appellant, and BING METALS GROUP, INC, Defendant.

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

Prior History: **[*1]** Wayne Circuit Court. LC No. 18-015920-CH.

Estate of Tyner v. O'Bey, 2020 Mich. App. LEXIS 7919 (Mich. Ct. App., Nov. 24, 2020)

Core Terms

innocent misrepresentation, summary disposition, trial court, unjust enrichment, promissory note, promised, repay, oral contract, statute of limitations, statute of frauds, material fact, meretricious relationship, Additionally, quieting title, parties, gratuitous, trial court's order, quotation, marks, privity of contract, own property, equitable, repayment, disputes, argues, light most favorable, past consideration, contract claim, fraud claim, misrepresentation

Counsel: For ARLINDA HICKMAN PERSONAL REPRESENTATIVE, Plaintiff-Counter Defendant-Appellee: RYAN E. HILL.

For DEWAYNE BROWN, Intervenor - Miscellaneous-Appellee: RYAN E. HILL.

For SANDRA O'BEY, Defendant-Counter Plaintiff-Appellant: ROGER S. CANZANO, CHARLES P. FARRAR.

Judges: Before: REDFORD, P.J., and BORRELLO and TUKEL, JJ.

Opinion

PER CURIAM.

Defendant/counterplaintiff Sandra O'Bey appeals as of right the trial court's order granting in part and denying in part the competing motions for summary disposition filed by O'Bey and the Estate of Leonard Tyner.[1] O'Bey argues that the trial court erred by concluding, on the basis that they had been in a meretricious relationship, that she did not have a valid contract with Leonard; the written contract attempted to compensate O'Bey for past performance; and O'Bey's reliance on Leonard's repeated verbal promises to pay O'Bey was unreasonable. O'Bey additionally argues that the trial court lacked subject matter jurisdiction to enter an order quieting title to the property at issue in this case. We agree in part and disagree in part with O'Bey.

Over the course of 30 years O'Bey gave Leonard about $750,000. She claims this money was **[*2]** a loan; Leonard claims that O'Bey gave him the money gratuitously. Leonard and O'Bey did not have a written contract until August 9, 2018. Now O'Bey seeks to recover the $750,000 from Leonard's estate under multiple legal theories. Disputes of material fact prevent any grant of summary disposition regarding O'Bey's unjust enrichment claims as well as her innocent misrepresentation claims based on oral contracts. O'Bey's innocent misrepresentation claims based on the written promissory note, however, fail due to a lack of consideration. Additionally, O'Bey did not actually challenge one of the trial court's reasons for granting summary disposition to Leonard's estate regarding O'Bey's fraud claims. Finally, O'Bey lacked standing to challenge whether the trial court had subject matter jurisdiction to enter the order quieting title in this case.

[1] Leonard died during the course of the trial court proceedings. For ease of reference, we will refer to Leonard by his first name because his wife, Lue Ease Tyner, is also a relevant individual in this case.

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I. UNDERLYING FACTS

A. HISTORY OF THE PROPERTY AT ISSUE

This case arises out of a dispute regarding loans O'Bey allegedly made to Leonard and on his behalf over the course of their 30-year friendship; these loans were for an alleged business relationship to own and operate a property located at 1130 West Grand Boulevard, Detroit, Michigan (the property). **[*3]** [2] Bing Metals Group, Inc. conveyed the property via warranty deed to Lue Ease Tyner on March 9, 2003. Lue Ease died on April 11, 2011; she apparently died intestate with her husband, Leonard, as her sole heir. As such, the parties agree that Leonard should have inherited the property through probate.

Probate proceedings regarding Lue Ease's estate began in Oakland County Probate Court shortly after Lue Ease's death, but her estate was administratively closed before the property was distributed from her estate. Leonard did not obtain the property's title until after his death when the trial court, in this case, entered an order on December 12, 2019, quieting title to the property and transferring it to Leonard's estate.

B. O'BEY'S PAYMENTS TO LEONARD

O'Bey and Leonard were friends for roughly 30 years. Additionally, they had a romantic relationship for an unspecified 15 years. Over the course of their 30-year friendship, O'Bey gave Leonard about $750,000. O'Bey claims she gave Leonard this money as part of a business relationship premised on his ownership of the property. According to O'Bey, Leonard always promised he would repay her, but he never specified when he would repay her and they did not have a written contract until August 9, 2018. According to Leonard, however, all of the money O'Bey gave him was gratuitous **[*5]** and he never promised to repay her.

The situation came to a head in August 2018 while Leonard was hospitalized following a stroke. On August 9, 2018, O'Bey presented Leonard with two documents: a quitclaim deed for the property and a promissory note stating that Leonard would repay O'Bey the $750,000 he owed her by selling the property. The promissory note provided, in relevant part:

> For consideration received, (funds advanced by Sandra O'Bey), payor, his heirs or assigns promise to pay the sum of $ 750,000.00 Thousand Dollars ($ 750,000.00) to SANDRA O'BEY within [sic] upon the sale of the building located at 1130 West grand Blvd., Detroit, Michigan, which was formerly used by Sandra O'Bey and Leonard Tyner for leasing purposes. Said property is described as: [the property's legal description.]
>
> * * *
>
> Said building shall be sold or listed for sale at a reasonable price within 2-years, and the lump payment shall be payable at 17755 Gregory Road, Gregory, Michigan 48137 upon closing.

O'Bey and the notary who notarized both documents claim that Leonard signed the documents and that he was mentally competent to do so. In contrast, Leonard denied signing the documents.

C. PROCEDURAL HISTORY

Leonard **[*6]** filed a complaint in December 2018 seeking to quiet title to the property. O'Bey answered the complaint, claiming she was entitled to the property. She also filed a complaint of her own alleging that Leonard owed her $750,000. She alleged that his failure to repay her unjustly enriched Leonard and breached his contracts with O'Bey. O'Bey further alleged that Leonard either fraudulently induced her to loan him money or that his innocent misrepresentation caused her to loan him the $750,000. Leonard and O'Bey then filed competing motions for summary disposition; during this time Leonard died and his estate was substituted as a party in the case.

Following the parties' competing motions for summary disposition, the trial court entered an order quieting title to the property and transferring it to Leonard's estate. The trial court then turned to the parties' motions for summary disposition

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[2] We note that the record is not clear regarding the actual street address of the property at issue in this case. The parties and the warranty deed refer to the property as having a "Grand River" address, but the promissory note, quitclaim deed, and order quieting title in this case all refer to the property as having a "Grand Boulevard" address. The property's legal description is identical in the warranty deed, promissory note, quitclaim deed, and order quieting title. As can be seen in the legal description of the property below, the property's legal description references "Grand Blvd.," not "Grand River":

> Lots 19 to 28, inclusive of Block 3, Bella Hubbard Subdivision of part of P.C. 77, North of Michigan Avenue, Detroit, Wayne County, Michigan, according to the plat thereof, recorded in Liber 4, Page 94, Wayne County Records. Also, vacant alley in the block bounded by West Grand Blvd., Magnolia St., Vinewood Ave., and the railroad right of way, except that portion of said lots deeded to the City of Detroit for boulevard purposes and included in the Grand Blvd. Also, all that part of Lots 22 to 28 inclusive, Block 3 of the plat of Bella Hubbard Subdivision of part of P.C. 77, North of Michigan Ave., Springwell Township, City of Detroit, Wayne County, Michigan according to the plat thereof as recorded in Liber 4, Page 94 of plats, Wayne County Records, being all that part of West Grand Blvd., lying between the East line of West Grand Blvd. 150 feet wide as now established and a line 29 feet **[*4]** Westerly thereof, and lying between the South line of Magnolia Street 60 feet wide as now established and the Northwesterly line of the Grand Trunk Railroad right of way.

Thus, we will use the "Grand Boulevard" address in this opinion.

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relating to O'Bey's payments to Leonard. In doing so, it granted summary disposition to Leonard's estate on O'Bey's breach of contract claims, holding that the promissory note was not supported by valid consideration because it relied on past consideration, it also ruled that the statute of frauds barred **[*7]** O'Bey's oral contract claims. The trial court granted summary disposition to Leonard's estate on O'Bey's remaining claims as well, holding that all of the money O'Bey paid Leonard was presumptively gratuitous because: (1) they had been in a meretricious relationship, (2) O'Bey failed to plead her fraud in the inducement claim with sufficient particularity, and (3) O'Bey's innocent misrepresentation claim failed because she was not in privity of contract with Leonard. Finally, the trial court concluded that, although most of O'Bey's unjust enrichment claims failed because her payments to Leonard were presumptively gratuitous due to their meretricious relationship, she was entitled to repayment for property tax payments she made within the six-year statute of limitations; it also concluded that the statute of frauds barred O'Bey's promissory estoppel claims. This appeal followed.

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and is reviewed de novo. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." **[*8]** *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). "The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)." *Barnes v 21st Century Premier Ins Co*, Mich App , ; NW2d , 2020 Mich. App. LEXIS 7454, *9 (2020) (Docket No. 347120). Indeed, summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Patrick*, 322 Mich App at 605. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, L.L.P.*, 481 Mich. 419, 425; 751 N.W.2d 8 (2008). "Only the substantively admissible evidence actually proffered may be considered." *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v Midmichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016).

The moving party has the initial burden to support its claim with documentary evidence, but once the moving party has met this burden, the burden then shifts to the nonmoving party to establish that a genuine issue of material fact exists. *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Additionally, if the **[*9]** moving party demonstrates that the nonmovant lacks evidence to support an essential element of one of his or her claims, the burden shifts to the nonmovant to present sufficient evidence to dispute that fact. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016). "Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

Finally, "[w]e review de novo questions of statutory interpretation." *Hayford v Hayford*, 279 Mich App 324, 325-326; 760 NW2d 503 (2008). When the language of a statute is clear and unambiguous, this Court "will apply the statute as written and judicial construction is not permitted." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). Similarly, "questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *Rory v Continental Ins Co*, 473 Mich. 457, 464; 703 N.W.2d 23 (2005). Furthermore, this Court also reviews de novo the question whether the statute of frauds bars a contract claim. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006).

III. UNJUST ENRICHMENT

O'Bey argues that the trial court erred by granting summary disposition to Leonard's estate on her unjust enrichment claims. We agree. The trial court erred by making a factual finding that Leonard and O'Bey had been in a meretricious relationship and, by extension, granting summary disposition to Leonard's estate regarding O'Bey's unjust enrichment claims. Disputes of material **[*10]** fact regarding when O'Bey's unjust enrichment claims accrued and whether Leonard promised to repay her prevent any grant of summary disposition regarding O'Bey's unjust enrichment claims at this time.

Michigan has long followed the rule that a party cannot sustain an unjust enrichment claim if the parties have an express contract. See *AFT Michigan v Michigan*, 303 Mich App 651, 660-661; 846 NW2d 583 (2014) ("[T]o prevent unjust enrichment, the law will imply a contract when the defendant has been inequitably enriched at the expense of the plaintiff. Courts, however, may not imply a contract if the parties have an express contract covering the same subject matter."). O'Bey raises her unjust enrichment claim to the extent that she and Leonard did not have an express contract. Whether O'Bey and Leonard actually had an express contract is addressed in Part IV. As discussed in further detail there, the promissory note was not a valid contract for want of consideration, and disputes of material fact prevent any conclusion at this time regarding

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whether any oral contracts existed between them.

"Unjust enrichment is an equitable doctrine." *Genesee Co Drain Commr v Genesee Co*, 321 Mich. App. 74, 78; 908 N.W.2d 313 (2017), aff'd sub nom *Wright v Genesee Co*, 504 Mich 410; 934 NW2d 805 (2019). "The elements of a claim for unjust enrichment are (1) receipt of a benefit by the defendant from the plaintiff, **[*11]** and (2) an inequity resulting to plaintiff from defendant's retention of the benefit. In such instances, the law operates to imply a contract in order to prevent unjust enrichment." *Bellevue Ventures, Inc v Morang-Kelly Investment, Inc*, 302 Mich App 59, 64; 836 NW2d 898 (2013). "That a person benefits from another is not alone sufficient to require the person to make restitution for the benefit." *NL Ventures VI Farmington, LLC v City of Livonia*, 314 Mich App 222, 241-242; 886 NW2d 772 (2015). Indeed, "[e]ven where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it." *Id.* (quotation marks and citation omitted). Stated differently, "[a] person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons." *Estate of McCallum*, 153 Mich App 328, 335; 395 NW2d 258 (1986) (quotation marks and citation omitted).[3]

The trial court concluded that the payments O'Bey made to Leonard were presumably gratuitous because they had been in a meretricious relationship.

> [S]ervices rendered during a meretricious relationship are presumably gratuitous. To overcome this presumption, plaintiff **[*12]** must show that she expected compensation from defendant at the time she rendered the services and that defendant expected to pay for them. The trier of fact resolves this question by considering all the circumstances, including the type of services rendered, the duration of the services, the closeness of the relationship of the parties, and the express expectations of the parties. [*Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997) (quotation marks and citations omitted).]

Black's Law Dictionary defines a meretricious relationship as "[a] stable, marriage-like relationship in which the parties cohabit knowing that a lawful marriage between them does not exist." *Black's Law Dictionary* (11th ed). An examination of this Court's opinions utilizing the phrase "meretricious relationship" reveals that this Court accords the phrase the same meaning as set forth in Black's Law Dictionary. See, e.g., *Featherston*, 226 Mich App 584; *Carnes v Sheldon*, 109 Mich App 204; 311 NW2d 747 (1981); *Tyranski v Piggins*, 44 Mich App 570; 205 NW2d 595 (1973).

The trial court concluded, without explaining its reasoning, that Leonard and O'Bey had been in a meretricious relationship. The trial court erred by doing so for multiple reasons, the first of which is that such a factual finding should not be made at the summary disposition stage of proceedings. See *Barnes*, Mich App at ; 2020 Mich. App. LEXIS 7454 at *8 **[*13]** . Additionally, the record does not establish that Leonard and O'Bey ever cohabitated. Consequently, cohabitation, an essential element of a meretricious relationship, is absent in this case. Finally, a meretricious relationship, even if it did exist, would do no more than create a presumption that O'Bey's payments were gratuitous. Whether that presumption has been overcome, however, is a question for the jury. See *Featherston*, 226 Mich App at 589. Thus, the trial court erred by concluding that the payments O'Bey made to Leonard were gratuitous based on a meretricious relationship.

As for whether the elements of an unjust enrichment claim have been met, disputes of material fact prevent summary disposition on this issue. Leonard undoubtedly received a monetary benefit from O'Bey over the course of their friendship and romantic relationship. As such, the first element of unjust enrichment has been met. See *Bellevue Ventures, Inc*, 302 Mich App at 64. Whether it would be inequitable to allow Leonard's estate to retain this benefit, however, presents a dispute of material fact. Leonard averred that he never promised to repay O'Bey and that everything she gave him was gratuitous due to their romantic relationship. O'Bey, however, claims that Leonard always promised **[*14]** to repay her. Grant supported O'Bey's testimony by testifying that he frequently heard Leonard say that he would pay O'Bey back. Viewing the record in the light most favorable to O'Bey, as we are required to do here, there is a dispute of material fact regarding whether Leonard ever promised to repay O'Bey for the money she lent him. If he did make such a promise, then it would be inequitable to allow his estate to retain that benefit. If he did not, however, then equity does not require that his estate repay O'Bey. Thus, a dispute of material fact prevents a grant of summary disposition for any unjust enrichment claim by O'Bey that is not barred by the statute of limitations.

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). Similarly, MCL 600.5815 provides that

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[3] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012) (citation omitted).

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"[t]he prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought. The equitable doctrine of laches shall also apply in actions where equitable relief is sought." The statute of limitations for filing an unjust enrichment claim is therefore the same six-year period as that prescribed for a breach of contract claim. See MCL 600.5807(9) (establishing **[*15]** a six-year period of limitations for general breach of contract claims). "[A] claim of breach of contract accrues when the promisor fails to perform under the contract." *Cordova Chem Co v Dept of Natural Resources*, 212 Mich App 144, 153; 536 NW2d 860 (1995).

Leonard moved for summary disposition on this issue. Thus, we must view the record in the light most favorable to O'Bey when considering her unjust enrichment claims. See *Patrick*, 322 Mich App at 605. The trial court did not consider the equitable defense of laches, and Leonard's estate does not argue on appeal that it applies here. Thus, we will not address that issue. Whether the statute of limitations applies to O'Bey's unjust enrichment claims, however, is properly before this Court. As discussed, the normal six-year statute of limitations for breach of contract claims applies to unjust enrichment claims. Thus, the statute of limitations bars all of O'Bey's claims that arose more than six years before February 6, 2019, the date she filed her counterclaim.

The record fails to establish when Leonard allegedly promised he would repay O'Bey.[4] "A loan made with no fixed time of repayment is payable on demand." *Jackson v Estate of Green*, 484 Mich 209, 217; 771 NW2d 675 (2009). The record, however, fails to establish when O'Bey demanded that Leonard repay her. Additionally, "the absence of a specific time for **[*16]** repayment does not allow a creditor to withhold this demand for an indefinite period of time. In the absence of an agreement to the contrary, we presume that the parties intended [the] plaintiff's demand for repayment to occur within a reasonable amount of time." *Id.* Indeed, "[i]t is a general rule of law that where no time is stipulated, a reasonable time will be presumed. Reasonable time depends upon the facts and circumstances of each case." *Id.*, quoting *Pierson v Davidson*, 252 Mich 319, 324, 233 NW 329 (1930). "Determining what constitutes a reasonable amount of time to request repayment of a loan is necessarily a factual question properly decided by the jury." *Jackson*, 484 Mich at 217. Consequently, Leonard did not break his promise to repay O'Bey until a "reasonable time" had passed. That question must be answered by the jury and its answer will determine when the statute of limitations began to run. Thus, the trial court erred by concluding that the statute of limitations barred any of O'Bey's unjust enrichment claims because the jury must answer a factual question for that determination to be made.

IV. INNOCENT MISREPRESENTATION

O'Bey argues that the trial court erred by granting summary disposition to Leonard's estate on her innocent misrepresentation claims. **[*17]** We agree in part and disagree in part. O'Bey's innocent misrepresentation claim premised on the promissory note fails for lack of consideration, but disputes of material fact regarding her innocent misrepresentation claims premised on the oral contracts prevent summary disposition of those claims. Additionally, the statute of frauds does not bar enforcement of the oral contracts and the record is insufficient to determine whether the statute of limitations bars any of O'Bey's claims based on the oral contracts.

A. INNOCENT MISREPRESENTATION

Innocent misrepresentation is a type of fraud claim. *M&D, Inc v WB McConkey*, 231 Mich App 22, 26-29; 585 NW2d 33 (1998).

> A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. The innocent misrepresentation rule represents a species of fraudulent misrepresentation but has, as its distinguished characteristics, the elimination of the need to prove a fraudulent purpose or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly **[*18]** false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure to the benefit of the party making the misrepresentation. Thus, the party alleging innocent misrepresentation is not required to prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false. Finally, in order to prevail on an innocent misrepresentation claim, a plaintiff must also show that the plaintiff and defendant were in privity of contract. [*M&D, Inc v WB McConkey*, 231 Mich App 22, 27-28; 585 NW2d 33 (1998) (citations omitted).]

Consequently, an innocent misrepresentation claim requires the plaintiff to establish that (1) he or she detrimentally relied on a false representation; (2) the plaintiff's injury benefitted the party who made the representation; and (3) privity of contract. *Id.* Additionally, "the party alleging innocent misrepresentation is not required to prove that the party making the

[4] As used in this opinion, the phrase "when Leonard promised he would repay O'Bey" refers to point in time in the future that Leonard allegedly promised O'Bey would receive his repayment, not the point in time at which Leonard made the promise that he would repay O'Bey.

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misrepresentation intended to deceive or that the other party knew the representation was false." *Id.* at 28.

O'Bey claims that Leonard repeatedly told her he owned the property and that this representation induced her to repeatedly give him money **[*19]** because she believed she was engaged in a business relationship with the property's owner. The record clearly establishes that Leonard did not own the property until after his death, when the trial court entered an order quieting title to the property and transferring it from Lue Ease's estate to Leonard's estate. Consequently, any representation Leonard made to O'Bey that he owned the property was false.

In her deposition, O'Bey acknowledged that she knew Lue Ease owned the property, but she testified that she believed Leonard operated the property with Lue Ease and that he had the ability to bring in a partner. Additionally, O'Bey also believed Leonard owned the property after Lue Ease's death, in large part because that was what Leonard told her. Consequently, Leonard's representation that he owned the property was false and O'Bey's interest in the property clearly benefitted Leonard because he received hundreds of thousands of dollars from her as a result of her belief that he owned the property. Thus, when viewing the record in the light most favorable to O'Bey, the only remaining element for her innocent misrepresentation claim is whether she and Leonard were in privity of contract. **[*20]**

B. PRIVITY OF CONTRACT

"The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation." *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich. App. 684, 694; 818 N.W.2d 410 (2012) (quotation marks and citation omitted). "To have consideration there must be a bargained-for exchange. There must be a benefit on one side, or a detriment suffered, or service done on the other. Courts do not generally inquire into the sufficiency of consideration." *Gen Motors Corp v Dep't of Treasury, Revenue Div*, 466 Mich 231, 238-239; 644 NW2d 734 (2002) (quotation marks, alteration, and citations omitted). Relevant to this case, past consideration does not establish sufficient consideration for a subsequent agreement. *Shirey v Camden*, 314 Mich 128, 138; 22 NW2d 98 (1946). Nonetheless, if consideration refers to past *and future* benefits or detriments then it is sufficient to support a valid contract; this is referred to as continuing consideration. *Riggs v Riggs' Estate*, 232 Mich 579, 590; 206 NW 508 (1925).

"In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co*, 473 Mich. 457, 464; 703 N.W.2d 23 (2005). "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be enforced as written." *Id.* at 468. Contracts are enforced "according to their unambiguous terms because **[*21]** doing so respects the freedom of individuals freely to arrange their affairs via contract." *Id.*

1. VALIDITY OF THE PROMISSORY NOTE

In relevant part, the promissory note provided

> For consideration received, (funds advanced by Sandra O'Bey), payor, his heirs or assigns promise to pay the sum of $ 750,000.00 Thousand Dollars ($ 750,000.00) to SANDRA O'BEY within [sic] upon the sale of the building located at 1130 West grand Blvd., Detroit, Michigan, which was formerly used by Sandra O'Bey and Leonard Tyner for leasing purposes. Said property is described as: [the legal description of the property]

By its plain terms, the promissory note established that Leonard would pay O'Bey $750,000 for "consideration received," which the promissory note defined as "funds advanced by" O'Bey. This is clearly past consideration. O'Bey argues that the promissory note established continuing consideration, not past consideration, because the promissory note did not require Leonard to pay O'Bey until the property was sold. O'Bey is correct that the promissory note did not require immediate payment from Leonard, but the consideration offered by O'Bey nevertheless existed entirely in the past. The promissory note's **[*22]** plain language referenced only past consideration from O'Bey, and did not contemplate any additional consideration O'Bey was required to provide between the signing of the promissory note and her receipt of payment. Thus, the promissory note was not supported by proper consideration and, therefore, was not a valid contract. See *Shirey*, 314 Mich at 138. Consequently, the trial court did not err by granting summary disposition to Leonard's estate regarding O'Bey's innocent misrepresentation claims premised on the promissory note.

2. VALIDITY OF THE ORAL CONTRACTS

The analysis does not end here, however, because O'Bey's innocent misrepresentation claim is also supported by the numerous alleged oral contracts between herself and Leonard, formed when Leonard promised each time O'Bey gave him money to repay her. Leonard and O'Bey dispute whether he ever actually promised to repay her and, therefore, a dispute of material fact precludes a ruling regarding whether the oral contracts actually existed. Nevertheless, the statute of frauds and statute of limitations may nevertheless bar O'Bey's innocent misrepresentation claims based on the oral contracts. The statute of frauds could establish that, despite an agreement **[*23]** between Leonard and O'Bey, no valid contract existed; additionally, the statute of limitations could bar O'Bey's

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innocent misrepresentation claims as untimely.

a. 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." *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 526-527; 644 NW2d 765 (2002). Contracts that fall within any portion of the statute of frauds are unenforceable. See, e.g., *Kelly-Stehney & Assoc, Inc v MacDonald's Indus Products, Inc*, 265 Mich App 105, 110-114; 693 NW2d 394 (2005) (holding that an oral contract was unenforceable because it fell within one portion of the statute of frauds). In relevant part, MCL 566.132[5] states:

> (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise, is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> (a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.

"[I]f there is any possibility that an oral contract is capable of being completed within a year, it is not within the statute of frauds, even though it is clear that the parties may have intended **[*24]** and thought it probable that it would extend over a longer period and even though it does so extend." *Hill v Gen Motor Acceptance Corp*, 207 Mich. App. 504, 509-510; 525 N.W.2d 905 (1994) (citation and quotation marks omitted; alteration in original).

The trial court concluded that the statute of frauds voided all of the oral contracts in this case because the promissory note provided that the property would be sold in two years. But the promissory note provided that the property "shall be sold or listed for sale at a reasonable price *within 2-years*," not two years in the future. (Emphasis added). Leonard's oral promises were not oral versions of the promissory note and they did not establish when he would repay O'Bey.[6] As such, no term of the oral contract precluded Leonard from immediately repaying her. Consequently, the trial court erred by concluding that the oral contracts fell within the statute of frauds.

b. STATUTE OF LIMITATIONS

There is no specific statute of limitations for innocent misrepresentation claims. As such, the general six-year statute of limitations applies to O'Bey's innocent misrepresentation claims. See 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 **[*25]** is stated in the statutes."). "[T]he period of limitations runs from the time the claim accrues," unless an exception not at issue in this case applies. MCL 600.5827. "[T]he claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id.* See also *Boyle v General Motors Corp*, 468 Mich. 226, 231; 661 N.W.2d 557 (2003) (addressing accrual of claims under MCL 600.5813).

As explained in Part III, however, the record fails to establish when Leonard allegedly promised his repayment would take place. As such, he was required to do so in a "reasonable time" that the jury must determine. See *Jackson*, 484 Mich at 217.[7] Consequently, Leonard did not breach his promise to repay O'Bey until a "reasonable time" had passed following demand. That question must be answered by the jury, and that answer will determine when the statute of limitations began to run. Thus, the trial court erred by concluding that the statute of limitations barred any of O'Bey's innocent misrepresentation claims based on oral contracts.

C. INNOCENT MISREPRESENTATION CONCLUSION

Viewing the record in the light most favorable to O'Bey, she has established all of the required elements for an innocent misrepresentation claim with the exception of privity of contract. The privity of contract **[*26]** component of O'Bey's innocent misrepresentation claim falls into two categories: the written promissory note and the oral contracts.

The promissory note was not supported by proper consideration because it relied on past consideration. Thus, the trial court did not err by granting summary disposition to Leonard on O'Bey's innocent misrepresentation claims based on the promissory note. The oral contracts also present disputes of material fact regarding whether Leonard agreed to repay O'Bey. Additionally, the statute of limitations and statute of frauds do not bar O'Bey's innocent misrepresentation claims based on the

---

[5] MCL 566.132 was amended by 2020 PA 63 after litigation began in this case. Relevant to this case, the amendment added the comma in the phrase "or promise, is in writing and signed." The amendment does not affect the analysis of this issue.

[6] To the extent that O'Bey argues to the contrary that the oral promises were oral versions of the promissory note and, therefore, the statute of limitations for those claims began to run on the date the promissory note was signed, this claim is plainly not supported by the record. O'Bey and a friend of Leonard and O'Bey both testified, in their depositions, that Leonard repeatedly promised to repay O'Bey for the money she gave him, but neither one testified that these oral promises had the same terms as the promissory note.

[7] As discussed in Part III, when no time is specified for performance in a contract a "reasonable time" is presumed, which depends on the "facts and circumstances of each case." *Jackson*, 484 Mich at 217.

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oral contracts because the record fails to establish when Leonard promised repayment would take place. As such, summary disposition on this issue would be inappropriate at this time.

V. FRAUD IN THE INDUCEMENT

O'Bey abandoned this issue because she failed to challenge the trial court's conclusion that she did not plead her fraud claim with sufficient particularity. Consequently, we will not address it on the merits.

O'Bey failed to address, in her brief on appeal, the issue of whether she pleaded her fraud claims with sufficient particularity. As such, the issue is abandoned. **[*27]** See *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015) ("An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims; nor may an appellant give an issue only cursory treatment with little or no citation of authority."). The trial court granted summary disposition to Leonard's estate on O'Bey's fraud claims on two grounds: (1) lack of pleading with sufficient particularity and (2) O'Bey's reliance on Leonard's promises to repay her were unreasonable. Based on our reading of the trial court's opinion and order, each ground could independently support its order. As such, O'Bey failed to actually challenge one of the grounds supporting the trial court's order granting summary disposition to Leonard's estate on O'Bey's fraud claims. Thus, O'Bey failed to challenge the entirety of the trial court's order granting summary disposition to Leonard's estate on this issue. Consequently, we will not address this issue further.

VI. SUBJECT MATTER JURISDICTION

O'Bey argues that the trial court lacked subject matter jurisdiction to enter its order quieting title to the property and transferring it to Leonard's estate. We decline to address that issue, however, because **[*28]** O'Bey lacks standing to challenge the trial court's subject matter jurisdiction.

At the trial court level "a litigant has standing whenever there is a legal cause of action." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) (*LSEA*). But if no legal cause of action is available to a litigant, "[a] litigant may have standing . . . if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id.*

> In general, standing requires a party to have a sufficient interest in the outcome of litigation to ensure vigorous advocacy and in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. [*Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust v City of Pontiac*, 309 Mich. App. 611, 621; 873 N.W.2d 783 (2015) (citation and quotation marks omitted).]

O'Bey has not presented any record evidence establishing that she had standing to challenge the trial court's order quieting title to the property. In essence, this would have required O'Bey to establish that she had an interest in the probate proceedings related to Lue Ease's estate. O'Bey has failed to **[*29]** do so. Instead, O'Bey argues that the trial court's order quieting title may have affected potential creditors of Lue Ease's estate; her claim revolves around being a creditor of Leonard's estate. O'Bey does not actually allege, in her brief on appeal, that she was a creditor of Lou Ease's estate. Indeed, in her brief on appeal, O'Bey stated that she "may have had an actionable claim against Lue Ease Tyner's estate relative to the improvements made to [the property]." O'Bey's hypothetical argument is insufficient to establish that she had standing to challenge the trial court's order quieting title to the property. See *id.* Thus, O'Bey lacked standing, and we affirm the trial court's order quieting title to the property and transferring it to Leonard's estate.

VII. CONCLUSION

For the reasons stated in this opinion, we affirm in part and reverse in part the trial court's order granting summary disposition to Leonard's estate. We additionally affirm its order quieting title to the property and transferring it to Leonard's estate. We do not retain jurisdiction.

/s/ James Robert Redford

/s/ Stephen L. Borrello

/s/ Jonathan Tukel

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EXHIBIT L

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Carey v. Foley & Lardner, LLP

Court of Appeals of Michigan

August 9, 2016, Decided

No. 321207

Reporter
2016 Mich. App. LEXIS 1499 *

RAYMOND J. CAREY, Plaintiff-Appellee, v FOLEY & LARDNER, LLP, Defendant-Appellant.

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

Subsequent History: Motion granted by Carey v. Foley & Lardner, LLP, 885 N.W.2d 475, 2016 Mich. LEXIS 2090 (Mich., Oct. 12, 2016)

Leave to appeal denied by Carey v. Foley & Lardner, LLP, 500 Mich. 981, 893 N.W.2d 621, 2017 Mich. LEXIS 762 (May 2, 2017)

Related proceeding at Carey v. Foley & Lardner LLP, 2019 Mich. App. LEXIS 1977 (Mich. Ct. App., Mar. 12, 2019)

Prior History: **[*1]** Wayne Circuit Court. LC No. 13-013005-CK.

Carey v. Foley & Lardner, LLP, 2016 Mich. App. LEXIS 539 (Mich. Ct. App., Mar. 15, 2016)

Core Terms

promises, federal court, summary disposition, plaintiff's claim, induce, breach of contract claim, promissory estoppel, statute of limitations, unjust enrichment, retaliation, complaints, asserts, annual, collateral estoppel, pretextual, contends, billing, adverse employment action, federal district court, partnership agreement, trial court, misrepresentation, disparity, premised, terms, integration clause, amended complaint, discriminatory, procured, reasons

Judges: Before: RONAYNE KRAUSE, P.J., and GLEICHER and STEPHENS, JJ.

Opinion

ON RECONSIDERATION

PER CURIAM.

Defendant appeals by leave granted the denial of its motion for summary disposition of the majority of the contract and employment law claims of plaintiff. *Carey v Foley & Lardner, LLP*, unpublished order of the Court of Appeals, entered August 18, 2014 (Docket No. 321207). Plaintiff asserts that throughout his employment, defendant breached his contract by engaging in gender, race and age discrimination in determining his compensation. He further contends he was subject to retaliation by defendant for his complaints to defendant's representatives. Plaintiff alleges he was paid at lower rates than other partners who were younger, female and not of European descent despite his commensurate or better billing levels and generation of income for the partnership. We affirm in part and reverse in part.

I. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 206; 828 NW2d 459 (2012). In accordance with MCR 2.116(C)(7), a party may file a motion to dismiss a lawsuit when "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of **[*2]** . . . immunity granted by law [or] statute of limitations. . . ." "When considering a motion brought under MCR 2.116(C)(7), it is proper for this Court to review all the material submitted in support of, and in opposition to, the plaintiff's claim." *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 222; 779 NW2d 304 (2009), amended 489 Mich. 925, 797 N.W.2d 141 (2011) (citations omitted). "In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." 286 Mich App at 222-223 (citations omitted).

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"A motion under 'MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted.'" *Maple Grove Twp*, 298 Mich App at 206 (citation omitted). A trial court's grant of summary disposition under MCR 2.116(C)(8) is deemed to be proper "'if no factual development could justify the plaintiff's claim for relief.'" *Id.* (citation omitted).

A motion brought pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *Cichewicz v Salesin*, 306 Mich App 14, 28; 854 NW2d 901 (2014). "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is appropriate **[*3]** when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

II. BREACH OF CONTRACT CLAIMS

Defendant argues that the trial court erred by failing to find that plaintiff's claims for breach of his employment contract, promissory estoppel, unjust enrichment, and fraudulent misrepresentation were barred by the applicable statutes of limitation. Defendant asserts that plaintiff's claims involve the abrogated continuing wrong doctrine and, thus, should be precluded. Defendant further asserts that the existence of an express contract bars a certain number of plaintiff's claims.

A. STATUTE OF LIMITATIONS

A six-year statute of limitations exists for breach of contract actions. MCL 600.5807(8). Similarly, claims of promissory estoppel and unjust enrichment are also subject to a six-year limitations period. See *Huhtala v Travelers Ins Co*, 401 Mich 118, 124-125; 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...."). A "long **[*4]** line of Michigan cases [also apply] the six-year period of limitations to fraud actions." *Nat'l Sand, Inc v Nagel Constr, Inc*, 182 Mich App 327, 333-334; 451 NW2d 618 (1990). The six-year limitation period of MCL 600.5807(8) begins to run "when the promisor fails to perform under the contract." *Cordova Chem Co v Dep't of Natural Resources*, 212 Mich App 144, 153; 536 NW2d 860 (1995). In other words, "[f]or a breach of contract action, the limitations period generally begins to run on the date that the breach occurs." *Seyburn, Kahn, Ginn, Bess, Deitch and Serlin, PC v Bakshi*, 483 Mich 345, 355; 771 NW2d 411 (2009).

Plaintiff's contract required periodic calculations of compensation. Plaintiff argues that each allegedly deficient annual compensation calculation comprises a new or individual breach of the contract. In accordance with MCL 600.5827, a breach of contract claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." Our Supreme Court, in *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 532 n 5; 676 NW2d 616 (2004) (emphasis deleted), quoting *Black's Law Dictionary* (7th ed), defined an installment contract as "'[a] contract requiring or authorizing the delivery of goods in separate lots, or payments in separate increments, to be separately accepted.'" Certain types of contracts that provide for regular or periodic payments have been deemed similar 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 v Detroit*, 232 Mich App 701, 704-705; 591 NW2d 67 (1998); *Harris v Allen Park*, 193 Mich App 103, 107; 483 NW2d 434 (1992). Under this type of contract, a separate and distinct breach of contract claim is recognized to accrue **[*5]** with each deficient payment. *H J Tucker*, 234 Mich App at 562-563. "[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*, 193 Mich App at 107; *H J Tucker*, 234 Mich App at 563. As such, each allegedly deficient compensation payment made by defendant to plaintiff constitutes a separate and distinct breach of the partnership agreement.

Defendant contends that plaintiff's claim is an improper attempt to use the "continuing wrong" doctrine, which was rejected in *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 246; 673 NW2d 805 (2003). Under the "continuing wrong" doctrine a claim based on a defendant's wrongful conduct will re-accrue each day that the wrongful conduct is continued, 259 Mich App at 246, 248, and the statute of limitations will not initiate until the wrong is abated, 259 Mich App at 246. In other words, continuous acts must be demonstrated, not ongoing harmful effects from an original completed act. *Id.* The "continuing wrong" doctrine has not, however, been applied in the context of a breach of contract claim. 259 Mich App at 251.

The trial court correctly divided plaintiff's breach of contract claims into two distinct periods: (a) those claims that arose more than six years before plaintiff's filing of a complaint and (b) claims that occurred within the six **[*6]** year period immediately preceding plaintiff's filing of a cause of action in this matter. As such, the trial court correctly granted partial summary disposition in accordance with MCR 2.116(C)(7).

B. UNJUST ENRICHMENT

Plaintiff's claim for unjust enrichment should have been dismissed based on the existence of an express contract

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concerning the same subject matter. A claim for unjust enrichment is the equitable counterpart to the legal claim for a breach of contract. An equitable claim of unjust enrichment is premised on the theory that the law will imply a contract to prevent the unjust enrichment of another party. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). A contract to preclude unjust enrichment will be implied "only if there is no express contract covering the same subject matter." *Id.* The parties' partnership agreement and the relevant compensation provisions constitute an express contract within the meaning of this rule. Thus, the court erred when it denied summary disposition on the unjust enrichment claims.

C. FRAUDULENT MISREPRESENTATION AND PROMISSORY ESTOPPEL

Plaintiff also raised claims of fraudulent misrepresentation and promissory estoppel indicating defendant made promises or false representations to induce his entry into the **[*7]** agreement with defendant and regarding his compensation under the agreement. The statute of limitations for a fraud claim begins to run when a plaintiff either is aware or should have been aware of an injury due to the fraudulent conduct. MCL 600.5827; *Moll v Abbott Laboratories*, 444 Mich 1, 17-18; 506 NW2d 816 (1993). This Court applies an objective standard when reviewing when a plaintiff discovered or should have discovered an injury. *Moll*, 444 Mich at 17-18.

Plaintiff's complaint lists nine promises and representations that were allegedly made by defendant to induce plaintiff to enter into an agreement of employment with defendant. We have created the chart below, identifying each claimed promise and representation and when a claim began to accrue for each.

Go to table1

The admissions of plaintiff in the complaint, coupled with the objective reality that the promises were purportedly breached by a date certain, allow us to surmise that the latest accrual of any alleged misrepresentation or fraud was February 1, 2008, thus the statute of limitations has run as to all such claims.

While a claim of promissory estoppel is grounded in contract law, *Huhtala*, 401 Mich at 124-125, it comprises an equitable doctrine, *Martin v East Lansing Sch Dist*, 193 Mich App 166, 178; 483 NW2d 656 (1992). This Court has explained:

> The elements of a promissory estoppel claim consist of (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. A promise is a manifestation of intention to act or refrain from acting in a specific way, so made as to justify a promisee in understanding that a commitment has been made. The promise must be definite and clear, and the reliance on it must be reasonable. [*Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008) (internal citations and quotation **[*11]** marks omitted).]

Plaintiff has alleged that defendant made promises that induced him to enter into an agreement with defendant in 2000. His complaint, also acknowledged that he was aware that those promises were not fulfilled as of October 2001. Thus, his claim as to the original promises made to him accrued as of that date and was barred by the statute of limitation in October 2006. Plaintiff asserts that each year, when defendant failed to calculate and pay his compensation, a new or renewed promise upon which separate promissory estoppel claims could be prosecuted arose. This mirrors his contract accrual argument with which we agree. However, alternative and concurrent counts for breach of contract and promissory estoppel cannot be brought when an enforceable contract exists as it does here where the performance that constitutes the consideration for the contract is the same performance that demonstrates detrimental reliance in a promissory estoppel claim. *Gen Aviation, Inc v Cessna Aircraft Co*, 915 F.2d 1038, 1042 (CA 6, 1990). In other words, "[p]romissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract." *Walker v KFC Corp*, 728 F2d 1215, 1220 (CA 9, 1984). Therefore, plaintiff is precluded from **[*12]** pursuing simultaneous claims of promissory estoppel.

D. COLLATERAL ESTOPPEL

Defendant next asserts that plaintiff is collaterally estopped from pursuing his breach of contract claims premised on the assertion of employment discrimination under Michigan's Elliott-Larsen Civil Rights Act [ELCRA], MCL 37.2101 *et seq.*, due to the federal district court's factual determination that defendant's reasons for its actions were not pretextual. We agree.

This Court reviews de novo the application of collateral estoppel as a question of law. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

"Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (internal citations and quotation marks omitted). Mutuality, for purposes of estoppel, exists when the

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litigant asserting collateral estoppel would have been bound by the previous litigation, had the judgment gone against him. 469 Mich at 684-685. Such is the case here.

The federal court reviewed the circumstances pled in this case to determine if the plaintiff was **[*13]** a member of a protected class due to gender, age and race. Those considerations are identical to the requirement for protected class membership under MCL 37.2202.

In accordance with MCL 37.2202:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

The federal court found that plaintiff met that burden of going forward.

The federal court ruled that plaintiff failed to present evidence that he was subject to adverse employment actions due to membership in any protected class. "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves v Sanderson Plumbing Prod, Inc*, 530 U.S 133, 153; 120 S Ct 2097; 147 L Ed 2d 105 (2000). Direct evidence, indirect evidence or circumstantial evidence can be used to prove discriminatory treatment. *Sniecinski v Blue Cross and Blue Shield of Mich*, 469 Mich 124, 132; 666 NW2d 186 (2003). "Direct evidence" has been defined as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." **[*14]** *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), quoting *Jacklyn v Schering Plough Healthcare Prod Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

In *Venable v Gen Motors Corp*, 253 Mich App 473, 476-477; 656 NW2d 188 (2002) (citations and footnotes omitted), to establish a rebuttable prima facie case of discrimination, this Court explained:

> [O]ur Supreme Court adapted the *McDonnell Douglas* framework to the Michigan Civil Rights Act. This was done to accommodate additional types of discrimination claims-including employment discrimination based on sex and age-and to accommodate other "adverse employment action[s]." The framework, long used by courts of this state, requires a showing that plaintiff was "(1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct."

Plaintiff contends that as an older, white male he was subject to disparate treatment in compensation when compared to younger, female and non-Caucasian employees of defendant. Under ELCRA, the plaintiff has a similar burden. The only direct evidence alleged in the federal court or here is the purported differential in compensation alleged by plaintiff.

Focusing on "female comparators," the federal district court evaluated plaintiff's Equal Pay Act, 29 USC 206(d), claim and rejected the **[*15]** claim premised, in part, on plaintiff's inability to demonstrate "that each of the proposed comparators perform job duties that are substantially equal to his." Specifically, the federal court found that "a cursory review of the profiles of Plaintiff and the proposed comparators suggests that their legal practices engage different skills, knowledge, expertise, and tasks." The federal court found that plaintiff failed to meet his "burden of demonstrating that he and his comparators perform substantially equal work." The federal court made the factual determination that "in some cases the proposed comparator did not earn *more* than Plaintiff on an annual basis," and that any alleged discrepancy set forth by plaintiff was attributable to his "attempting to impose a formula that does not reflect how Defendant determines compensation."

Under ELCRA, a plaintiff who has made a prima facie claim where the defendant offers a purported business reason for the employment action must provide proof of pretext. Again the federal court examined the same issue and found that, defendant was able to demonstrate to the satisfaction of the federal district court the reasons for higher compensation to a **[*16]** specific female attorney "based upon various gender-neutral factors," resulting in defendant having "established the affirmative defense that its compensation decisions were based upon 'any other factor other than sex.'" The federal district court determined that defendant's reasons or explanations for any differential in compensation were not pretextual, stating: "There is no evidence that these factors are shams or are used by the firm merely to mask sex discrimination." The federal district court clearly rejected plaintiff's contention that his compensation by defendant was discriminatory. Specifically:

> Plaintiff disagrees with Defendant's assessment of his performance . . . . Plaintiff's evidence in this regard is largely based upon his opinion of others' qualifications, contributions to firm, and/or performance. Although Plaintiff may disagree with Defendant's justifications for any perceived pay disparity or feel that Defendant's method of determining compensation is unfair, Plaintiff has not set forth facts that raise an inference that any such differential was based upon gender or that Defendant's reasoning is pretextual. Indeed, a review of partner compensation for Defendant's **[*17]** Detroit office reveals

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> that the highest-paid partners (as well as the decision-makers regarding compensation) are overwhelmingly white men.

The federal court also rejected plaintiff's reverse sex and race discrimination claims under Title VII regarding his compensation. The federal court found:

> Plaintiff has failed to muster evidence that Defendant discriminates against whites and/or men, and thus cannot establish a prima facie case of reverse discrimination under Title VII. . . . Plaintiff has not presented facts raising such an inference, with respect to gender or race.

Similarly, the federal court rejected plaintiff's age discrimination claim based on the failure to present "evidence of intentional age discrimination with respect to his pay," noting that even if it were assumed that plaintiff was "treated less favorably than younger attorneys," he had failed to "set forth facts raising an inference that Defendant's reasons for doing so were pretextual." The ruling of the federal district court was affirmed by the federal appellate court finding plaintiff "failed to provide evidence that any of the partners to whom he compared himself performed substantially equal work," thereby rendering **[*18]** plaintiff unable to "establish a genuine factual dispute regarding at least one element of a prima face case of discrimination." *Carey v Foley & Lardner, LLP*, 577 F Appx 573, 574-575 (CA 6, 2014). Based on the federal district court's finding that plaintiff had failed to come forward with direct evidence of pay disparity premised on sex, age or race, collateral estoppel is applicable. *Monat*, 469 Mich at 682-684.

In examining plaintiff's claims this Court would examine whether the employees whom plaintiff claimed were treated differently than he were in fact comparable. The federal district court ruled that plaintiff failed to meet his burden of establishing that the individuals identified were properly comparable and, in addition, that plaintiff had received higher compensation than some of the identified individuals used for comparison. Further, even if plaintiff had been able to establish a prima facie case of discrimination under the applicable framework, he could not survive the burden shifting analysis that comprises the next step in evaluating his claim. The federal district court explicitly found that the reasons or justifications provided by defendant for any disparity in compensation were legitimate, nondiscriminatory and not pretextual. As such, plaintiff's claims **[*19]** under the ELCRA are precluded based on collateral estoppel.

Plaintiff has also, however, in the state court alleged a claim of unlawful retaliation premised on his assertion that his complaints to defendant's management regarding his disparate compensation resulted in a reduction in his compensation. Specifically, plaintiff claimed:

> Defendant through its Management Committee and other agents treated Plaintiff differently than similarly situated younger partners with respect to compensation during each of its fiscal years since and beginning with Defendant's 2001 fiscal year because of his complaints.

Based on plaintiff's amended pleading, his complaints to defendant regarding his alleged discriminatory treatment occurred yearly, "each time he was notified of his annual compensation for since [sic] and beginning with defendant's 2001 fiscal year."

To establish a prima facie case of retaliation a plaintiff must demonstrate:

> "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." **[*20]** [*Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

"To establish causation, the plaintiff must show that his participation in activity protected by the CRA [Civil Rights Act] was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett v Kirtland Comm College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). In other words, to support a claim of retaliation, "[t]he employee's charge must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the [EL]CRA." 245 Mich App at 319. If the evidence demonstrates only that the plaintiff was simply asserting "generic, non-[discriminatory]-based complaints regarding working conditions," a claim for retaliation has not been established. 245 Mich App at 319-320. This plaintiff, however, pleads that his complaints were specific and concerned ELCRA issues.

As a preliminary matter, this cause of action was not addressed by the federal court and, therefore, is not collaterally estopped. Defendant argues that plaintiff cannot establish the causal link between the complaints and the subsequent years' compensation decisions. We agree that expiration of an extended period between a plaintiff's participation in a protected activity and the adverse employment action **[*21]** may preclude a finding that the engagement in a protected activity comprised a significant factor in the adverse employment action. See *Aho v Dep't of Corrections*, 263 Mich App 281, 291-292; 688 NW2d 104 (2004). "Courts have consistently held that a lengthy period between the protected activity and the adverse employment action precludes a nexus between the two events." 263 Mich App at 291.

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However, what constitutes a lengthy period is case specific. Since compensation was a yearly decision, we cannot say as a matter of law that time alone bars this cause of action.

E. INTEGRATION CLAUSE

Defendant also asserts that plaintiff's breach of contract claim should have been dismissed based on the existence of an integration clause within the Partnership Agreement belying any different or ancillary agreements between the parties. Defendant further contends that the breach of contract claim should have been dismissed based on the prior determinations of the federal court that plaintiff had failed to demonstrate that defendant's yearly compensation calculations were pretextual or were not in conformance with the agreement and, therefore, could not be construed to be arbitrary or done in bad faith.

The parties' partnership agreement contains an integration clause. Plaintiff implicitly **[*22]** suggests that the contract is voidable based on his allegations that he was induced by fraud to enter into the contract and, later, coerced into signing the agreement for his full partner position without a complete disclosure of the contract terms. Specifically, plaintiff contends he was forced to enter into an agreement with defendant in 2000 because defendant had jeopardized plaintiff's relationship with his prior employer and that defendant made false promises to entice plaintiff's entry into the agreement. He further contends that he was forced by defendant to sign the partnership agreement in 2004, without having been provided a full copy of the agreement, thereby lacking a "meeting of the minds" to establish an enforceable contract.

In general, a party breaches a contract if it fails to perform a required promise, obligation or duty required by the contract. See *Schware v Derthick*, 332 Mich 357, 364-365; 51 NW2d 305 (1952). In this contract, defendant promises to compensate plaintiff in the "sole" or "absolute discretion" of an identified Committee. There is no language in the agreement that entitles plaintiff to a specified level of compensation or that the amount of compensation be determined in the manner preferred or advocated by plaintiff. **[*23]** As such, plaintiff has failed to establish a breach of the agreement by defendant based on the express terms of the partnership agreement. Notably, plaintiff does not rely on or identify any specific provision of the contract as the basis for his breach of contract claim. All of his allegations pertaining to breach of contract reference either fraud by defendant in inducing his entry into the contract or discriminatory treatment in determining his compensation.

Plaintiff's suggestion that defendant has failed to fulfill promises made to induce plaintiff's entry into the Agreement are without merit, in part, premised on the existence of the integration clause. When parties to a contract explicitly include within the contract a provision indicating that the contract is a full and complete integration of their agreement, courts have given such an expressed declaration full effect. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 493-499; 579 NW2d 411 (1998).

In this instance, however, plaintiff has alleged fraud, which can render "a contract voidable at the instance of the innocent party." 228 Mich App at 503 (citation omitted). But, "in the context of an integration clause . . . only certain types of fraud would vitiate the contract." *Id.* Specifically:

> [W]hile parol evidence is generally **[*24]** admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract. Thus, when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause. [Id.]

To the extent that plaintiff contends that the terms of the written agreement are different from promises made by defendant before the agreement was reduced to a writing, his claim cannot be sustained premised on the existence of the integration clause. A sustainable claim of fraud requires the demonstration of a reasonable reliance on a misrepresented fact. *Barclae v Zarb*, 300 Mich App 455, 482; 834 NW2d 100 (2013). A party's reliance on oral promises or representations made before entering into a fully integrated written contract is deemed to be per se unreasonable. *UAW-GM*, 228 Mich App at 504.

Further, plaintiff's argument that he was coerced into signing an agreement without full disclosure of its terms is somewhat disingenuous given plaintiff's profession as an attorney, particularly in his areas of practice, and the **[*25]** length of the time the parties have continued to perform under the contractual agreement. As noted, defendant's misrepresentations and coercive actions are alleged to have occurred in 2001 and early 2004. Based on plaintiff's filing of his complaint in 2011, his claims are precluded by the applicable statute of limitations. *Nat'l Sand, Inc*, 182 Mich App at 333-334. Plaintiff's claim that he signed an agreement without having access to, or defendant's provision of, all of the contract terms is unavailing as "[t]he stability of written instruments demands that a person who executes one shall know its contents or be chargeable with such knowledge." *Christy v Kelly*, 198 Mich App 215, 217; 497 NW2d 194 (1992), quoting *Sponseller v Kimball*, 246 Mich 255, 260; 224 NW 359 (1929). Thus, "[i]t is well established that a person cannot avoid a written contract on the ground that he did not attend to its terms, did not read it, supposed it was different in its terms, or that he believed it to be a matter of mere form." *Rowady v K Mart Corp*, 170 Mich App 54, 60; 428 NW2d 22

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(1988). Specifically, "a person who signs and executes an instrument without inquiring as to its contents cannot have the instrument set aside on the ground of ignorance of the contents." *Christensen v Christensen*, 126 Mich App 640, 645; 337 NW2d 611 (1983).

Plaintiff also suggests that defendant fraudulently induced his entry into their contract by misrepresenting future actions. "Fraud in the inducement occurs where **[*26]** a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon. Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party." *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639-640; 534 NW2d 217 (1995) (internal citations omitted). To establish fraud in the inducement, it must be shown that

> "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that is was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." [*Belle Isle Grill Corp*, 256 Mich App at 477 (citation omitted).]

Even assuming that fraud occurred and plaintiff's reliance on the alleged misrepresentations was reasonable there exists, however, a commensurate responsibility that "'a person . . . who has been defrauded, must act promptly; and, if he would repudiate the contract, he must do nothing in affirmance of it after ascertaining the facts.'" *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 628; 692 NW2d 388 (2004) (citations omitted). In this instance, the **[*27]** alleged fraud and coercion occurred in 2001, yet plaintiff delayed until 2011 to file a lawsuit despite his acknowledgement that he was aware that defendant was not abiding by their alleged agreement since 2001.

F. GOOD FAITH AND FAIR DEALING

To the extent plaintiff suggests his breach of contract claim was not subject to dismissal based on his demonstration of bad faith and arbitrary conduct by defendant, this assertion is indiscernible from his claims of fraud and discrimination. The term "bad faith" is defined in *Black's Law Dictionary* (10th ed) as "[d]ishonesty of belief, purpose, or motive." The federal court rejected plaintiff's contentions of discrimination having found defendant's explanation for its compensation decisions to be neither discriminatory nor pretextual. The federal court's determination is, thus, contrary to any suggestion of bad faith. "Arbitrary" is defined as "[d]epending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures." *Id.* The Partnership Agreement permits the designated committee to determine individual or final distributions "in its sole discretion" or "absolute **[*28]** discretion." "Where a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *Ferrell v Vic Tanny Intern, Inc*, 137 Mich App 238, 243; 357 NW2d 669 (1984) (citations omitted). However, as explained in *Barber v SMH, Inc*, 202 Mich App 366, 372-373; 509 NW2d 791 (1993), "this Court has refused to recognize a cause of action for breach of an implied covenant of good faith and fair dealing in the employment context." Even if applicable, any implied "good faith" requirement imposed was satisfied by the federal district court's determination that defendant's explanations for plaintiff's compensation were neither discriminatory nor pretextual based on its exploration of the factors and methods used by defendant in determining individual compensation.

III. AMENDED COMPLAINT

Finally, defendant contends the trial court erred in failing to strike plaintiff's amended complaint as violative of the Michigan Rules of Court and futility. This Court reviews for an abuse of discretion the trial court's decision to strike a pleading. *Belle Isle Grill Corp*, 256 Mich App at 469. The interpretation of a court rule presents an issue of law that this Court reviews de novo. *Acorn Inv Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 348; 852 N.W.2d 22 (2014); *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 187; 732 NW2d 88 (2007). "A court by definition abuses its discretion when it makes an error of law." **[*29]** *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009) (citation and quotation marks omitted).

When construing a court rule, the legal principles governing the interpretation and application of statutes are applicable. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). The objective of the judiciary when interpreting a statute is to discern and give effect to the intent of the Legislature. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). The most reliable evidence of the Legislature's intent is deemed to be the language of the statute. *Id.* "When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012). Effect is to be given to every word, phrase, and clause within the statute, and the court is to avoid a construction that would render part of the statute surplusage or nugatory. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted."

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Whitman, 493 Mich at 311.

MCR 2.118 provides, in pertinent part:

> (A) Amendments.
>
> (1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require **[*30]** a responsive pleading.
>
> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

Plaintiff served his complaint on defendant on December 27, 2013. Rather than filing an answer to the complaint, defendant elected to file a motion for summary disposition on January 16, 2014. While the motion was pending, plaintiff filed an amended complaint, adding a claim for retaliation, on January 31, 2014.

A motion for summary disposition is not considered a responsive pleading. MCR 2.110(A); *City of Huntington Woods v Ajax Paving Indus, Inc*, 179 Mich App 600, 601; 446 NW2d 331 (1989). In accordance with MCR 2.110(A), a "pleading" includes only a complaint, a cross-complaint, a counterclaim, a third-party complaint, an answer to any of the former, and a reply to an answer. MCR 2.110(A) specifically states, "[n]o other form of pleading is allowed." Because defendant never filed a responsive pleading to plaintiff's complaint, but only a motion for summary disposition, plaintiff had the right to file an amended complaint as a matter of course under MCR 2.118(A)(1). As explained within the commentary provided by authors Dean and Longhofer in Michigan Court Rules Practice (4th ed), § 2118.2, p 552:

> Since the time allowed **[*31]** for an amendment as of right is limited to 14 days after service of a responsive "pleading," it is important to note that the term "pleading" is defined under MCR 2.110(A) to include only complaints, cross-claims, counterclaims, third-party complaints, an answer to any of these, and a reply to an answer. The list does not include, for example, a motion for summary disposition, under MCR 2.116, or a motion to strike or for a more definite statement under MCR 2.115. A party may therefore appropriately reply to a motion under either rule with an amended pleading designed to cure the defect revealed by the motion (assuming a responsive pleading has not also been filed and served more than 14 days before the proposed amendment).

As such, the trial court did not err in determining that the timeframes of MCR 2.118 did not preclude plaintiff's filing of an amended complaint.

Leave to amend a pleading should be freely granted if justice requires. MCR 2.118(A)(2); *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

> However, leave to amend a complaint may be denied for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would **[*32]** be futile. "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." [Id. (citations omitted).]

Plaintiff's retaliation claim is not futile. The retaliation claim added to plaintiff's complaint alleged that he complained to defendant yearly, in conjunction with his receipt of notification of his compensation, that he was dissatisfied with the amount received and attributed the perceived disparity as being attributable to age discrimination. Because we find that this is a jury question, the amended complaint should be allowed. Defendant however, is not precluded from challenging plaintiff's retaliation claim by timely filing a motion for summary disposition with the trial court.

Affirmed in part, reversed in part and remanded to the trial court for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause

/s/ Elizabeth L. Gleicher

/s/ Cynthia Diane Stephens

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Table1 (Return to related document text**)**

Promises / Misrepresentations	**Plaintiff discovered the misrep**	**Plaintiff should have discovered the misrep**	**Plaintiff complained to Defendant**
Plaintiff would at all times be treated as a full partner of defendant	Feb 1, 2001 (Complaint, ¶ 50, p. 15)		
Plaintiff would be paid the guaranteed, minimum monthly and	Late Feb or early March 2003 (Complaint, ¶ 69, p. 22)	Feb 1, 2002	Before late Feb or early March 2003 or early (Complaint, ¶ 70, p. 22)
Plaintiff's monthly and annual compensation would annually increase based on plaintiff's productivity **[*8]**	Feb 1, 2001 (Complaint, ¶ 63, p. 20)		
Plaintiff's productivity would be measured by hours recorded by plaintiff and billed by defendant to clients for professional services provided by plaintiff to the clients as a member of defendant firm and annual revenue realized by defendant from client payment of fees charged by defendant for professional services provided by plaintiff and/or for which plaintiff was entitled to billing and/or supervisory credit	February 28, 2005 (Complaint, ¶¶ 116-117, pp. 42-43)	Feb 1, 2002	
Plaintiff would receive full billing credit for all clients and client matters procured by him for full supervisory	Feb 1, 2001 (Complaint, ¶ 63, p. 20)		Before Feb 1, 2002 (Complaint, ¶ 67, p. 21)

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Promises / Misrepresentations	Plaintiff discovered the misrep	Plaintiff should have discovered the misrep	Plaintiff complained to Defendant
credit for all client matters for which he provided legal representation whether or not he procured the client or client matter			
Neither defendant nor partners of defendant would interfere with then extant and prospective client relationships procured by plaintiff	Feb 1, 2001 (Complaint, ¶ 60, p. 20)		
In all other respects plaintiff would be treated the same as other founding partners of the Detroit office and other partners of defendant relative to compensation, benefits and all other terms and conditions of employment, **[*9]** including but not limited to, billing and supervisory credit for clients and client matters procured by plaintiff as a member of the defendant law firm	February 28, 2005 (Complaint, ¶¶ 116-117, pp. 42-43)	Feb 1, 2002	
In all other respects plaintiff would be treated without regard to his or others' gender, race or age relative to compensation, benefits and all other terms and conditions of employment, including but not limited to, billing and supervisory credit for clients and client matter procured by plaintiff as a member of the defendant law firm	February 28, 2005 (Complaint, ¶ ¶ 116, 118, 119 pp. 42, 43)	Feb 1, 2002	

Promises / Misrepresentations	Plaintiff discovered the misrep	Plaintiff should have discovered the misrep	Plaintiff complained to Defendant
Plaintiff's annual compensation would be the greater of 60% of amounts annually billed by defendant for professional services provided by plaintiff or a reasonable, equitably fair higher percentage of annual revenue realized by defendant due to plaintiff's productivity and from client payment of fees charged by defendant for professional services provided by plaintiff and/or for which plaintiff was entitled to billing and/or supervisory credit, which defendant was able to set and collect at substantially higher hourly rates than that charged for most other similarly situated Detroit and other partners of defendant because **[*10]** of plaintiff's expertise and experience and relationships he maintained with clients that he procured	February 28, 2005 (Complaint, ¶ ¶ 116-117, pp. 42-43)	Feb 1, 2002	

Table1 (Return to related document text**)**

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700. Not received from House.

701. Not received from House.

702. Not received from House.

703. Not received from House.

704. Income taxes; cities and villages, uniform city ordinance, functions of state revenue commissioner.
Introduced by Rep. Folks.
April 1, received from House and referred to Committee on Taxation 742
April 10, reported favorably with a substitute; bill and substitute ordered printed and referred to committee of the whole 850
April 20, pending amendments printed in Journal, consideration postponed 995
April 22, reported by committee of the whole favorably with a substitute; substitute amended; motion to take a separate vote on amendments Nos. 1, 2, 3, 4 and 15 postponed 1069
April 22, amendments Nos. 5-14 and 16 concurred in; amendments Nos. 1, 2, 3, 4 and 15 concurred in; substitute as amended concurred in and bill as substituted placed on order of third reading; rules suspended to place on immediate passage 1083
April 22, passed, title amended, returned to House 1084
May 4, House concurred in Senate substitute as amended by House; consideration postponed 1339
May 5, House amendments to Senate substitute concurred in 1354
May 5, Senate requested House to return bill 1384
May 6, House returned bill as requested, motion to reconsider vote postponed 1391
May 6, motion to reconsider vote defeated 1408
May 12, Senate requested House to return bill 1423
May 13, House returned bill as requested; motion to suspend rule to reconsider postponed 1437
May 13, rule suspended, vote reconsidered; amendments non-concurred in 1449
May 21, House amended Senate substitute; House amendments to Senate substitute concurred in; given immediate effect 1508
June 12, approved by Governor, see House Journal, page 2194.
Public Act No. 284, I.E.

705. Taxes; limitation on authority of cities and villages.
Introduced by Rep. Folks.
April 1, received from House and referred to Committee on Taxation 742
April 10, reported favorably with amendments; bill and amendments referred to committee of the whole 850
April 21, reported by committee of the whole, favorably, with amendments; amendments concurred in and bill placed on order of third reading 1029
April 21, rules suspended, passed, given immediate effect, returned to House 1054
May 4, House non-concurred in Senate amendments; Senate receded from its amendments 1339
May 28, approved by Governor, see House Journal, page 2182.
Public Act No. 243.

706. Not received from House.

707. Not received from House.

708. Not received from House.

709. Economic poisons; increase fee of manufacturer or seller from $5.00 to $10.00 per brand; fees in control fund to revert to general fund; retention of sales and shipment records. Amends sec. 4, Act 297, P.A. 1949 (C.L. 286.164).
Introduced by Rep. Cobb.
March 25, received from House and referred to Committee on Agriculture 726

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A message was received from the House of Representatives transmitting

House Bill No. 704, entitled

A bill to permit the imposition and collection by cities of excise tax levied on or measured by income; to prescribe and require the adoption of a uniform city income tax ordinance by cities which desire to impose and collect an excise tax levied on or measured by income; to prohibit the imposition and collection by cities or villages of excise taxes levied on or measured by income, in accordance with this act; to provide for appeals; and to prescribe the powers and duties of the state commissioner of revenue.

The message informed the Senate that the House of Representatives had passed the bill; in which action the concurrence of the Senate was requested.

The bill was read a first and second time by title and referred to the Committee on Taxation.

A message was received from the House of Representatives transmitting

House Bill No. 705, entitled

A bill to prohibit the imposition, levy or collection of taxes other than ad valorem property taxes by cities and villages.

The message informed the Senate that the House of Representatives had passed the bill; in which action the concurrence of the Senate was requested.

The bill was read a first and second time by title and referred to the Committee on Taxation.

A message was received from the House of Representatives transmitting

House Bill No. 710, entitled

A bill to amend sections 1 and 5 of Act No. 174 of the Public Acts of 1917, entitled "An act to provide for safety to life and property in this state in the use and construction of steam boilers; creating a board of boiler rules to prescribe uniform rules and regulations for boilers used in this state; to define the powers of the board of boiler rules; to provide penalties for the violation of this act and rules and regulations of the board of boiler rules, and making an appropriation to carry out the provisions of this act," being sections 408.301 and 408.305 of the Compiled Laws of 1948.

The message informed the Senate that the House of Representatives had passed the bill; in which action the concurrence of the Senate was requested.

The bill was read a first and second time by title and referred to the Committee on Labor.

A message was received from the House of Representatives transmitting

House Bill No. 732, entitled

A bill to amend section 7b of Act No. 84 of the Public Acts of 1909, entitled "An act to increase the efficiency of the military establishment of the state of Michigan, to make an appropriation therefor, and to repeal all former acts or parts of acts inconsistent with the provisions of this act," being section 32.7b of the Compiled Laws of 1948.

The message informed the Senate that the House of Representatives had passed the bill; in which action the concurrence of the Senate was requested.

The bill was read a first and second time by title and referred to the Committee on Insurance.

A message was received from the House of Representatives transmitting

House Bill No. 733, entitled

A bill to amend section 298a of Act No. 269 of the Public Acts of 1955, entitled "The school code of 1955," as added by Act No. 190 of the Public Acts of 1962, being section 340.298a of the Compiled Laws of 1948.

The message informed the Senate that the House of Representatives had passed the bill and had ordered that it be given immediate effect; in which action the concurrence of the Senate was requested.

The bill was read a first and second time by title and referred to the Committee on Education.

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The Senate was called to order by the President. 9:50 o'clock a.m.

Mr. Thayer moved that when the Senate adjourns today it stand adjourned until Monday, April 13, at 2:00 o'clock p.m.

Reports of Standing Committees.

Mr. Geerlings submitted the following report:

The Committee on Taxation respectfully reports back to the Senate the following entitled bill with amendments recommending that the amendments be agreed to and that the bill, as thus amended, do pass:

House Bill No. 705, entitled

A bill to prohibit the imposition, levy or collection of taxes other than ad valorem property taxes by cities and villages.

The following are the amendments recommended by the committee:

1. Amend page 1, line 2, after "levy" by inserting a comma and striking out "or".
2. Amend page 1, line 3, after "collect" by inserting "or increase".
3. Amend page 1, after line 5, by inserting "Sec. 2. The provisions of this act shall be null and void on June 30, 1965.".

CLYDE H. GEERLINGS,
Chairman.

The report was accepted.

The bill and the amendments recommended by the committee were referred to the Committee of the Whole.

Mr. Geerlings submitted the following report:

The Committee on Taxation respectfully reports back to the Senate the following entitled bill, with a substitute therefor, recommending that the substitute be agreed to and that the bill, as thus substituted, do pass:

House Bill No. 704, entitled

A bill to permit the imposition and collection by cities of an excise tax levied on or measured by income; to prescribe and require the adoption of a uniform city income tax ordinance by cities which desire to impose and collect an excise tax levied on or measured by income; to prohibit the imposition and collection by cities or villages of excise taxes levied on or measured by income, in accordance with this act; to provide for appeals; and to prescribe the powers and duties of the state commissioner of revenue.

CLYDE H. GEERLINGS,
Chairman.

The report was accepted.

The bill as substituted was ordered printed and was referred to the Committee of the Whole.

Mr. VanderLaan submitted the following report:

The Committee on Labor respectfully reports back to the Senate the following entitled bill with amendments recommending that the amendments be agreed to and that the bill, as thus amended, do pass:

House Bill No. 522, entitled

A bill to amend section 10 of Act No. 89 of the Public Acts of 1963, entitled "Construction safety act of 1963," being section 408.720 of the Compiled Laws of 1948.

The following are the amendments recommended by the committee:

1. Amend page 2, line 3, after "of" by striking out the House amendment and inserting "$5.00 FOR EMPLOYERS OF LESS THAN 3 EMPLOYEES AND $35.00 FOR EMPLOYERS OF 3 OR MORE EMPLOYEES".
2. Amend page 1, following line 3, by inserting a new section 2 to read as follows:

"Sec. 2. As used in this act:

(a) "Commission" means the state construction safety commission created by this act.

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The Committee of the Whole, through its Chairman, reported back to the Senate, favorably and with amendments the following entitled bill:

House Bill No. 705, entitled

A bill to prohibit the imposition, levy or collection of taxes other than ad valorem property taxes by cities and villages.

The following are the amendments recommended by the Committee of the Whole:

1. Amend page 1, line 2, after "levy" by inserting a comma and striking out "or".
2. Amend page 1, line 3, after "collect" by inserting "or increase".
3. Amend page 1, after line 5, by inserting "Sec. 2. The provisions of this act shall be null and void on June 30, 1965.".

The Senate agreed to the amendments recommended by the Committee of the Whole and the bill as amended was placed on the order of Third Reading of Bills.

Messages from the House.

A message was received from the House of Representatives, re-returning, together with the House amendments to the bill, in the adoption of which amendments the Senate non-concurred,

Senate Bill No. 1036, entitled

A bill to amend Act No. 328 of the Public Acts of 1931, entitled "The Michigan penal code," as amended, being sections 750.1 to 750.568 of the Compiled Laws of 1948, by adding a new section 362a.

(For House amendments see Senate Journal No. 40, page 510.)

The message informed the Senate that the House of Representatives insists on its amendments and asks for a second conference with the Senate on the matters of difference between the two Houses relative to the bill, and had appointed Representatives Whinery, Bassett and Mrs. Hunsinger as conferees on the part of the House.

Mr. Lane moved that the request of the House of Representatives for a second conference be granted.

The motion prevailed.

A message was received from the House of Representatives returning with an amendment to the title

Senate Bill No. 1414, entitled

A bill to amend section 25 of Act No. 167 of the Public Acts of 1933, entitled as amended "General sales tax act," as amended by Act No. 272 of the Public Acts of 1949, being section 205.75 of the Compiled Laws of 1948.

The message informed the Senate that the House of Representatives had passed the bill and had ordered that it be given immediate effect.

The message further informed the Senate that the House of Representatives had amended the title of the bill by striking out "General sales tax act," and inserting "An act to provide for the raising of additional public revenue by prescribing certain specific taxes, fees, and charges to be paid to the state for the privilege of engaging in certain business activities; to provide, incident to the enforcement thereof, for the issuance of licenses to engage in such occupations; to provide for the ascertainment, assessment and collection thereof; to appropriate the proceeds thereof; and to prescribe penalties for violations of the provisions of this act,".

The amendment to the title was agreed to.

The bill was referred to the Secretary for enrollment printing and presentation to the Governor.

A message was received from the House of Representatives returning with an amendment to the title

Senate Bill No. 1032, entitled

A bill to amend section 32 of Act No. 327 of the Public Acts of 1931, entitled "Michigan general corporation act," as amended by Act No. 232 of the Public Acts of 1949, being section 450.32 of the Compiled Laws of 1948.

The message informed the Senate that the House of Representatives had passed the bill and had ordered that it be given immediate effect.

The message further informed the Senate that the House of Representatives had amended the title of the bill by striking out "Michigan general corporation

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So, a majority of all the Senators-elect having voted therefor,
The bill was passed.
The Senate agreed to the title of the bill.

The following entitled bill was read a third time:

House Bill No. 705, entitled

A bill to prohibit the imposition, levy or collection of taxes other than ad valorem property taxes by cities and villages.

The question being on the passage of the bill, the roll was called and the Senators voted as follows:

YEAS—27.

Beadle	Hilbert	McManiman	Stephens
Begick	Hughes	Milliken	Thayer
Bowman	Lane	Nichols	VanderLaan
Dehmel	Leppien	Porter	Youngblood
Fitzgerald	Litowich	Rahoi	Younger
Ford	Lockwood	Roberts	Zaagman
Geerlings	Lundgren	Schweigert	

NAYS—6.

Blondy	Brown, G.	Novak	Rozycki
Brown, B.	Dzendzel		

So, a majority of all the Senators-elect having voted therefor,
The bill was passed.
The Senate agreed to the title of the bill.
Mr. Ford moved that the bill be given immediate effect.
The motion prevailed, 2/3 of all the Senators-elect having voted therefor.

The following entitled bill was read a third time:

House Bill No. 179, entitled

A bill to repeal Act No. 9 of the Public Acts of 1963, entitled "An act creating the state recreation and exhibits building authority with power to acquire, construct, purchase, maintain, repair, remodel and convert stadiums, buildings and other necessary recreational facilities; to authorize the acquisition of properties for such purposes; to authorize the execution of leases pertaining to such properties and facilities by said building authority with the state or any of its public agencies; to provide for the issuance of revenue bonds; to authorize the conveyance of lands by the state or any of its agencies for the purposes herein authorized; to provide an appropriation for initial expenses; and to provide for other matters in relation thereto," being sections 291.101 to 291.115 of the Compiled Laws of 1948.

The question being on the passage of the bill, the roll was called and the Senators voted as follows:

YEAS—30.

Beadle	Fitzgerald	McManiman	Rozycki
Begick	Ford	Milliken	Schweigert
Blondy	Geerlings	Nichols	Stephens
Bowman	Hilbert	Novak	Thayer
Brown, B.	Hughes	Porter	VanderLaan
Brown, G.	Lane	Rahoi	Youngblood
Dehmel	Leppien	Roberts	Zaagman
Dzendzel	Lockwood		

NAYS—2.

Litowich	Lundgren

So, a majority of all the Senators-elect having voted therefor,
The bill was passed.

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Senate Bill No. 1288 at 12:09 p.m.
Senate Bill No. 1290 at 12:03 p.m.
Senate Bill No. 1306 at 12:14 p.m.
Senate Bill No. 1312 at 12:01 p.m.
Senate Bill No. 1313 at 12:08 p.m.
Senate Bill No. 1325 at 11:57 a.m.
Senate Bill No. 1328 at 12:13 p.m.
Senate Bill No. 1329 at 12:15 p.m.
Senate Bill No. 1332 at 3:56 p.m.
Senate Bill No. 1333 at 12:17 p.m.
Senate Bill No. 1334 at 3:57 p.m.
Senate Bill No. 1338 at 11:56 a.m.
Senate Bill No. 1339 at 12:12 p.m.
Senate Bill No. 1342 at 12:16 p.m.
Senate Bill No. 1343 at 12:04 p.m.
Senate Bill No. 1400 at 3:58 p.m.
Senate Bill No. 1404 at 12:11 p.m.
Senate Bill No. 1432 at 12:10 p.m.
Senate Bill No. 1450 at 3:59 p.m.
Senate Bill No. 1456 at 4:00 p.m.
Senate Bill No. 1477 at 12:18 p.m.

By unanimous consent the Senate returned to the order of

Messages from the House.

A message was received from the House of Representatives re-transmitting, together with the Senate amendments thereto,

House Bill No. 705, entitled

A bill to prohibit the imposition, levy or collection of taxes other than ad valorem property taxes by cities and villages.

(For Senate amendments see Senate Journal No. 59, p. 1029.)

The message informed the Senate that the House of Representatives had non-concurred in the amendments made to the bill by the Senate.

Mr. Geerlings moved that the Senate recede from its amendments to the bill.

The question being on receding from the amendments made to the bill by the Senate,

The roll was called and the Senators voted as follows:

YEAS—22.

Begick	Hughes	Nichols	Thayer
Brown, G.	Leppien	Rahoi	VanderLaan
Dehmel	Litowich	Roberts	Youngblood
Dzendzel	Lockwood	Schweigert	Younger
Geerlings	Lundgren	Stephens	Zaagman
Hilbert	Milliken		

NAYS—1.

McManiman

So, a majority of all the Senators-elect voting therefor,

The Senate receded from the amendments made to the bill.

A message was received from the House of Representatives re-transmitting, together with the Senate amendments thereto,

House Bill No. 704, entitled

A bill to permit the imposition and collection by cities of an excise tax levied on

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EXHIBIT N

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JOURNAL

OF THE

House of Representatives

OF THE

State of Michigan

1964

REGULAR SESSION

IN TWO VOLUMES—VOLUME II

Printed by virtue of an act of the Legislature, under the direction and supervision of

NORMAN E. PHILLEO
CLERK OF THE HOUSE OF REPRESENTATIVES

SPEAKER-HINES AND THOMAS, INC., STATE PRINTERS, LANSING, MICHIGAN — 1964

704. Income taxes; cities and villages, uniform city ordinance, functions of state revenue commissioner.
introduced by Rep. Folks, ordered printed, referred to Committee on General Taxation, February 19 365
printed copies filed, March 10 633
reported with recommendation, with amendments, placed on general orders, March 18 746
rule suspended, committee of the whole discharged from further consideration, rule suspended, placed on immediate passage, March 25 947
read a third time, amended, passed, transmitted, March 26 1008
returned from Senate with a substitute, with amendments, with title amended, laid over one day, April 23 1548
Senate substitute, as amended, concurred in, May 2 1835
re-returned from Senate, Senate concurred in House amendments to its substitute, ordered enrolled, May 5 1965
Senate requested return of bill, enrollment vacated, re-transmitted to Senate as per request, May 5 1993
re-returned from Senate, Senate had taken no further action on the bill, May 13 2034
Senate again requested return of bill, re-transmitted to Senate as per request, May 13 2036
re-returned from Senate, Senate non-concurred in House amendments to its substitute, May 21 2111
rule suspended, vote on Senate substitute as amended by House reconsidered, Senate substitute as amended by House concurred in, given immediate effect, re-transmitted, May 21 2115
re-returned from Senate, Senate concurred in House amendments to its substitute, with immediate effect, title agreed to, ordered enrolled, May 21 2125
presented to Governor, June 8 (enrolled no. 704, I.E.) 2189
approved, June 12 (Public Act No. 284) 2194

705. Taxes: limitation on authority of cities and villages.
introduced by Rep. Folks, ordered printed, referred to Committee on General Taxation, February 19 365
printed copies filed, March 3 531
reported with recommendation, placed on general orders, March 18 .. 747
rule suspended, committee of the whole discharged from further consideration, rule suspended, placed on immediate passage, March 25 947
read a third time, passed, transmitted, March 26 1014
returned from Senate with amendments, with immediate effect, laid over one day, April 23 1540
Senate amendments non-concurred in, May 4 1880
re-returned from Senate, Senate receded from its amendments, ordered enrolled, May 5 1937
presented to Governor, May 15 (enrolled No. 705) 2048
approved, May 28 (Public Act No. 243) 2182

706. Social welfare; general relief; change formula to 50-50 or state pay full costs after local unit has spent 1 mill on state equalized value. Amends sec. 18, Act 280, P.A. 1939 (C.L. 400.18).
introduced by Reps. Bradley, Holmes, E. D. O'Brien and West, ordered printed, referred to Committee on Social Aid and Welfare, February 20 395
printed copies filed, March 6 609

707. World War I veterans: create state service officer: make appropriation.
introduced by Reps. Good, Doorn, Mack, Penczak, Copeland, Mrs. Hager, Conlin, Olsen, Bradley, Holmes, Mrs. Hunsinger, E. D. O'Brien, Tisdale, Baker, Hayward, Michalski, Cartwright, Snyder, Bouwsma, Perras, Cyril H. Root, Farnsworth, Edson V. Root, Jr., Rockwell, Handy, Little, Horrigan, Beedon, Stevens, Spencer, Most, Nakkula, Mrs. McCollough, Hellman, Mrs. Elliott and Rasmussen, ordered printed, referred to Committee on Ways and Means, February 20 395
printed copies filed, March 4 565
21 days extension granted, March 17 729

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ment systems for Michigan public school employees; to provide retirement allowances for such public school employees; and to repeal all acts and parts of acts inconsistent herewith," section 27 as last amended by Act No. 246 of the Public Acts of 1955 and section 45 as last amended by Act No. 234 of the Public Acts of 1955, being sections 38.227 and 38.345 of the Compiled Laws of 1948.

The bill was read a first and second time by its title, ordered printed and referred to the Committee on Retirement.

Rep. Folks introduced

House Bill No. 704, entitled

A bill to permit the imposition and collection by cities of excise tax levied on or measured by income; to prescribe and require the adoption of a uniform city income tax ordinance by cities which desire to impose and collect an excise tax levied on or measured by income; to prohibit the imposition and collection by cities or villages of excise taxes levied on or measured by income, in accordance with this act; to provide for appeals; and to prescribe the powers and duties of the state commissioner of revenue.

The bill was read a first and second time by its title, ordered printed and referred to the Committee on General Taxation.

Rep. Folks introduced

House Bill No. 705, entitled

A bill to prohibit the imposition, levy or collection of taxes other than ad valorem property taxes by cities and villages.

The bill was read a first and second time by its title, ordered printed and referred to the Committee on General Taxation.

Rep. Boos introduced

House Joint Resolution W, entitled

A joint resolution proposing an amendment to article 9 of the state constitution to add a new section 25 relating to granting the credit of the state to or in aid of certain public benefit corporations.

The joint resolution was read a first and second time by its title, ordered printed and referred to the Committee on Revision and Amendment of the Constitution.

Reps. Most, Rockwell, Brigham, Little, Stevens, Mielock, Thorne, Romano, DeMaso, Huffman, McNeeley, Doorn and Knabusch introduced

House Joint Resolution X, entitled

A joint resolution proposing an amendment to section 7 of article 7 of the state constitution to provide for at least 1 member from each city within a county and additional representatives from cities and townships as provided by law on the board of supervisors.

The joint resolution was read a first and second time by its title, ordered printed and referred to the Committee on Revision and Amendment of the Constitution.

Rep. Mrs. Hager moved that the House adjourn.

The motion prevailed, the time being 4:10 o'clock p.m.

The Acting Speaker declared the House adjourned until Thursday, February 20, at 2:00 o'clock p.m.

NORMAN E. PHILLEO,
Clerk of the House of Representatives.

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JOURNAL OF THE HOUSE

NUMBER THIRTY TWO.

Lansing, Tuesday, March 3, 1964.

2:00 o'clock p.m.

The House was called to order by the Speaker pro tem.

Rev. E. R. Fisher, Executive Secretary, Michigan Church of the Brethren of Lansing, offered the invocation.

The roll of the House was called by the Clerk, who announced that a quorum was present.

The following members were absent with leave:
Reps. Jacobetti and Mack.

The following members were absent without leave:
Reps. Guzowski, Law and Wales.

Rep. Michael J. O'Brien moved that all absentees without leave be temporarily excused from today's session.
The motion prevailed.

Rep. Marshall asked and obtained leave of absence from the session of March 12.

Rep. Law entered the House and took his seat.

Announcement by Clerk of Printing and Enrollment of Bills.

The Clerk announced that the following bill had been printed and placed upon the files of the members, Friday, February 14:

House Bill No. 315

The Clerk also announced that the following bills had been printed and placed upon the files of the members, Monday, March 2:

House Bills Nos.

339	340	527	536	537	561	582	603
611	645	653	689				

The Clerk also announced that the following bills and joint resolution had been printed and placed upon the files of the members, Tuesday, March 3:

House Bills Nos.

579	586	590	609	620	639	658	659
679	705						

3. Amend page 2, line 8, after "as", by striking out "set forth in section 6" and inserting "hereinafter set forth".

4. Amend page 3, line 1, after "the", by striking out "ordinance herein before provided" and inserting "uniform city income tax ordinance".

5. Amend page 4, line 8, after "The", by striking out "ordinance provided in section 6 shall" and inserting "uniform city income tax ordinance does".

6. Amend page 4, line 11, after "as", by striking out "follows:" and inserting "set forth in chapter 2."

7. Amend page 4, between lines 11 and 12, by inserting and centering "CHAPTER 2."

8. Amend page 9, line 19, after "city", by striking out the comma and "vacation" and inserting a period and "Vacation".

9. Amend page 24, following line 15, by inserting:

"(10) Compensation received for service in the armed forces of the United States."

The bill and amendments were referred to the Committee of the Whole and placed on the general orders.

The Committee on General Taxation, by Rep. Folks, Chairman, reported

House Bill No. 705, entitled

A bill to prohibit the imposition, levy or collection of taxes other than ad valorem property taxes by cities and villages.

With the recommendation that the bill pass.

The bill was referred to the Committee of the Whole and placed on the general orders.

The Committee on General Taxation, by Rep. Folks, Chairman, reported

House Bill No. 907, entitled

A bill to amend section 13 of Act No. 150 of the Public Acts of 1927, entitled as amended "An act to prescribe a privilege tax for the use of the public highways by owners and drivers of motor vehicles by imposing a specific tax upon the sale or use within the state of Michigan, of motor fuel; to prescribe the manner and the time of paying such tax and the duties of officials and others respecting such payment and collection; to provide for the licensing of wholesale distributors and the registration of retail dealers and users as defined herein; to require identification markings upon certain vehicles transporting petroleum products; to fix a time when such tax and interest and penalties thereon become a lien upon the property of persons, firms, associations or corporations, subject to the payment of such tax and to provide for the enforcement of said lien; to permit the inspection and testing of petroleum products; to provide for certain exemptions and refunds and for the disposition of the proceeds of such tax; and to prescribe penalties for the violation of this act," being section 207.113 of the Compiled Laws of 1948.

Without recommendation.

The bill was ordered laid on the table.

The Committee on Retirement, by Rep. Davis, Chairman, reported

House Bill No. 703, entitled

A bill to amend section 27 of chapter 1 and section 45 of chapter 2 of Act No. 136 of the Public Acts of 1945, entitled "An act to provide for retirement systems for Michigan public school employees, as defined herein; to combine and continue the operations of the Michigan teachers' retirement fund and public school teachers' retirement fund, as created under Act No. 184 of the Public Acts of 1937, as amended, and the Michigan non-teaching public school employees' retirement fund and the employees' retirement fund, as created under Act No. 56 of the Public Acts of 1941; to make annual appropriations of funds to assist in the maintaining of such retirement systems for Michigan public school employees; to provide retirement allowances for such public school employees; and to repeal all acts and parts of acts inconsistent herewith," section 27 as last amended by Act No. 246 of the Public Acts of 1955 and section 45 as last amended by Act No. 234 of the Public Acts of 1955, being sections 38.227 and 38.345 of the Compiled Laws of 1948.

The Committee recommended that the bill be referred to the Committee on Ways and Means.

The bill was referred to the Committee on Ways and Means.

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Elliott, Mrs.	Law	Romano	Whinery
Engstrom	Little	Root, C. H.	Wismer
Erlandsen	Mack	Root, E. V., Jr.	Wurzel
Farnsworth	Mahoney, F. A.	Sharpe	Young, Mrs.
FitzPatrick, E. A.	Mahoney, R. D.	Snyder	Speaker
Fitzpatrick, J. J.	McCollough, Mrs.		86

NAYS

Ruth	Handy	Marshall	Tisdale
Edwards	Huffman	O'Brien, E. D.	Townsend
Fitzgerald	Hunsinger, Mrs.	Petri	West
Gibbs	Lesinski		14

The House agreed to the title of the bill.

Motions and Resolutions.

Reps. Waldron and Jacobetti offered the following resolution:

House Resolution No. 63.

A resolution prescribing the vote necessary to amend bills on the order of Third Reading of Bills during sessions of March 25 through March 28, 1964.

Resolved by the House of Representatives, That notwithstanding the provisions of any House Rule, all bills on the order of Third Reading of Bills may be amended only by a majority vote of all the members-elect, during sessions of March 25 through March 28, 1964.

Pending the reference of the resolution to a committee,

Rep. Nakkula moved that the rules be suspended and that the resolution be considered at this time.

The motion prevailed, two-thirds of the members present voting therefor.

The question being on the adoption of the resolution,

The resolution was adopted, a majority of the members elected and serving voting therefor.

Rep. Waldron moved that the rules be suspended and that the Committee of the Whole be discharged from further consideration of

House Bills Nos.

895	807	498	440	344	866	732	643
427	473	709	867	607	660	871	917
65	888	946	194	834	835	608	694
641	520	435	746	414	179	350	600
690	865	901	256	33	241	664	704
705	651	549	733	691	909	377	728
434	433	142	633	522	452	509	426
449	710	810	402	766	829	604	361
847	931	929	849	848	318	143	

The motion prevailed, two-thirds of the members present voting therefor.

Rep. Waldron moved that the rules be suspended and that the bills be placed upon their immediate passage.

The motion prevailed, two-thirds of the members present voting therefor.

Rep. Van Til moved that

House Bill No. 231, entitled

A bill to amend section 20 of Act No. 1 of the Public Acts of the Extra Session of 1936, entitled as amended "Michigan employment security act," as last amended by Act No. 281 of the Public Acts of 1955, being section 421.20 of the Compiled Laws of 1948.

(The bill was read a third time and passed for the day on March 24, see p. 889 of House Journal No. 47.)

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Roll Call No. 280

YEAS

Allen	Engstrom	Marshall	Stevens
Anderson	Erlandsen	McCollough, Mrs.	Strange
Baker	Farnsworth	McNeeley	Thorne
Bassett	Fitzgerald	Mielock	Tisdale
Bolt	Folks	Nakkula	Toepp
Boos	Gibbs	Newton	Towner
Borgman	Good	Olsen	Townsend
Bouwsma	Gordon	Perras	Upton
Brigham	Hager, Mrs.	Petri	Van Til
Bursley	Hayward	Rasmussen	Wagner
Buth	Hogan	Rockwell	Waldron
Cobb	Horrigan	Romano	Warner
Conlin	Huffman	Root, C. H.	Whinery
Copeland	Hungerford	Root, E. V., Jr.	Wismer
Davis	Karoub	Sharpe	Wurzel
DeMaso	Knabusch	Snyder	Speaker
Doorn	Little	Spencer	67

NAYS

Baird	Hyso	Michalski	Penczak
Bradley	Jacobetti	Montgomery	Ryan
Cartwright	Kowalski	Morrison	Sobieski
Gillis	Law	Most	Sumeracki
Guzowski	Lesinski	Novak	Traxler
Hellman	Mack	O'Brien, E. D.	Walton
Holmes	Mahoney, F. A.	O'Brien, F. J.	West
Hunsinger, Mrs.	Mahoney, R. D.	O'Brien, M. J.	Young, Mrs.
			32

The House agreed to the title of the bill.

House Bill No. 705, entitled

A bill to prohibit the imposition, levy or collection of taxes other than ad valorem property taxes by cities and villages.

Was read a third time, and, the question being on its passage,

After debate,

Rep. Cartwright demanded the previous question.

The demand was seconded.

The question being, "Shall the main question now be put?"

The previous question was ordered.

The question being on the passage of the bill,

The bill was then passed, a majority of the members elected and serving voting therefor, by yeas and nays, as follows:

Roll Call No. 281

YEAS

Allen	Erlandsen	Mack	Snyder
Anderson	Farnsworth	Marshall	Spencer
Arnett	Fitzgerald	McCollough, Mrs.	Stevens
Baker	Folks	McNeeley	Strange
Bassett	Gibbs	Mielock	Thorne
Bolt	Good	Morrison	Tisdale
Borgman	Gordon	Most	Toepp
Bouwsma	Hager, Mrs.	Nakkula	Towner
Brigham	Hayward	Newton	Townsend
Bursley	Hogan	Olsen	Upton
Buth	Horrigan	Perras	Van Til
Cobb	Huffman	Rasmussen	Wagner
Conlin	Hungerford	Rockwell	Waldron
Davis	Hyso	Romano	Warner

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DeMaso	Karoub	Root, C. H.	Wismer
Doorn	Knabusch	Root, E. V., Jr.	Wurzel
Engstrom	Little	Sharpe	Speaker

68

NAYS

Baird	Gillis	Mahoney, F. A.	Petri
Boos	Guzowski	Mahoney, R. D.	Ryan
Bradley	Hellman	Michalski	Sobieski
Cartwright	Holmes	Montgomery	Sumeracki
Copeland	Hunsinger, Mrs.	Novak	Traxler
Edwards	Jacobetti	O'Brien, E. D.	Walton
Elliott, Mrs.	Kowalski	O'Brien, F. J.	West
FitzPatrick, E. A.	Law	O'Brien, M. J.	Whinery
Fitzpatrick, J. J.	Lesinski	Penczak	Young, Mrs.

36

The House agreed to the title of the bill.

House Bill No. 733, entitled

A bill to amend section 298a of Act No. 269 of the Public Acts of 1955, entitled "The school code of 1955," as added by Act No. 190 of the Public Acts of 1962, being section 340.298a of the Compiled Laws of 1948.

The bill was read a third time and the question being on the adoption of the following proposed amendments recommended by the Committee on Education:

1. Amend page 7, line 5, after "780", by inserting "PRIOR TO JULY 1, 1967".
2. Amend page 7, line 6, after "10%", by inserting "OF THE ANNUAL BUDGET".

The amendments were adopted, a majority of the members elected and serving voting therefor.

The question being on the passage of the bill,

The bill was then passed, a majority of the members elected and serving voting therefor, by yeas and nays, as follows:

Roll Call No. 282

YEAS

Allen	FitzPatrick, E. A.	Mahoney, F. A.	Root, E. V., Jr.
Anderson	Fitzpatrick, J. J.	Mahoney, R. D.	Sharpe
Arnett	Folks	Marshall	Sobieski
Baird	Gibbs	McCollough, Mrs.	Spencer
Baker	Gillis	McNeeley	Stevens
Bassett	Good	Michalski	Strange
Bolt	Gordon	Mielock	Sumeracki
Borgman	Guzowski	Montgomery	Thorne
Bouwsma	Hager, Mrs.	Morrison	Tisdale
Bradley	Hayward	Most	Toepp
Brigham	Hellman	Nakkula	Towner
Bursley	Hogan	Newton	Townsend
Buth	Holmes	Novak	Traxler
Cartwright	Horrigan	O'Brien, E. D.	Upton
Cobb	Huffman	O'Brien, F. J.	Wagner
Copeland	Hungerford	O'Brien, M. J.	Waldron
Davis	Hunsinger, Mrs.	Olsen	Walton
DeMaso	Hyso	Penczak	West
Doorn	Knabusch	Perras	Whinery
Edwards	Law	Petri	Wismer
Elliott, Mrs.	Lesinski	Rasmussen	Wurzel
Engstrom	Little	Romano	Young, Mrs.
Erlandsen	Mack	Root, C. H.	Speaker
Fitzgerald			

93

NAYS

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The question being on agreeing to the title as amended by the Senate,

The title was agreed to.

Rep. Towner moved that the bill be given immediate effect.

The motion prevailed, two-thirds of the members elected and serving voting therefor.

The bill was referred to the Clerk for enrollment printing and presentation to the Governor.

A message was received from the Senate returning with an amendment to the title

House Bill No. 633, entitled

A bill to amend section 16 of Act No. 199 of the Public Acts of 1962, entitled "Ski area safety act of 1962," being section 408.336 of the Compiled Laws of 1948.

The message informed the House of Representatives that the Senate had passed the bill and had amended the title by striking out "Ski area safety act of 1962," and inserting "An act to provide for the inspection, licensing and regulation of ski areas and ski lifts; to provide for the safety of skiers, spectators and the public using ski areas; to create a ski area safety board in the office of the commissioner of labor; to provide for the disposition of revenues; to make an appropriation; and to provide penalties for violations.".

The question being on agreeing to the title as amended by the Senate,

The title was agreed to.

The bill was referred to the Clerk for enrollment printing and presentation to the Governor.

A message was received from the Senate returning with amendments

House Bill No. 705, entitled

A bill to prohibit the imposition, levy or collection of taxes other than ad valorem property taxes by cities and villages.

The following are the amendments made to the bill by the Senate:

1. Amend page 1, line 2, after "levy", by inserting a comma and striking out "or".
2. Amend page 1, line 3, after "collect", by inserting "or increase".
3. Amend page 1, after line 5, by inserting "Sec. 2. The provisions of this act shall be null and void on June 30, 1965."

The message informed the House of Representatives that the Senate had passed the bill as thus amended and had ordered that it be given immediate effect.

The Speaker announced that under Rule 59 the bill would lie over one day.

A message was received from the Senate returning with an amendment

House Bill No. 732, entitled

A bill to amend section 7b of Act No. 84 of the Public Acts of 1909, entitled "An act to increase the efficiency of the military establishment of the state of Michigan, to make an appropriation therefor, and to repeal all former acts or parts of acts inconsistent with the provisions of this act," being section 32.7b of the Compiled Laws of 1948.

The following is the amendment made to the bill by the Senate:

1. Amend page 3, line 5, after "INSURANCE", by inserting "OR PREPAYMENT PLANS FOR HOSPITAL AND MEDICAL SERVICE OR INSURANCE".

The message informed the House of Representatives that the Senate had passed the bill as thus amended and had ordered that it be given immediate effect.

The Speaker announced that under Rule 59 the bill would lie over one day.

A message was received from the Senate returning with an amendment

House Bill No. 762, entitled

A bill to amend section 1 of Act No. 103 of the Public Acts of 1937, entitled "An act to prescribe certain conditions relative to the execution of instruments entitled to be recorded in the office of the register of deeds," as amended by Act No. 150 of the Public Acts of 1963, being section 565.201 of the Compiled Laws of 1948.

The following is the amendment made to the bill by the Senate:

1. Amend page 4, after line 5, by adding an enacting section 2 to read as follows: "Section 2. This act shall become effective on January 1, 1965.".

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The Speaker laid before the House

House Bill No. 705, entitled

A bill to prohibit the imposition, levy or collection of taxes other than ad valorem property taxes by cities and villages.

(The bill was received from the Senate on April 23 with amendments made by the Senate, consideration of which, under the rules, was postponed until April 24.)

(For amendments, see p. 1540 of House Journal No. 66.)

The question being on concurring in the adoption of the amendments made to the bill by the Senate,

The amendments were not concurred in, a majority of the members elected and serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 616

YEAS

Allen	Doorn	McCollough, Mrs.	Spencer
Anderson	Engstrom	Mielock	Stevens
Arnett	Farnsworth	Montgomery	Strange
Baker	Fitzgerald	Morrison	Tisdale
Beedon	Folks	Most	Toepp
Bolt	Gibbs	Nakkula	Upton
Bouwsma	Good	Newton	Vander Werp
Brigham	Gordon	Olsen	Van Til
Bursley	Hager, Mrs.	Perras	Wagner
Buth	Hayward	Rasmussen	Waldron
Cobb	Hogan	Rockwell	Warner
Conlin	Hungerford	Root, C. H.	Wismer
Davis	Little	Root, E. V., Jr.	Speaker
DeMaso	Marshall	Sharpe	

55

NAYS

Baird	Kowalski	O'Brien, E. D.	Sumeracki
Boos	Law	O'Brien, F. J.	Thorne
Copeland	Lesinski	O'Brien, M. J.	Towner
Elliott, Mrs.	Mack	Penczak	Townsend
Erlandsen	Mahoney, F. A.	Petri	Traxler
Fitzpatrick, J. J.	Mahoney, R. D.	Romano	Wales
Gillis	Michalski	Ryan	Walton
Handy	Murphy	Snyder	West
Huffman	Novak	Sobieski	Whinery
Hunsinger, Mrs.			

37

Rep. Waldron moved to reconsider the vote by which the House did not concur in the Senate amendments to House Bill No. 705.

The motion prevailed.

The question being on concurring in the adoption of the amendments made to the bill by the Senate,

The amendments again were not concurred in, a majority of the members elected and serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 617

YEAS

Allen	Doorn	Marshall	Strange
Anderson	Engstrom	Mielock	Tisdale
Arnett	Farnsworth	Morrison	Toepp
Bassett	Folks	Most	Upton
Bolt	Gibbs	Nakkula	Vander Werp
Bouwsma	Good	Newton	Van Til
Brigham	Gordon	Olsen	Wagner
Bursley	Hager, Mrs.	Rasmussen	Waldron
Buth	Handy	Rockwell	Warner
Cobb	Hogan	Root, C. H.	Whinery
Conlin	Hungerford	Root, E. V., Jr.	Wismer
Davis	Knabusch	Sharpe	Speaker
DeMaso	Little	Stevens	

51

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NAYS

Baird	Huffman	McNeeley	Snyder
Baker	Hunsinger, Mrs.	Michalski	Sobieski
Beedon	Jacobetti	Montgomery	Spencer
Boos	Karoub	Murphy	Sumeracki
Copeland	Kowalski	Novak	Thorne
Edwards	Law	O'Brien, E. D.	Towner
Elliott, Mrs.	Lesinski	O'Brien, M. J.	Townsend
Erlandsen	Mack	Penczak	Traxler
Fitzgerald	Mahoney, F. A.	Perras	Wales
Fitzpatrick, J. J.	Mahoney, R. D.	Petri	Walton
Gillis	McCollough, Mrs.	Ryan	West
Hayward			

45

Rep. Waldron moved that the House take a recess subject to the call of the Chair.

The motion prevailed, the time being 2:55 o'clock p.m.

The Speaker announced that the House would take a recess subject to the call of the Chair.

After Recess.

5:10 o'clock p.m.

The House was called to order by the Speaker.

Rep. Holmes entered the House and took his seat.

Rep. Cartwright entered the House and took his seat.

Rep. Bradley entered the House and took his seat.

Rep. Guzowski entered the House and took his seat.

Third Reading of Bills.

Senate Bill No. 1210, entitled

A bill to amend section 558 of Act No. 116 of the Public Acts of 1954, entitled "Michigan election law," as last amended by Act No. 190 of the Public Acts of 1956, being section 168.558 of the Compiled Laws of 1948.

Was read a third time and passed, a majority of the members elected and serving voting therefor, by yeas and nays, as follows:

Roll Call No. 618

YEAS

Allen	Farnsworth	Mahoney, R. D.	Snyder
Anderson	Fitzgerald	Marshall	Sobieski
Arnett	Fitzpatrick, J. J.	McCollough, Mrs.	Spencer
Baird	Folks	Michalski	Stevens
Baker	Gibbs	Mielock	Strange
Bassett	Good	Montgomery	Sumeracki
Beedon	Gordon	Morrison	Thorne
Bolt	Guzowski	Most	Tisdale
Boos	Hager, Mrs.	Nakkula	Toepp
Bouwsma	Handy	Newton	Towner
Bradley	Hayward	Novak	Townsend
Brigham	Hogan	O'Brien, E. D.	Traxler
Bursley	Holmes	O'Brien, M. J.	Upton
Buth	Huffman	Olsen	Vander Werp
Cartwright	Hunsinger, Mrs.	Penczak	Van Til
Cobb	Hyso	Perras	Wagner

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substantiating data of the inestimable benefits to the social values and economic growth of the States with good park and recreational facilities.

LET US KEEP THE PRESTIGE MICHIGAN HOLDS; LET US MAKE MICHIGAN THE BEST!

Respectfully submitted,

Representative RIEMER VAN TIL, Chairman
Representative RUSSELL STRANGE,
Vice Chairman
Representative WILLIAM R. COPELAND
Representative JOSEPH S MACK
Representative EDSON V. ROOT, JR.
INTERIM COMMITTEE ON STATE PARKS AND PUBLIC LANDS OF THE HOUSE OF REPRESENTATIVES

The report was referred to the Clerk and ordered printed in the Journal.

Rep. E. D. O'Brien entered the House and took his seat.

Rep. Walton entered the House and took his seat.

Messages from the Senate.

A message was received from the Senate re-returning

House Bill No. 705, entitled

A bill to prohibit the imposition, levy or collection of taxes other than ad valorem property taxes by cities and villages.

The message informed the House of Representatives that the Senate had receded from its amendments to the bill.

(For text of amendments, see p. 1540 of House Journal No. 66.)

The bill was referred to the Clerk for enrollment printing and presentation to the Governor.

A message was received from the Senate relative to conference on

Senate Bill No. 1278, entitled

A bill to make appropriations for certain construction at state institutions and the acquisition of land; to provide for the elimination of fire hazards, repairs and maintenance at such institutions; to provide for certain remodeling and additions at state institutions; to provide for grants to junior and community colleges; to provide for new construction at certain state institutions; to authorize the sale of bonds and to provide for parks development; to provide for the award of contracts by controller, department of administration; and to provide for the expenditure thereof under the supervision of the state administrative board.

The message informed the House of Representatives that the Senate had concurred in amendments Nos. 7, 14, 19, 23, 25, 26, 28, 29, 30, 35, 46, 47, 48, 49, 51, 52, 53 and 54.

The message further informed the House of Representatives that the Senate had non-concurred in all others made to the bill by the House of Representatives.

The message informed the House of Representatives that the Senate had granted the request of the House of Representatives for a conference on the matters of difference between the two Houses relative to the bill and that Senators Porter, Beadle and Lane had been appointed as conferees on the part of the Senate, to join with Representatives Engstrom, Bassett and Sobieski, who had been previously appointed as conferees on the part of the House, and had referred the bill to the conference committee.

A message was received from the Senate returning

House Concurrent Resolution No. 30.

A concurrent resolution offering congratulations to the Michigan state waterways commission for receipt of the Ole Evinrude Award for 1964.

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The Clerk also announced the enrollment printing and presentation to the Governor on Thursday, May 14, for his approval of the following bills:

Enrolled House Bill No. 318 at 10:11 a.m.
Enrolled House Bill No. 328 at 10:12 a.m.
Enrolled House Bill No. 335 at 10:13 a.m.
Enrolled House Bill No. 373 at 10:14 a.m.
Enrolled House Bill No. 401 at 10:15 a.m.
Enrolled House Bill No. 433 at 10:16 a.m.
Enrolled House Bill No. 485 at 10:17 a.m.
Enrolled House Bill No. 498 at 10:18 a.m.
Enrolled House Bill No. 580 at 10:19 a.m.
Enrolled House Bill No. 552 at 10:20 a.m.
Enrolled House Bill No. 668 at 10:21 a.m.
Enrolled House Bill No. 645 at 10:22 a.m.
Enrolled House Bill No. 929 at 10:23 a.m.
Enrolled House Bill No. 847 at 10:24 a.m.
Enrolled House Bill No. 957 at 10:25 a.m.

The Clerk also announced that the following joint resolution had been printed and placed upon the files of the members, Friday, May 15:

House Joint Resolution EE

The Clerk also announced the enrollment printing and presentation to the Governor on Friday, May 15, for his approval of the following bills:

Enrolled House Bill No. 347 at 11:29 a.m.
Enrolled House Bill No. 705 at 11:30 a.m.
Enrolled House Bill No. 871 at 11:31 a.m.

The Clerk also announced the enrollment printing and presentation to the Governor on Monday, May 18, for his approval of the following bills:

Enrolled House Bill No. 39 at 10:41 a.m.
Enrolled House Bill No. 526 at 10:42 a.m.
Enrolled House Bill No. 806 at 10:43 a.m.

The Clerk also announced the enrollment printing and presentation to the Governor on Tuesday, May 19, for his approval of the following bills:

Enrolled House Bill No. 1 at 10:50 a.m.
Enrolled House Bill No. 2 at 10:51 a.m.
Enrolled House Bill No. 23 at 10:52 a.m.
Enrolled House Bill No. 122 at 10:53 a.m.
Enrolled House Bill No. 288 at 10:54 a.m.
Enrolled House Bill No. 776 at 10:55 a.m.

Reports of Select Committees.

Conference Report.

The Committee of Conference on the matters of difference between the two Houses relative to

House Bill No. 72, entitled

A bill to amend sections 6, 7, 9, 10, 11, 12, 13, 14 and 15 of chapter 4 of Act No. 286 of the Public Acts of 1929, entitled as amended "The game law of 1929," sections 6, 7, 9, 11, 12 and 14 as last amended by Act No. 74 of the Public Acts of 1959, section

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Engstrom, DeMaso, Whinery, Mrs. McCollough, Wurzel, Beedon, Bolt, Erlandsen, Snyder and Most be named as co-sponsors of the resolution.

The motion prevailed.

Messages from the Governor.

A message was received from the Governor informing the House of Representatives that on Thursday, May 28, 1964, he had approved and deposited in the office of the Secretary of State

Enrolled House Bill No. 705 (P.A. 243), entitled

An act to prohibit the imposition, levy or collection of taxes other than ad valorem property taxes by cities and villages. (signed at 4:17 p.m.)

Enrolled House Bill No. 871 (P.A. 242), entitled

An act to amend the title and Act No. 350 of the Public Acts of 1913, entitled as amended "An act to enable counties to establish and maintain public hospitals, levy a tax and issue bonds therefor, borrow money and issue bonds and notes therefor, elect hospital trustees, maintain training schools for nurses, provide suitable means for the care of tuberculous persons, and to make possible the ultimate establishment of an adequate supply of hospitals," as amended, being sections 331.151 to 331.169 of the Compiled Laws of 1948, by adding a new section 14a. (signed at 4:16 p.m.)

Messages from the Senate.

A message was received from the Senate returning

House Concurrent Resolution No. 104.

A concurrent resolution commending Dr. V. Jerome Mirkil of Lansing.

(For text of resolution, see p. 2175 of House Journal No. 87.)

The message informed the House of Representatives that the Senate had adopted the concurrent resolution.

The concurrent resolution was referred to the Clerk for record.

A message was received from the Senate re-returning, with amendments

House Bill No. 498, entitled

A bill to amend sections 1 and 8 of Act No. 197 of the Public Acts of 1952, entitled "An act to prescribe the rights of the public in the administrative procedure before state administrative agencies; to provide for the promulgation of procedural rules and regulations; to provide for the hearing of contested cases, and rules of evidence with respect thereto; and to provide for decisions and orders of state agencies," section 1 as amended by Act No. 103 of the Public Acts of 1953, being sections 24.101 and 24.108 of the Compiled Laws of 1948.

The message informed the House of Representatives that the Senate had reconsidered the vote by which the bill had passed, and had further amended the bill as follows:

1. Amend page 2, line 5, after "COMMISSION" by inserting "THE WORKMEN'S COMPENSATION DEPARTMENT, THE EMPLOYMENT SECURITY COMMISSION".

2. Amend page 2, line 5, after "branches." by striking out the balance of the paragraph.

The message informed the House of Representatives that the Senate had passed the bill as thus amended.

The Speaker announced that under Rule 59 the bill would lie over one day.

A message was received from the Senate returning

House Concurrent Resolution No. 73.

A concurrent resolution creating a special committee to study county home rule.

(For text of resolution, see p. 1209 of House Journal No. 56.)

The message informed the House of Representatives that the Senate had adopted the concurrent resolution.

The concurrent resolution was referred to the Clerk for record.

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EXHIBIT O

Order

Michigan Supreme Court
Lansing, Michigan

September 29, 2021

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

160806

KELLY GOTTESMAN, on Behalf of Himself and All Others Similarly Situated,
Plaintiff-Appellee,
v

SC: 160806
COA: 344568
Wayne CC: 17-014341-CZ

CITY OF HARPER WOODS,
Defendant-Appellant.

_____/

By order of July 28, 2020, the application for leave to appeal the December 3, 2019 judgment of the Court of Appeals was held in abeyance pending the decision in *Detroit Alliance Against the Rain Tax v Detroit* (Docket No. 158852). On order of the Court, the case having been decided on December 11, 2020, 506 Mich 996 (2020), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to that court for further consideration.

The Court of Appeals erred by holding that defendant's impermeable-acreage charge is not a tax authorized before the adoption of the Headlee Amendment, Const 1963, art 9, § 6 and §§ 25 to 34, because "MCL 280.539(4) authorizes various types of *charges*; it does not authorize a *tax*." *Gottesman v Harper Woods*, unpublished per curiam opinion of the Court of Appeals, issued December 3, 2019 (Docket No. 344568), p 11. Assuming that the Court of Appeals was correct that the impermeable-acreage charge is a disguised tax under Headlee, see *Bolt v Lansing*, 459 Mich 152 (1998), the dispositive inquiry under Const 1963, art 9, § 31 is whether MCL 280.539(4) permitted the levying of the impermeable-acreage charge before the ratification of the Headlee Amendment, not whether the statute purports to authorize a "tax" or a "charge."

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*, unpub op at 14. As this Court has recognized, "statutes of limitations may apply by analogy to equitable claims." *Taxpayers Allied for Constitutional Taxation v*

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Wayne Co, 450 Mich 119, 127 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 (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. Because the first issue was not previously addressed by the trial court, the Court of Appeals may, in its discretion, remand to the trial court to resolve this issue in the first instance. See *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444 (2005) (holding that an appellate court has the discretion to address "an issue raised before, but not decided by, the trial court" if "the lower court record provides the necessary facts").

We do not retain jurisdiction.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 29, 2021

Clerk

s0922

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EXHIBIT P

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Warning
As of: June 6, 2024 5:58 PM Z

Hyde Park Coop. v. City of Detroit

Court of Appeals of Michigan

July 24, 2012, Decided

No. 303143

Reporter
2012 Mich. App. LEXIS 1408 *; 2012 WL 3020407

HYDE PARK COOPERATIVE, VILLAGE CENTER ASSOCIATES LIMITED DIVIDEND HOUSING ASSOCIATION, BOWIN PLACE ASSOCIATES LIMITED DIVIDEND HOUSING ASSOCIATION, CAMBRIDGE TOWER ASSOCIATES LIMITED DIVIDEND HOUSING ASSOCIATION, FENIMORE LIMITED DIVIDEND HOUSING ASSOCIATION, MILLENDER CENTER ASSOCIATES LIMITED PARTNERSHIP, PLYMOUTH SQUARE LIMITED DIVIDEND HOUSING ASSOCIATION, and FOUNTAIN COURT CONSUMER HOUSING COOPERATIVE, Plaintiffs-Appellants, v CITY OF DETROIT, and BUILDINGS AND SAFETY ENGINEERING DEPARTMENT, Defendant-Appellee.

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

Subsequent History: Vacated by, in part, Leave to appeal denied by Hyde Park Coop. v. City of Detroit & Bldgs. & Safety Eng'g Dep't, 2013 Mich. LEXIS 518 (Mich., Apr. 26, 2013)

Prior History: **[*1]** Wayne Circuit Court. LC No. 10-005687-CZ.

Core Terms

inspection, Housing Law, inspection fees, reasonable cost, summary disposition, regulation, ordinance, minimum requirements, dwellings, engineering department, indirect cost, multi-family, plaintiffs', compliance, preempt

Judges: Before: O'CONNELL, P.J., AND JANSEN AND RIORDAN, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right the trial court's order denying their motion for summary disposition and granting defendant's motion for summary disposition. We affirm in part, reverse in part. We remand for consideration of whether the inspection fee charged in this case was reasonable.

Plaintiffs are owners of multi-family cooperatives and apartment buildings located in the City of Detroit (Detroit). Pursuant to the Detroit Property Maintenance Code (PMC),[1] the Detroit Buildings and Safety Engineering Department performs annual or close to annual inspections of these multi-family residential dwellings. At issue in this appeal is the inspection fee Detroit collects for the inspections, which accounts for direct and indirect costs such as inspection time, mileage, car expenses, and pro rata clerical, administrative, and overhead expenses. The size of the building is also used to estimate the time required for the inspection and according to the Department's fee schedule, inspection fees are also dependent on the type of building subject to inspection.

I. BACKGROUND

Plaintiffs' initiated this lawsuit claiming that the PMC's inspection fee provision conflicts with the Housing Law of Michigan (Housing Law), MCL 125.401 *et seq.*, because the Housing Law only authorizes an inspection fee for the "actual, reasonable cost" of the inspection. According to plaintiffs, the "actual, reasonable cost" standard imposed under the Housing Law limits the inspection fee to the direct cost of the pro rata share of the inspector's annual monetary compensation for the actual time the inspector spends performing the inspection. Plaintiffs sought monetary damages equal to the inspection fees charged in excess of the actual, reasonable cost of the inspection and injunctive relief to enjoin defendant from charging the alleged excessive fees under the PMC.

Plaintiffs' filed a motion for partial summary disposition under

[1] The PMC is part of the Detroit **[*2]** City Code.

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MCR 2.116(C)(10), arguing that the Housing Law preempts the PMC. Defendant also moved for summary disposition, arguing that any violation of the Housing Law does not give rise to a claim for damages as a matter of law and that plaintiffs' claim for injunctive relief should also be dismissed as a matter of law. After oral arguments, **[*3]** the trial court denied plaintiffs' motion for summary disposition and request for a preliminary injunction and granted summary disposition in favor of defendant. The trial court found that the inspection fee collected was done pursuant to the PMC, not the Housing Law, and that even if that was not the case, the Housing Law did not conflict with the PMC because "actual, reasonable cost" includes indirect costs. Plaintiffs now appeal.

II. STANDARD OF REVIEW

A grant or denial of a motion for summary disposition is reviewed de novo. *McLean v McElhaney*, 289 Mich App 592, 596; 798 NW2d 29 (2010). Additionally, "[w]hether a state statute preempts a local ordinance is a question of statutory interpretation-a question of law that this Court reviews de novo." *Charter Twp of Shelby v Papesh*, 267 Mich App 92, 98; 704 NW2d 92 (2005).

III. ANALYSIS

A. Applicability of the Housing Law

The Housing Law "establishes minimum requirements for the health, welfare and safety of the community . . . ." *Foote v City of Pontiac*, 161 Mich App 60, 65; 409 NW2d 756 (1987); MCL 125.408. The Housing Law requires the inspection of multi-family residential dwellings at least every four years and provides the basis for **[*4]** an enforcing agency to perform the inspections of regulated dwellings. MCL 125.526(1) & (4).[2] Specifically, MCL 125.526(1) provides that "[t]he enforcing agency shall inspect multiple dwellings and rooming houses regulated by this act in accordance with this act." While municipalities are not required to adopt the Housing Law, they may not dispense with the minimum standards set forth in it. MCL 125.543; MCL 125.408. Thus, while the minimum standards must be met, "every city and local unit may establish requirements *higher* than those set out in the [Housing Law]." *Foote*, 161 Mich App at 65 (emphasis added).

Detroit adopted the PMC as its housing code, which was modeled after the 2000 International Property Maintenance Code (IPMC). Detroit City Code § 9-1-1.[3] The IPMC was developed by the International Code Council, Inc., and Detroit adopted it in order to "establish[] the minimum legal requirements for maintenance, inspection and reinspection of all buildings." Detroit City Code § 9-1-1 & 9-1-4(a). Purportedly, any provisions **[*5]** of the IPMC conflicting with Michigan law were not adopted. Detroit City Code § 9-1-1.

A threshold inquiry involves the relationship between the Housing Law and the PMC, and whether the Housing Law provision about inspection fees, MCL 125.526(12), applies to inspections completed pursuant to the PMC. We conclude that the Housing Law does apply to inspections completed pursuant to the PMC. By its very terms, the Housing Law applies to inspections of **[*6]** multi-family residential dwellings in cities, such as Detroit, that meet a threshold population requirement. MCL 125.401; MCL 125.402. Moreover, while a city is not required to adopt the Housing Law, a city is required to implement the minimum requirements of the Housing Law. MCL 125.408. Thus, no matter which housing code is adopted, a city still must comply with the minimum requirements of the Housing Law in order to be in compliance with state law. Furthermore, the PMC specifically references compliance with the Housing Law in the context of inspections. The PMC states that "[t]he director of the buildings and safety engineering department . . . shall conduct inspections to obtain compliance with this article based upon at least one (1) of the following[,]" including "the Housing Law of Michigan, being MCL 125.401 et seq." Detroit City Code § 9-1-35(d)(11). Thus, the expressed intent of the PMC is compliance with the Housing Law.

Therefore, contrary to defendant's argument, the fact that inspections are conducted under the authority of the PMC does not relieve Detroit of its duty to comply with the inspection requirements of the Housing Law for multi-family residential dwellings. **[*7]** See MCL 125.408 ("[n]o ordinance, regulation, ruling or decision of any municipal body . . . shall repeal, amend, modify or dispense with any of the said minimum requirements laid down in this act . . . .") Therefore, when Detroit conducts inspections to ensure compliance with the PMC, the inspection also must comply with the requirements of the Housing Law, including the requirement limiting the inspection fee to the "actual, reasonable cost of providing the inspection" under

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[2] Under the housing law, a governing body of a municipality must designate an officer or agency to be in charge of administering the provisions of the act. MCL 125.523.

[3] Pursuant to the Home Rule City Act, MCL 117.1 *et seq*., home rule cities, like Detroit, are given the "specific authority to enact ordinances in order to advance the interests of the city." *Mich Coal For Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 407; 662 NW2d 864 (2003); see also *AFSCME v Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003). The Home Rule City Act also specifically grants home rule cities the authority to adopt a property maintenance code. MCL 117.3(k). However, the power to adopt ordinances relating to municipal concerns is subject to the state constitution and state law. *Mich Coalition*, 256 Mich App at 408, citing *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 256-257; 566 NW2d 514 (1997).

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MCL 125.526(12).

We also conclude that the state Housing Law does not preempt the PMC. In order to determine if "a municipal ordinance is preempted by state law[,]" this Court looks at whether "1) the statute completely occupies the field that the ordinance attempts to regulate, or 2) the ordinance directly conflicts with a state statute." *Mich Coal For Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 408; 662 NW2d 864 (2003); quoting *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). While the Housing Law is certainly pervasive, it does not completely occupy the field of housing regulations. In fact, the Housing Law provides only "the minimum requirements adopted **[*8]** for the protection of health, welfare, and safety of the community," and specifically grants cities the authority to "impos[e] requirements higher than the minimum requirements laid down in this act . . . ." MCL 125.408. Furthermore, the Housing Law explicitly states that "[t]his act does not preempt, preclude, or interfere with the authority of a municipality to protect the health, safety, and general welfare of the public through ordinance, charter, or other means." MCL 125.534(8). Hence, "[w]hen the language of a statute is unambiguous, [as here,] the Legislature's intent is clear and judicial construction is neither necessary nor permitted." *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007).

Moreover, we do not interpret the PMC's inspection fee provision to be in conflict with the Housing Law's inspection fee provision. As noted in USA Cash # 1, *Inc v City of Saginaw*, 285 Mich App 262, 267; 776 NW2d 346 (2009), "[f]or purposes of preemption, a direct conflict exists between a local regulation and a state statute when the local regulation permits what the statute prohibits or prohibits what the statute permits." However, "[i]t is well established . . . that a local ordinance **[*9]** that regulates in an area where a state statute also regulates, with mere differences in detail, is not rendered invalid due to conflict." *Id.*

The PMC's inspection fee provision states:

> [t]he director of the buildings and safety engineering department shall establish fee schedules, including fees for . . . inspections, pertaining to all buildings, premises, and structures that are subject to inspection or reinspection under this article and are determined to be necessary for the administration of this article, subject to the approval of the buildings and safety engineering department board of rules, and collection procedures for services. The fees authorized by this section shall cover the costs of rendering such services and be equitable and sufficient to cover, insofar as possible to determine, the cost incurred by the buildings and safety engineering department in the administration and enforcement of this article. Fees established pursuant to this section shall be reviewed, revised, and approved, as necessary, in accordance with this section. [Detroit City Code§ 9-1-34(a).]

The Housing Law's inspection fee provision, MCL 125.526(12), states:

> [t]he enforcing agency may establish and **[*10]** charge a reasonable fee for inspections conducted under this act. The fee shall not exceed the actual, reasonable cost of providing the inspection for which the fee is charged. An owner or property manager shall not be liable for an inspection fee if the inspection is not performed and the enforcing agency is the direct cause of the failure to perform.

Plaintiffs attempt to narrowly limit the phrase "actual, reasonable cost" to only the direct costs of the pro rata share of the inspector's annual monetary compensation for the actual time the inspector spends performing the inspection. In determining whether plaintiffs' interpretation is correct, we are mindful of the principles of statutory interpretation. The "primary goal" of statutory interpretation "is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). When the language is clear and unambiguous, "no further judicial construction is required or permitted, and the statute must be enforced as written." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (internal citations and quotations omitted). A statutory provision **[*11]** must be read in the context of the entire act, and "every word or phrase of a statute should be accorded its plain and ordinary meaning." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011).

The Housing Law, MCL 125.526(12), does not state that an inspection fee may only be charged for "direct" costs. Instead, it limits the fee applicable to inspections to the "actual, reasonable cost of providing the inspection." MCL 125.526(12).[4] The phrase "actual, reasonable cost" is not defined by the Housing Law and, thus, this Court can refer to dictionary definitions to ascertain its common meaning. *Klida v Braman*, 278 Mich App 60, 65; 748 NW2d 244 (2008). The word "actual" is defined as "existing in reality or in fact; not merely possible, but real; as it really is." *Webster's New World Dictionary Second College Edition* (1984). As argued by defendant, the "actual" or "real" cost of providing an inspection includes not only the inspector's salary, but also the indirect costs associated with providing an inspection service, such as the administrative and enforcement overhead of the Department in charge of the inspection. The

[4] The fee provision of the Housing Law was amended in 1997 to add the word "actual."

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indirect costs incurred by the Department in providing **[*12]** an inspection are "real" components of the actual cost of the inspection, as they exist in reality and are a result of the inspection.

B. Reasonableness

Thus, the Housing Law applies to inspections performed pursuant to the PMC and the two statutes do not conflict. In regard to whether the inspection fee charged in this case was reasonable, however, there has been insufficient factual development for us to review this issue. Plaintiffs submitted the general fee schedule suggesting that inspection fees charged for similar buildings vary significantly. Without any factual development explaining why these fees may, or may not, be reasonable we are unable to determine whether summary disposition was properly granted.

IV. CONCLUSION

The Housing Law applies to inspections performed under the PMC and we affirm the trial court's ruling that the Housing Law does not conflict with the PMC and may account for indirect costs. We affirm in part, reverse in part. We remand for consideration of whether the inspection fee charged in this case was reasonable.[5] We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Kathleen Jansen

/s/ Michael J. Riordan

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[5] We note that plaintiffs would **[*13]** not be entitled to money damages. The Housing Law does not expressly authorize a private cause of action against a municipality for money damages. See MCL 125.401 *et seq*. Furthermore, while plaintiffs now claim that there was a genuine issue of material fact regarding the proportionality of the inspection fee, plaintiffs did address this claim in the lower court and the trial court did not decide this issue. "An issue is not properly preserved for appeal if not raised in the [lower court], and we need not address arguments first raised on appeal." *Green v Ziegelman*, 282 Mich App 292, 300; 767 NW2d 660 (2009).

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EXHIBIT Q

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Kincaid v. City of Flint

Court of Appeals of Michigan

April 16, 2020, Decided

Nos. 337972; 337976

Reporter
2020 Mich. App. LEXIS 2948 *; 2020 WL 1896712

WILLIAM SCOTT KINCAID, ERAINA POOLE, GEORGE POOLE, and MARY B. BELL, Plaintiffs-Appellees, v CITY OF FLINT, Defendant-Appellant.

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

Subsequent History: Review pending at, Motion granted by, Motion granted by, in part, Motion denied by, in part Kincaid v. City of Flint, 944 N.W.2d 681, 2020 Mich. LEXIS 1082, 2020 WL 3494415 (Mich., June 26, 2020)

Leave to appeal denied by Kincaid v. City of Flint, 2020 Mich. LEXIS 2270 (Mich., Dec. 22, 2020)

Prior History: **[*1]** Genesee Circuit Court. LC No. 12-098490-CZ.

Kincaid v. City of Flint, 505 Mich. 882, 935 N.W.2d 724, 2019 Mich. LEXIS 2338, 2019 WL 6830830 (Dec. 13, 2019)

Core Terms

summary disposition, trial court, plaintiffs', ordinances, water and sewer, unjust enrichment, rate increase, water service, collected, funds, rates, first amended complaint, sewer, cause of action, CALCULATION, charges, governmental immunity, finance director, ultra vires, contractual, amend, amended complaint, city council, water rate, commingling, customers, quotation, schedules, exaction, refund

Judges: Before: BECKERING, P.J., and M. J. KELLY and O'BRIEN, JJ.

Opinion

PER CURIAM.

This case, which involves a dispute over utility pricing in the City of Flint, returns to this Court on remand from the Supreme Court. *Kincaid v City of Flint*, 505 Mich 882; 935 N.W.2d 724 (2019) (*Kincaid V*). The Supreme Court has directed this Court to reconsider plaintiffs' unjust enrichment claim in light of *Wright v Genesee Co Bd of Comm'rs*, 504 Mich 410; 934 NW2d 805 (2019), and, "if necessary," to consider "the issues raised by the defendant" that this Court did not address in its initial review. In accordance with our Supreme Court's directive, we now consider defendant, the City of Flint's, argument that the trial court erred by denying summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(8). For the reasons stated in this opinion, we affirm in part, reverse in part, and remand for further proceedings.

I. BASIC FACTS

The underlying factual dispute was set forth by this Court in *Kincaid v City of Flint*, 311 Mich App 76, 77-80; 874 NW2d 193 (2015) (*Kincaid II*):

> On August 15, 2011, defendant's finance director, Michael Townsend, sent to the city council and mayor a notice of a proposed 35% water and sewer rate increase to be effective September 6, 2011. The increase was proposed to meet a projected fiscal year deficit in the sewer fund of $14,789,666 as well as a water fund deficit of $8,078,917. **[*2]** The city council adopted the proposal and the mayor signed it.
> Shortly thereafter, defendant was declared to be in a state of financial emergency. On November 28, 2011, Governor Rick Snyder appointed Michael Brown as defendant's Emergency Manager (EM). On May 30, 2012, after he was informed by newly appointed finance director, Gerald Ambrose, of the financial disarray of defendant's water and sewer funds, EM Brown created Emergency Order No. 31. Order No. 31 ratified and confirmed the water and sewer rates implemented under former finance director Townsend on September 16, 2011, and additionally raised water and sewer rates, 12.5% and 45%, respectively,

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effective July 1, 2012.

After the emergency order by EM Brown, plaintiffs in this suit filed a complaint seeking this Court's original jurisdiction pursuant to Const. 1963, art. 9, §§ 31 and 32. The claim of error was that defendant violated the Headlee Amendment. This Court dismissed plaintiffs' claims without a hearing, finding that the rate increases from September 2011 and those set to take place in July 2012 were "revisions of existing user fees that do not implicate the Headlee Amendment." *Kincaid v Flint*, unpublished order of the Court of Appeals, entered June 29, 2012 (Docket No. 310221) [(*Kincaid I* ***[*3]***)]. Plaintiffs' claims not relating to the Headlee Amendment were dismissed for lack of original jurisdiction. *Id.*

After the case before this Court was dismissed, plaintiff filed the instant action. The essence of this case is a claim that the rate increases in September 2011 were made contrary to defendant's Ordinances § 46-52.1 and § 46-57.1, and a claim that defendant had illegally pooled the [money] collected for the water and sewer funds and used [it] to pay general obligations not related to sewer or water expenses. Plaintiffs requested that the trial court certify a class action suit against defendant by all sewer and water customers of defendant, declare that the rate increases were an illegal tax under the Headlee Amendment, and order the commingling of funds to cease. Additionally, plaintiffs asked for monetary relief in the form of a refund of the illegally collected rates and for damages caused to defendant's residents who were left without water and sewer service.

In lieu of filing an answer, defendant moved the trial court to grant it summary disposition pursuant to MCR 2.116(C)(6), (7), and (8). However, before defendant's motion for summary disposition was heard, plaintiffs moved the trial court for leave to amend their complaint to allege a violation **[*4]** of MCL 123.141(2) and (3).

Defendant responded to plaintiffs' motion to amend their complaint by arguing that it should be denied as futile. On February 15, 2013, the trial court heard the two outstanding motions. On June 21, 2013, the trial court entered an opinion and order granting summary disposition in favor of defendant. [Footnotes omitted.]

Thereafter, plaintiffs filed an appeal in this Court, arguing that

(1) water and sewer rate increases that occurred under former finance director Townsend in September 2011 were not authorized by defendant's ordinances, (2) EM Brown did not have the authority to ratify Townsend's unauthorized increases and then further increase water and sewer rates in violation of the same ordinances, and (3) defendant wrongly deposited funds from water and sewer revenue into a single pooled cash account. [*Id.* at 82-83.]

With regard to the first of those claims of error, the *Kincaid II* Court agreed with plaintiffs "in part," holding that some of the September 2011 rate increases violated the applicable ordinances. *Id.* at 84. With regard to the second claim of error, this Court agreed with plaintiffs that EM Brown lacked "the authority to ratify a previously unauthorized rate increase[.]" *Id.* at 91. Contrastingly, **[*5]** with regard to the third claim of error, this Court held that the trial court had properly granted summary disposition under MCR 2.116(C)(10), concluding that "plaintiffs provided no evidence that [Flint]'s accounting system was illegal." *Id.* at 93. Finally, this Court held that it was unable to "discern on what basis the trial court denied plaintiffs' motion to amend their complaint;" therefore, this Court remanded that issue with instructions for the trial court "to consider the additional claims in plaintiffs' proposed amended complaint and articulate its reasons for granting or denying the motion." *Id.* at 95.

On remand, the trial court granted plaintiffs leave to file their first amended complaint. In their amended complaint plaintiffs continue to allege that the water and sewer rate increases between January 15, 2011 and September 15, 2011 were contrary to the Flint City Ordinances and that the money collected was illegally pooled with the general fund and was used to pay general obligations unrelated to the sewer or water expenses. In addition, plaintiffs alleged, somewhat confusingly, that defendant violated Ordinance 46-52 when it charged and collected water and sewer rates between July 3, 2006 and June 30, **[*6]** 2012 (or September 15, 2011).[1] Plaintiffs stated legal theories were for breach of contract, or, in the alternative, for unjust enrichment, and throughout the complaint, plaintiffs alleged that defendant's actions were "Ultra Vires." Plaintiffs sought the equitable remedy of "recoupment," but also sought that the "excessive, illegal, and ultra vires" rate increases be refunded to plaintiffs. Plaintiffs also requested declaratory relief in the form of an injunction.

Defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(8). In support, it argued that summary disposition was appropriate under MCR 2.116(C)(7) on dual grounds: (1) because Flint was entitled to immunity under the governmental immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, and (2) because plaintiffs' claims were barred by the three-year period of limitation set forth by MCL 600.5805(10). Regarding MCR 2.116(C)(8), Flint

[1] Without consistency or explanation, the first amended complaint sets forth the time range for the claim starting in 2006 as being "between July 3, 2006 and September 15, 2011" in one part; between "July 3, 2006 and June 30, 2012" in other parts; and as "between June 30, 2012 and July 3, 2006" for other parts.

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contended that summary disposition of all plaintiffs' claims was appropriate (1) because plaintiffs' "egregiously belated claims" were barred by the equitable doctrine of laches, (2) because plaintiffs had failed to plead the claims in their first amended complaint in avoidance of governmental immunity, alleging "ultra vires" acts where none existed, **[*7]** and (3) because the claims were precluded by the res judicata effect of a ruling in related litigation (specifically, the order appealed and decided in *Shears v Bingaman*, unpublished per curiam opinion of the Court of Appeals, issued August 24, 2017 (Docket No. 329776), 2017 Mich. App. LEXIS 1377). Additionally, Flint contended that, in light of this Court's decision in *Kincaid I*, unpublished order of the Court of Appeals, entered June 29, 2012 (Docket No. 310221), collateral estoppel precluded plaintiffs from relitigating the issue whether the rate increases at issue were merely "revisions of existing user fees[.]" Defendant further argued that Count V of plaintiffs' first amended complaint (alleging that Flint had improperly commingled funds) was barred by the law of the case doctrine. In particular, Flint noted that in *Kincaid II*, this Court had ruled that plaintiffs failed to present any evidence that the commingling of such funds was unlawful. See *Kincaid II*, 311 Mich App at 93.

The trial court dispensed with oral argument[2] and denied Flint's motion for summary disposition in a written opinion and order. Concerning the preclusive effect of *Shears*, the trial court indicated that it was then unable to decide that issue, noting that it was **[*8]** "not conversant with all of the specifics of the *Shears* litigation" and that the lower court file in *Shears* was unavailable because it had been conveyed to this Court for the then-pending appeal in *Shears*. Nor did the trial court's opinion squarely address Flint's other arguments in favor of summary disposition. Rather, the trial court glossed over those arguments, reasoning as follows:

> Defendant [Flint] has filed a motion to dismiss plaintiffs' first amended complaint on the grounds that the complaint raises issues not contemplated or contained within the original complaint filed by the plaintiffs. If that were not the case, there would be no reason to amend the Complaint. This Court has reviewed the briefs submitted with respect to this motion and the Court finds the plaintiffs' response to be correct. This Court did not rule that an amended complaint could never be filed. The denial was without prejudice. However, to the extent that the amended complaint raises issues that were addressed by [the circuit court] or by the Court of Appeals in the *Shears* case, the Court reserves the right to revisit the question upon the return of the *Shears* file to Genesee County.

Defendant appealed **[*9]** in this Court, alleging that the trial court erred by failing to grant it summary disposition (1) based on governmental immunity under the GTLA, (2) because the local ordinances at issue in this matter do not afford plaintiffs any private cause of action against defendant, (3) for plaintiffs' failure to rebut the strong presumption that those ordinances were not intended to create vested contractual rights, (4) in light of the applicable period of limitations, (5) under the equitable doctrine of laches, (6) under the law of the case doctrine, (7) because collateral estoppel precludes relitigation of previously decided issues, and (8) because res judicata bars all of plaintiffs' claims in this action. In an unpublished per curiam opinion, this Court concluded that plaintiffs' claims were barred by res judicata; therefore, we reversed the trial court's order denying summary disposition and remanded for entry of an order granting defendant summary disposition under MCR 2.116(C)(7). *Kincaid v City of Flint*, unpublished order of the Court of Appeals, entered June 26, 2018 (Docket Nos. 337972 and 337976), 2018 Mich. App. LEXIS 2753 (*Kincaid III*).[3]

Plaintiffs applied **[*10]** for leave in our Supreme Court, which, as indicated *supra*, vacated our opinion and remanded to this Court to reconsider plaintiffs' unjust enrichment claims and, as necessary, the issues raised by defendant that we declined to address in *Kincaid III*. We do so now.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Per the *Kincaid V* Court's directive, we now consider whether the trial court erred by denying defendant's motion for summary disposition. Our review of a trial court's decision regarding a motion for summary disposition is de novo *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009). Likewise, we review de novo whether governmental immunity

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[2] Under MCR 2.119(E)(3), "[a] court may, in its discretion, dispense with or limit oral arguments on motions."

[3] The prior action identified by this Court in *Kincaid III* was *Shears v Bingaman*, unpublished per curiam opinion of the Court of Appeals, issued August 24, 2017 (Docket No. 329776), 2017 Mich. App. LEXIS 1377 (*Shears I*). *Shears I*, however, has been vacated in part and remanded to the trial court for further proceedings. ***Shears v Bingaman*, 505 Mich 882; 935 N.W.2d 723 (2019)** (*Shears II*). Accordingly, because the *Shears* case is again pending in the trial court without any final judgment, and additional appeals may ensue, the decision in *Shears I* cannot be considered a "final" decision for purposes of res judicata. See *In re Bibi*, 315 Mich App 323, 333; 890 NW2d 387 (2016). Additionally, we note that on remand the *Shears* case has been stayed pending resolution of the appeal in this case. See register of actions Docket No. 14-103476-CZ available at http://www.co.genesee.mi.us/roaccsinq/default.aspx, last accessed April 8, 2020.

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applies under the GTLA, *Ray v Swager*, 501 Mich 52, 61; 903 NW2d 366 (2017), and whether the applicable statute of limitations bars a claim, *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006). "De novo review means that we review the legal issue independently, without required deference to the courts below." *Wright*, 504 Mich at 417.

B. ANALYSIS

1. BREACH OF CONTRACT

We first consider whether the trial court erred by denying defendant's motion for summary disposition of Counts I and III of plaintiffs' first amended complaint. Defendant argues that these claims should have been dismissed under MCR 2.116(C)(8). We agree.[4]

Summary disposition under MCR 2.116(C)(8) is appropriate if the plaintiff has "failed to state a claim on which relief can be granted." **[*11]** As explained by our Supreme Court in *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019):

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); MCR 2.116(G)(5). A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).

In their first amended complaint, plaintiffs allege that a contract for the provision of water services was created by the Flint City Ordinances. Plaintiffs contend that under the ordinance-created contract defendant is a vendor of water services and plaintiffs, the purchasers of the "water commodity," are defendant's customers. Specifically, in Counts I and III, plaintiffs allege that by violating Ordinances 46-52.1 and 46-57.1, defendant breached its contract with plaintiffs by forcing them to overpay for water and sewer services. In response, defendant argues that no contract was created by the Flint City Ordinances.

"[T]he rules governing statutory interpretation apply with equal force to a municipal ordinance[.]" *Bonner v City of Brighton*, 495 Mich 209, 222; 848 NW2d 380 (2014). Although the

> venerable principle that a legislative **[*12]** body may not bind its successors can be limited in some circumstances because of its tension with the constitutional prohibitions against the impairment of contracts, . . . such surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments. A necessary corollary of these limitations . . . is the strong presumption that statutes do not create contractual rights. [*Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 660-661; 698 NW2d 350 (2005) (citations omitted).]

"This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state." *Id.* at 661 (quotation marks and citation omitted). "Thus, the party asserting the creation of a contract must overcome this well-founded presumption, and we proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Id.* at 662 (quotation marks and citation omitted). "The first step in this cautious procession is to examine the statutory language itself. In order for a statute to form the basis of a contract, the statutory language must **[*13]** be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract." *Id.* (quotation marks and citations omitted). Moreover, "as a general rule, a statute will not be held to have created contractual rights if the Legislature did not covenant not to amend the legislation." *Id.* at 663 (quotation marks and citations omitted).

Flint Ordinance, § 46-52.1 provides:

> CALCULATION OF RATES.
>
> (a) Every year the Director of Finance shall calculate and transmit on or before April 15 to the Mayor and City Council the new water rate schedules with a complete itemization of water system costs for all classes of customers as given in § 46-52, for the purpose of calculating all bills for the forthcoming 12 months beginning July 1 of that year. The new water rate schedules shall be published at least 30 days prior to the date of implementation.
>
> (b) Water rates shall be reviewed annually and the water rate percentage index (WRI) as applied to the water rate schedules shall be limited to an adjustment of 8% in any year unless:
>
> (1) The adjustment is necessary to provide for all costs of operation, maintenance, replacement and debt service of the water supply system; or
>
> (2) The adjustment **[*14]** is necessary to comply with

[4] Defendant also asserts that this claim should have been dismissed under MCR 2.116(C)(7). However, because we agree that the court erred by not granting summary disposition under MCR 2.116(C)(8), we decline to consider whether summary disposition was also warranted under (C)(7).

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> applicable provisions of the City's water supply revenue bond resolutions or ordinances.

Flint Ordinance, § 46-57.1 provides:

> CALCULATION OF RATES.
>
> Every year the Director of Finance shall calculate and transmit, on or before April 15, to the Mayor and City Council the new sewage rate schedules with a complete itemization of sewage system costs for all classes of customers as given in § 46-57, for the purpose of calculating all bills for the forthcoming 12 months beginning July 1 of that year. The new sewage rate schedules shall be published at least 30 days prior to the date of implementation.

Based on the plain language of the ordinances, it is clear that neither Ordinance 46-52.1 nor Ordinance 46-57.1 expressly state any intent to bind defendant contractually with regard to pricing structures. Indeed, in their brief on appeal, plaintiffs admit "that there was no express contract[.]"

Furthermore, assuming arguendo that one could reasonably infer an intent to contract on behalf of Flint based on ordinances 46-52.1 and 46-57.1, such an inference is insufficient. On their face, the ordinances are equally susceptible—if not more so—to a reasonable interpretation that they were **[*15]** merely intended to state Flint's policy with regard to rate calculation. Also fatal to plaintiffs breach of contract claims is that the ordinances did not state (or imply in any way), that Flint would be unable to subsequently amend them. Accordingly, plaintiffs have failed to rebut the strong presumption that Flint Ordinances, §§ 46-52.1 and 46-57.1, were not intended to bind Flint contractually to any particular pricing schedule. Therefore, the trial court erred by failing to grant Flint summary disposition of plaintiffs' breach of contract claims (Counts I and III) under MCR 2.116(C)(8). We reverse the court's order denying summary disposition with respect to Counts I and III, and remand for entry of an order granting defendant summary disposition on both claims under MCR 2.116(C)(8).

2. UNJUST ENRICHMENT

Defendant next argues that the trial court erred by not summarily dismissing plaintiffs' unjust enrichment claims set forth in Counts II and IV. "In order to sustain the claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). "If this is established, the law will imply a contract **[*16]** in order to prevent unjust enrichment." *Id.* "However, a contract will be implied only if there is no express contract covering the same subject matter." *Id.*

We first consider defendant's argument that the Flint Ordinances at issue here, Flint Ordinances, §§ 46-52.1 and 46-57.1, did not afford plaintiffs a private cause of action. We agree only in part.

"[N]o cause of action can be inferred against a governmental defendant." *Myers v City of Portage*, 304 Mich App 637, 643; 848 NW2d 200 (2014). Absent "*express* legislative authorization, a cause of action cannot be created in contravention of the broad scope of governmental immunity[.]" *Lash*, 479 Mich at 194 (quotation marks and citations omitted; emphasis added). Yet, it has long been recognized that "[t]he right to recover money illegally exacted does not depend upon the statute." *Pingree v Mut Gas Co*, 107 Mich 156, 157; 65 NW 6 (1895). Instead, a common-law action, i.e., an action not dependent upon a statute (or in this case an ordinance), is available to allow recovery for such unlawful exactions. See *id.* *Hyde Park Co-op v City of Detroit*, 493 Mich 966; 829 N.W.2d 195 (2013); *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 705; 178 NW2d 484 (1970), citing *City of Detroit v Martin*, 34 Mich 170, 174 (1876) ("in all such cases, the party pays under compulsion and may afterwards in an action of assumpsit recover back the amount of the illegal exaction.").[5] Based on these principles, it is plain that plaintiffs cannot maintain a cause of action for money damages based on defendant's **[*17]** mere violation of a City Ordinance, *Lash*, 479 Mich at 194, but it is equally clear that plaintiffs may maintain a cause of action for a refund of an unlawful exaction.

In Count IV (unjust enrichment), plaintiffs expressly identified the 22% increase to the water and sewer rates as the misconduct that resulted in plaintiffs' overpaying for water and sewer services. In *Kincaid II*, this Court concluded that some of the September 2011 rate increases violated the applicable ordinances. *Kincaid II*, 311 Mich App at 84. Given that the rate increase was in violation of the statute for the reasons stated in *Kincaid II*, Count IV properly sets forth a claim for unjust enrichment premised on an unlawful exaction. See *Pingree*, 107 Mich at 157. Moreover, as our Supreme Court made clear in *Wright*, a claim for unjust enrichment is not barred by the GTLA. *Wright*, 504 Mich at 422, summary disposition of Count III was not appropriate under MCR 2.116(C)(7).[6]

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[5] Modernly, "assumpsit" is often described as an action for an implied contract. *Garcia v McCord Gasket Corp.*, 201 Mich. App. 697, 714; 506 N.W.2d 912 (1993).

[6] Defendant, in a supplemental brief, contends that *Wright* should not apply in this case because there is no contract between it and plaintiffs in this case. That distinction, however, is not dispositive. In *Wright*, the plaintiff brought an unjust-enrichment claim against his employer after it overcharged him for health-insurance premiums, thereby enriching itself at his expense. *Wright*, 504 Mich at 414-415. The *Wright* Court explained that unjust enrichment seeks "to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution.

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Turning to Count II (unjust enrichment), plaintiffs argue that defendant "charged and collected an illegal water readiness to serve charge . . . between January 15, 2011 and September 15, 2011" and that defendant "charged and collected an illegal water readiness to service charge . . . between June 30, 2012 and July 3, 2006 [sic]." Although **[*18]** plaintiffs allege that by receiving the "unauthorized/illegal water service charge payments" defendant "unjustly received" a benefit from plaintiffs in breach of an implied contract for the above timeframes, nothing in Count II specifically identifies *why* the water service charge was illegal or unauthorized. Turning to other sections of the first amended complaint, plaintiffs allege that defendant violated Flint City Ordinance, § 46-52(b)(1), which provides that "[w]here the customer has a remote water meter and the bills are for residential, small commercial and industrial accounts, a readiness-to-serve charge shall apply. The charges shall be established from time to time by resolution of the City Council, kept on file by the City Clerk, and contained in Appendix A of the City Code." Plaintiffs alleged that the resolution required by Ordinance 46-52(b)(1) was not kept on file or contained in Appendix A of the City Code at the times relevant to this lawsuit. Accordingly, based on consideration of the entire first amended complaint, it appears that the unjust enrichment claim stated in Count II is premised on defendant's alleged violation of Ordinance, § 46-52(b)(1). Yet, even assuming that such a violation **[*19]** exists, it does not automatically mean that all payments for the water services resulted in an inequity. Nothing in the complaint indicates that plaintiffs did not receive the benefit of the water services that they paid for between July 3, 2006 and June 30, 2012. Furthermore, there is nothing in the complaint indicating that the amount charged was illegal. Instead, Count II alleges a mere violation of the statute, for which there is no private cause of action for money damages available. See *Lash*, 479 Mich at 194. Accordingly, the trial court erred by denying defendant summary disposition on Count II of the complaint.

3. COUNT V

Next, we also examine Count V, which is labeled "equitable remedy—recoupment by refunds of the 22% water and sewer rates of January 15, 2011 and the water service charges from July 3, 2006—September 15, 2011." It provides:

> 54. FLINT's excessive/illegal/Ultra Vires water and sewer rates, and water service charges, charged and collected between January 15, 2011 and September 15, 2011 were illegal charges that were collected for an improper purpose in violation of law, including but not limited to using restricted water and sewer revenues to fund the general fund or other funds or general **[*20]** operations of FLINT.
>
> 55. FLINT's excessive/illegal/Ultra Vires water service charges, charged and collected between July 3, 2006 and September 15, 2011 were illegal charges that were collected for an improper purpose in violation of law, including but not limited to using restricted water service charge revenues to fund the general fund or other funds, or general operations of FLINT.
>
> 56. FLINT'S actions alleged herein, through the Ultra Vires actions and misconduct of various former city officials constitute illegal charges and collections from plaintiffs that proximately caused Plaintiffs to make overpayments to FLINT which should be ordered refunded by FLINT to Plaintiffs.

Defendant contends that Count V, which alleges that Flint unlawfully used its water and sewer revenues to "fund the general fund," is barred by the law-of-the-case doctrine. We agree.

"Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Admin v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000). Here, as defendant **[*21]** correctly notes, *Kincaid II*, 311 Mich App at 92, explicitly ruled on the merits of this issue, as follows: "Plaintiffs argue that defendant illegally commingled funds. We find no merit to this claim." Under the law of the case doctrine, *Kincaid II*'s judgment in that regard is binding on the trial court, which was not entitled to "take action on remand . . . inconsistent with the judgment" of this Court. See *Grievance Admin*, 462 Mich at 260. Consequently, to the extent that the claims in plaintiffs' first amended complaint alleged that Flint's commingling of funds was unlawful, summary disposition of those claims was appropriate under MCR 2.116(C)(8). No possible factual development could justify granting plaintiffs relief regarding such claims. The trial court erred by denying summary disposition on this basis.

Restitution restores a party who yielded excessive and unjust benefits to his or her rightful position." *Id.* at 419 (citing **Restatement (Third) of Restitution & Unjust Enrichment § 1** (2011)). Here, plaintiffs are seeking a refund of money overpaid for water and sewer services. Thus, as explained in *Wright*, the GTLA does not bar the claim. That is not to say that a plaintiff will automatically be able to avoid governmental immunity by labeling a tort claim as a claim for unjust enrichment. When evaluating summary disposition motions, we examine the nature of the claim, not the label that the parties attach to the claim. See *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998) (stating that courts are not bound by the labels that parties attach to their claims); see also *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007) ("It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.").

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4. DECLARATORY RELIEF

Count VI of plaintiffs' amended complaint seeks declaratory relief in the form of an injunction. Defendant contends that this claim is barred by the GTLA. However, in *In re Bradley Estate*, 494 Mich 367, 389 n 54; 835 NW2d 545 (2013), our Supreme Court explained that the GTLA does not afford governmental immunity against claims seeking declaratory relief. Accordingly, the trial court did not err by declining to grant summary disposition of this claim.

III. CONCLUSION

Based on our de novo review, we **[*22]** conclude that the trial court erred by not summarily dismissing Counts I and III (breach of contract) under MCR 2.116(C)(8). Additionally, we conclude that summary disposition under MCR 2.116(C)(8) was warranted for Count II (unjust enrichment) and the parts of Count V that sought recovery for the imposition of a water readiness charge in violation of Ordinance, § 46-52(b)(1), between July 3, 2006 and September 15, 2011. The court also erred by not dismissing Count V under the law-of-the-case doctrine. However, the trial court did not err by denying summary disposition of Count IV and Count VI. Accordingly, we affirm the court's denial of summary disposition as to Count IV and Count VI, but we reverse the remainder of the order and remand for the court to enter an order granting defendant summary disposition of Counts I, II, III, and V.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. No taxable costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Michael J. Kelly

/s/ Colleen A. O'Brien

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Logan v. Charter W. Bloomfield

Court of Appeals of Michigan

February 18, 2020, Filed

No. 333452

Reporter
2020 Mich. App. LEXIS 1247 *; 2020 WL 814408

KEVIN LOGAN, Individually and on Behalf of All others Similarly Situated, Plaintiffs-Appellants, v CHARTER TOWNSHIP OF WEST BLOOMFIELD, 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 Circuit Court. LC No. 2015-149134-CZ.

Core Terms

unjust enrichment, township, plaintiffs', cause of action, circuit court, injunctive

Judges: Before: CAMERON, P.J., and SERVITTO and GLEICHER, JJ.

Opinion

ON REMAND

PER CURIAM.

As noted in our prior opinion, "[p]laintiffs brought a self-styled class-action suit against West Bloomfield Charter Township, challenging fees levied by the township's building division" and raising both equitable and legal claims. *Logan v West Bloomfield Charter Twp*, unpublished per curiam opinion of the Court of Appeals, issued January 11, 2018 (Docket No. 333452) (*Logan I*), slip op at 1. We vacated the circuit court order partially granting summary disposition in the township's favor. *Id.* The township applied for leave to appeal to the Supreme Court, which ultimately vacated our judgment and remanded for reconsideration in light of *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204; 934 NW2d 713 (2019) (*MAHB*), and *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410; 934 NW2d 805 (2019). *Logan v West Bloomfield Charter Twp*, __ Mich __; 935 NW2d 42 (2019). *MAHB* and *Genesee Co* further support our previous judgment and we again vacate the circuit court's partial summary disposition order.

I. BACKGROUND

We succinctly outlined the relevant background of this case in *Logan I*, slip op at 1-2, as follows:

> Plaintiffs' putative class action complaint against West Bloomfield Charter Township alleges that the township's building division charged excessive fees, generated a profit, and deposited the extra money in the township general fund **[*2]** "to finance other operations." The class representative[1] asserted that he and others were forced to pay into this illegal municipal enterprise when applying for building permits. Through this system, plaintiffs alleged, the township violated the Stille-DeRossett-Hale single state construction code act (CCA), MCL 125.1501 *et seq.* Plaintiffs alleged that the township also violated the Headlee Amendment, Const 1963, Art 9, § 31,[2] by charging fees that exceeded the reasonable cost of its building division services as the fees had "the effect of a tax increase that was not authorized by a majority of the electorate . . . ." Plaintiffs ultimately raised four counts in their complaint: (1) statutory violation of the CCA, (2) violation of the Headlee Amendment, (3) unjust enrichment premised on the township's violation of the CCA, and (4) a request for permanent injunctive relief against imposition of the challenged fees.
>
> The circuit court summarily dismissed plaintiffs' complaint in part upon the township's motion. The court dismissed

[1] Kevin Logan raised individual claims as well.

[2] The Headlee Amendment provides:

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

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the class plaintiffs' and Logan's individual Headlee Amendment claims arising before September 16, 2014, on statute of limitations grounds pursuant to MCR 2.116(C)(7). Plaintiffs do not challenge this ruling.

The township contended that plaintiffs' claims for unjust enrichment **[*3]** and for violation of the CCA were "derived from the Headlee Amendment Claim" and therefore were also time barred. Plaintiffs retorted that the claims were "distinct causes of action requiring different proofs." The circuit court avoided deciding this issue, ruling instead that "there is no private cause of action for a refund or damages under the CCA" according to the plain language of the act and that "there is no cause of action for unjust enrichment arising out of the Headlee Amendment violation."[3] In relation to the latter, the court ruled that equitable relief was precluded in plaintiffs' Headlee Amendment claim because "there is already a fully [sic], complete, and adequate legal remedy." Accordingly, the court dismissed the CCA and unjust enrichment claims under MCR 2.116(C)(8). Only plaintiffs' request for injunctive relief to prevent future excessive fees remained.

We granted leave to appeal limited to the issue of whether the circuit court erred when it dismissed plaintiffs' unjust enrichment claim premised on the township's alleged violation of the CCA (not the Headlee Amendment as incorrectly posited in the circuit court's opinion) pursuant to MCR 2.116(C)(8). *Logan v Charter Twp of West Bloomfield*, unpublished order of the Court of Appeals, entered November 30, 2016 (Docket **[*4]** No. 333452). Plaintiffs contend that the circuit court erred because: (1) they were permitted to plead alternative and inconsistent causes of action, and (2) the circuit court incorrectly ruled that plaintiffs were precluded from raising a claim of unjust enrichment premised on MCL 125.1522(1) where that statute did not expressly provide a legal remedy for violations of its provisions.

We ultimately concluded in *Logan I*, slip op at 4, that MCL 125.1522(1) of the CCA did not preclude a plaintiff from raising an unjust enrichment claim relating to a violation of the statute. We further held that under the court rules, plaintiffs could raise inconsistent claims in their complaint—one for unjust enrichment in relation to a violation of the CCA and one for a legal remedy in relation to a violation of the Headlee Amendment. *Id.*

II. ANALYSIS

[3] Plaintiffs had not sought equitable relief in connection with its Headlee Amendment claim, however, only in relation to their challenge under the CCA.

Genesee Co and *MAHB* further support that the circuit court **[*5]** improperly summarily dismissed plaintiffs' unjust enrichment claim stemming from the township's violation of the CCA.

Relevant to the current matter, in *MAHB*, 504 Mich at 207, the Supreme Court held that the city of Troy violated MCL 125.1522(1) of the CCA by charging excessive fees for the city's Building Inspection Department's public services in order to generate a revenue to pay off the department's existing deficit. Just as we found in *Logan I*, the Supreme Court determined in *MAHB* that MCL 125.1522(1) does not include an "express or implied monetary remedy" for its violation. *MAHB*, 504 Mich at 208. But, the Court concluded, the trade associations who filed suit against the city could "seek declaratory and injunctive relief to redress present and future violations." *Id.*

The background of *MAHB* is different in one important aspect from the current case. In *MAHB*, the plaintiffs filed suit against the city alleging CCA and Headlee Amendment violations, just as here. However, the plaintiffs did not seek relief in the form of unjust enrichment. Instead, they sought injunctive and declaratory relief to end the building department's illegal practices. *Id.* at 209. The Court held that MCL 125.1522(1) "does not explicitly provide for a private cause of action" and that there was "no indication that the Legislature **[*6]** intended a monetary remedy for a violation" of the statute. *MAHB*, 504 Mich at 223, 225. The Court further noted that a private cause of action would be precluded by the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.* *MAHB*, 504 Mich at 224. However, the Court continued, a private cause of action for monetary damages was not "the only mechanism" for enforcing the statute. *Id.* at 225. The plaintiffs could enforce the statute through a preliminary injunction preventing the further collection of excessive fees until the debate was settled in court. *Id.* The plaintiffs could assert an "actual controversy" as they claimed their "economic interests" were affected by the fees and therefore could seek a declaratory judgment that the fees were illegal and could not be assessed in the future. *Id.* at 225-226.

As noted, in the current case, plaintiffs are individuals who seek the return of excessive fees assessed in violation of the CCA. But plaintiffs have not sought redress directly under the statute; rather, plaintiffs claimed that the township was unjustly enriched by the funds collected in violation of the statute. *MAHB* does not address whether such an unjust enrichment claim would be permitted in response to a violation of the CCA.

In *Genesee Co*, the Supreme Court considered **[*7]** the nature of an unjust enrichment claim. In that case, the defendant county served as the administrator for its employees' Blue Cross healthcare plan. Blue Cross conducted a multiyear audit and discovered that the county had collected "millions of dollars"

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more insurance premiums from its employees than it should have charged. The plaintiff, the county's drain commissioner, filed suit seeking his pro rata refund of the premium overpayment, raising claims in contract and tort (conversion and fraud). *Genesee Co*, 504 Mich 414-415. In an amended complaint, the plaintiff added an unjust enrichment count based on the county's wrongful retention of the overpayed insurance premiums. *Id.* at 416. The trial court dismissed the plaintiff's tort claims as barred by the GTLA, and this Court affirmed that ruling. This Court and the Supreme Court agreed with the trial court, too, that the unjust enrichment claim was not barred by governmental immunity. *Id.*

The Court described unjust enrichment as follows:

> Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another. It is grounded in the idea that a party shall not be allowed to profit or enrich himself inequitably at another's expense. **[*8]** A claim of unjust enrichment can arise when a party has and retains money or benefits which in justice and equity belong to another. [*Id.* at 417-418 (cleaned up).[4]]

The remedy for a tort and sometimes a contractual breach, the Court held, is compensatory damages. *Id.* at 419. But, "[t]he remedy for unjust enrichment is restitution." *Id.* at 418.

> Unjust enrichment . . . doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded excessive and unjust benefits to his or her rightful position. [*Id.* at 419 (cleaned up).]

The Court alternatively explained, "[U]njust enrichment claims based in equity [historically] involved remedies other than money judgments, including the establishment of constructive trusts, equitable liens, subrogation, and accounting." *Id.* at 421. Ultimately, the Court asserted:

> Unjust enrichment has evolved from a category of restitutionary claims with components in law and equity into a unified independent doctrine that serves a unique legal purpose: it corrects for a benefit received by the defendant rather than compensating for the defendant's **[*9]** wrongful behavior. Both the nature of an unjust-enrichment action and its remedy—whether restitution at law or in equity—separate it from tort and contract. [*Id.* at 422.]

The current matter is similar to *Genesee Co* in that while the plaintiffs in both actions do seek money from the defendants, the money is not meant as compensation. Rather, plaintiffs in this action, like the plaintiff in *Genesee Co*, seek the return of monies paid over to defendant that should not have been charged in the first instance and therefore was unjustly held by defendant. Requesting the return of the funds was not a tort or contract action, but an action to divest the township of benefits unjustly retained. As the relief sought is equitable in nature, the claim is not barred by *MAHB*. Accordingly, we again conclude that the circuit court improperly dismissed plaintiffs' unjust enrichment claim.

We vacate the summary disposition judgment in relation to plaintiffs' unjust enrichment claim and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron

/s/ Deborah A. Servitto

/s/ Elizabeth L. Gleicher

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[4] This opinion uses the parenthetical (cleaned up) to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

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Logan v. Charter Twp. of W. Bloomfield

Court of Appeals of Michigan

January 11, 2018, Decided

No. 333452

Reporter
2018 Mich. App. LEXIS 89 *; 2018 WL 383751

KEVIN LOGAN, Individually and on Behalf of All others Similarly Situated, Plaintiffs-Appellants, v CHARTER TOWNSHIP OF WEST BLOOMFIELD, Defendant-Appellee.

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

Subsequent History: Held in Abeyance at *Logan v. Charter Twp., 917 N.W.2d 635, 2018 Mich. LEXIS 1933 (Mich., Oct. 2, 2018)*

Motion granted by *Logan v. Charter Twp. of W. Bloomfield, 932 N.W.2d 637, 2019 Mich. LEXIS 1658 (Mich., Sept. 12, 2019)*

Vacated by, Remanded by *Logan v. Charter Twp. of W. Bloomfield, 2019 Mich. LEXIS 2145 (Mich., Nov. 20, 2019)*

Prior History: [*1] Oakland Circuit Court. LC No. 2015-149134-CZ.

Core Terms

township, unjust enrichment, plaintiffs', Headlee Amendment, legal remedy, circuit court, cause of action, equitable, equitable relief

Judges: Before: CAMERON, P.J., and SERVITTO and GLEICHER, JJ.

Opinion

PER CURIAM.

Plaintiffs brought a self-styled class-action suit against West Bloomfield Charter Township, challenging fees levied by the township's building division. Their complaint asserted equitable and legal claims. The circuit court granted partial summary disposition to the township, ruling that plaintiffs could not seek equitable damages when they had an adequate remedy at law, and that a statute underlying one of plaintiffs' legal claims did not authorize an independent cause of action. We granted plaintiffs' application for leave to appeal, and now vacate the circuit court's order.

I. BACKGROUND

Plaintiffs' putative class action complaint against West Bloomfield Charter Township alleges that the township's building division charged excessive fees, generated a profit, and deposited the extra money in the township general fund "to finance other operations." The class representative[1] asserted that he and others were forced to pay into this illegal municipal enterprise when applying for building permits. Through this system, plaintiffs alleged, the township violated the Stille-DeRossett-Hale **[*2]** single state construction code act (CCA), *MCL 125.1501 et seq.* Plaintiffs alleged that the township also violated the Headlee Amendment, *Const 1963, Art 9, § 31*,[2] by charging fees that exceeded the reasonable cost of its building division services as the fees had "the effect of a tax increase that was not authorized by a majority of the electorate . . . ." Plaintiffs ultimately raised four counts in their complaint: (1) statutory violation of the CCA, (2) violation of the Headlee Amendment, (3) unjust enrichment premised on the township's violation of the CCA, and (4) a request for permanent injunctive relief against imposition of the challenged fees.

The circuit court summarily dismissed plaintiffs' complaint in part upon the township's motion. The court dismissed the class plaintiffs' and Logan's individual Headlee Amendment claims

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[1] Kevin Logan raised individual claims as well.

[2] The Headlee Amendment provides:

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

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arising before September 16, 2014, on statute of limitations grounds pursuant to **[*3]** MCR 2.116(C)(7). Plaintiffs do not challenge this ruling.

The township contended that plaintiffs' claims for unjust enrichment and for violation of the CCA were "derived from the Headlee Amendment Claim" and therefore were also time barred. Plaintiffs retorted that the claims were "distinct causes of action requiring different proofs." The circuit court avoided deciding this issue, ruling instead that "there is no private cause of action for a refund or damages under the CCA" according to the plain language of the act and that "there is no cause of action for unjust enrichment arising out of the Headlee Amendment violation."[3] In relation to the latter, the court ruled that equitable relief was precluded in plaintiffs' Headlee Amendment claim because "there is already a fully [sic], complete, and adequate legal remedy." Accordingly, the court dismissed the CCA and unjust enrichment claims under MCR 2.116(C)(8). Only plaintiffs' request for injunctive relief to prevent future excessive fees remained.

We granted leave to appeal limited to the issue of whether the circuit court erred when it dismissed plaintiffs' unjust enrichment claim premised on the township's alleged violation of the CCA (not the Headlee Amendment as incorrectly posited in the circuit court's opinion) pursuant to MCR 2.116(C)(8). *Logan* **[*4]** *v Charter Twp of West Bloomfield*, unpublished order of the Court of Appeals, entered November 30, 2016 (Docket No. 333452). Plaintiffs contend that the circuit court erred because: (1) they were permitted to plead alternative and inconsistent causes of action, and (2) the circuit court incorrectly ruled that plaintiffs were precluded from raising a claim of unjust enrichment premised on MCL 125.1522(1) where that statute did not expressly provide a legal remedy for violations of its provisions.

II. ANALYSIS

> We review a trial court's decision on a motion for summary disposition de novo. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted. We must accept all wellpleaded allegations as true and construe them in the light most favorable to the nonmoving party. The motion should be granted only if no factual development could possibly justify recovery. [Zaher v Miotke, 300 Mich App 132, 139; 832 NW2d 266 (2013) (quotation marks and citations omitted).]

The Michigan Supreme Court has explained that a court

> may grant equitable relief "[w]here a legal remedy is not available[.]" "A remedy at law, in order to preclude a suit in equity, must **[*5]** be complete and ample, and not doubtful and uncertain . . . ." Furthermore, to preclude a suit in equity, a remedy at law, "both in respect to its final relief and its modes of obtaining the relief, must be as effectual as the remedy which equity would confer under the circumstances . . . ." While legislative action that provides an adequate remedy by statute precludes equitable relief, the absence of such action does not. This is so because "[e]very equitable right or interest derives not from a declaration of substantive law, but from the broad and flexible jurisdiction of courts of equity to afford remedial relief, where justice and good conscience so dictate." [Tkachik v Mandeville, 487 Mich 38, 45; 790 NW2d 260 (2010) (citations omitted).]

Accordingly, the Legislature may preclude equitable relief by specifically including a legal remedy in a statute or act. Where the Legislature neither includes nor expressly excludes a legal remedy, equitable relief might remain available.

This Court outlined the remedy of unjust enrichment in AFT Mich v Michigan, 303 Mich App 651, 677; 846 NW2d 583 (2014), aff'd sub nom AFT Mich v State of Michigan, 497 Mich 197 (2015), as follows:

> Unjust enrichment is an equitable doctrine. It is the equitable counterpart of a legal claim for breach of contract. Unjust enrichment of a person occurs when he has and retains money **[*6]** or benefits which in justice and equity belong to another. [I]n order to sustain a claim of . . . unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. [Quotation marks and citations omitted, alterations in original.]

The statute at issue in this case—MCL 125.1522(1)—neither provides a legal remedy nor expressly excludes a plaintiff from seeking recourse:

> The legislative body of a governmental subdivision shall establish reasonable fees to be charged by the governmental subdivision for acts and services performed by the enforcing agency or construction board of appeals under this act, which fees shall be intended to bear a reasonable relation to the cost, including overhead, to the governmental subdivision of the acts and services, including, without limitation, those services and acts as, in case of an enforcing agency, issuance of building permits, examination of plans and specifications, inspection of

[3] Plaintiffs had not sought equitable relief in connection with its Headlee Amendment claim, however, only in relation to their challenge under the CCA.

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> construction undertaken pursuant to a building permit, and the issuance of certificates of use and occupancy, and, in case of a board of **[*7]** appeals, hearing appeals in accordance with this act. The enforcing agency shall collect the fees established under this subsection. The legislative body of a governmental subdivision shall only use fees generated under this section for the operation of the enforcing agency or the construction board of appeals, or both, and shall not use the fees for any other purpose.

Although the circuit court correctly recognized that the statute did "not expressly allow a private cause of action for recovery of fees collected in violation of its provisions," it failed to take the next, necessary step; the court did not ask whether *any* remedy was available to plaintiffs with regard to their claim that the township had violated MCL 125.1522(1). And plaintiffs did properly state an unjust enrichment claim.

In their complaint, plaintiffs alleged that the township received a benefit from them in the form of payment of the challenged fees. Plaintiffs also alleged that the township was "not authorized by its ordinances or the [CCA] to impose or collect the excessive or otherwise unwarranted charges and fees mandated by its Building Division." When viewing all of the factual allegations raised by plaintiffs in their complaint **[*8]** in the light most favorable to plaintiffs, plaintiffs have stated a claim of unjust enrichment sufficiently to survive a (C)(8) motion and the court erred in dismissing this count.

However, the township alternatively contends that plaintiffs' CCA challenge is duplicative of their Headlee Amendment challenge and that plaintiffs have an adequate legal remedy for that violation. Accordingly, the township asserts, dismissal of plaintiffs' claim for unjust enrichment under the CCA would still be appropriate as time-barred. But the township disregards MCR 2.111(A)(2)(b). The court rule provides, "Inconsistent claims or defenses are not objectionable. A party may . . . state as many separate claims or defenses as the party has, regardless of consistency and whether they are based on legal or equitable grounds or on both." MCR 2.116(C)(8) is not a proper vehicle to dismiss properly raised, although inconsistent, alternative grounds for relief. MCR 2.116(C)(8) only concerns the legal sufficiency of a claim and whether a party has stated a claim on which relief could be granted. Zaher, 300 Mich App at 139. The summary disposition rule does not preclude plaintiffs from investigating the factual support for alternative claims in discovery. And the unjust enrichment claim based on the **[*9]** CCA is not fettered by the same short limitations period.

In their CCA claim, plaintiffs assert that the township's building division fees were unreasonable and misappropriated for non-building division purposes in violation of MCL 125.1522(1). In the Headlee Amendment claim, plaintiffs contended that the township's fees were actually an illegal tax. "There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." Jackson Co v City of Jackson, 302 Mich App 90, 99; 836 NW2d 903 (2013) (quotation marks and citation omitted). "Generally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.' A 'tax,' on the other hand, is designed to raise revenue." (citations omitted). "[T]hree primary criteria" guide a court's determination: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose," (2) "user fees must be proportionate to the necessary costs of the service," and (3) a fee is voluntary. Id. at 161-162. While the factual considerations are similar and interrelated, plaintiffs were not required to exclusively allege one claim over the other. Moreover, given that there is no "bright-line test" for a Headlee Amendment claim, it is entirely **[*10]** possible that plaintiffs' Headlee Amendment claim might fail, leaving them without an adequate legal remedy absent their unjust enrichment claim. Therefore, it was appropriate for plaintiffs to raise both claims in their complaint.

We vacate the summary disposition judgment in relation to plaintiffs' unjust enrichment claim and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron

/s/ Deborah A. Servitto

/s/ Elizabeth L. Gleicher

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