

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Jansen, PJ, and O'Connell and Owens, JJ

BRIGGS TAX SERVICE, LLC,
Individually and on behalf of all others
similarly situated,

Supreme Court Docket No. 138168
138179
138182

v

Petitioner/Appellee,

Court of Appeals Docket No. 278865

DETROIT PUBLIC SCHOOLS,
DETROIT BOARD OF EDUCATION, CITY OF
DETROIT, RAYMOND WOJTOWICZ as
WAYNE COUNTY TREASURER, KENNETH
BURNLEY, KEN A. FORREST, DORI
FREELAIN, PAMELA ANESTEY, MICHAEL
BRIDGES, MARY ELLIS, ROBERT F.
MOORE, NELIDA BRAVO, MARVIS
COFIELD, W. FRANK FOUNTAIN, GERALD
K. SMITH, REGINALD TURNER, TOM
WATKINS, WILLIAM C. BROOKS, BELDA
GARZA, MICHAEL TENBUSCH, GENEVA
WILLIAMS, MARK A. DOUGLAS, ALLAN
SPOONER, and ALMA STALWORTH,

MI Tax Tribunal Docket No. 00-319592

**APPELLANTS DETROIT PUBLIC
SCHOOLS AND DETROIT BOARD OF
EDUCATION'S REPLY BRIEF**

ORAL ARGUMENT REQUESTED

Respondents/Appellants

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Dated: September 15, 2009

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I. INTRODUCTION

Briggs' brief raises no arguments of substance that overcome the analysis offered in DPS' Brief on Appeal. Briggs omits facts that demonstrate that, since 1994, DPS perceived that the school operating tax was authorized by Proposal A. This undercuts the major factual premise of Briggs' case. Major legal premises in Briggs' analysis are wholly unsupported by citations to statutes or case law, and Briggs' arguments are in contravention of plain statutory language as well as the common law definitions of a "mutual mistake of fact" and "caused" or affected the tax overpayment. Finally, Briggs relies heavily on policy arguments that are properly made to the Legislature.

II. REPLY TO APPELLEE BRIGGS' ARGUMENTS

A. **Briggs' Statement of "Material Substantive Facts" is Incomplete and Inaccurate.**

MCR 7.212(C)(6) requires a statement of all facts, favorable and unfavorable, without argument or bias. Briggs crosses the line by stating:

In an effort to deny taxpayers refunds of taxes that had been improperly collected, DPS **post-facto claimed** that its officials made a legal determination that assessment of the tax was proper in 2002 – 2005.

Appellee's Brief at p. 5-6 (emphasis added). Briggs attempts to use this fiction by arguing that DPS' mistake of law argument was made up "after the fact" to avoid liability for refunds. Appellee's Brief at p. 18. The truth, which Briggs omits from its brief, is that since the voters approved Proposal A in March **1994**, DPS believed that Proposal A authorized its operating tax rate. DPS stated this in its sworn and uncontroverted interrogatory answers, and the Tax Tribunal explicitly relied upon them in reaching its decision in favor of DPS. *See* Appendix at 32a. DPS's belief is further documented by the fact that DPS in 1994 stopped referencing other earlier authorizations as the basis for its operating tax and referenced the March 1994 vote as the basis

for its authority to impose the 18 mill operating tax on the forms it files every year. (See Appendix at 131a. – 141a.) In 1995, the form began to ask for an expiration date of the millage authorized. Proposal A has no expiration date, and DPS consistently listed "N/A" as the expiration date each year. Thus, DPS's position was clearly based on Proposal A since 1994. This mistake was evident long before the inquiry of the CFO, Mr. Forrest, and refutes Briggs' contention (p. 30) that there was no evidence of any "mistake of law" before 2003 or 2004.

Entirely consistent with the forms, Mr. Forrest testified that he was informed that Proposal A authorized the DPS operating tax. The record is clear and uncontroverted: Mr. Forrest heard that Dearborn was having an election to approve its millage, and that caused him to inquire whether DPS needed one. He inquired of his staff and was told that DPS did not need an election and the reason was Proposal A. Briggs' counsel tried to lead Mr. Forrest to say that he never determined the basis for why Dearborn needed a vote and DPS did not, but the witness answered that he was told that DPS did not need a vote because of Proposal A:

EXAMINATION by Mr. Bennett:

Q. And it is correct that you never determined the basis why there was a difference between what Dearborn had to do and what DPS had to do?

A. I recall the answer being that Proposal I believe it's A solved that issue.

* * *

EXAMINATION by Mr. Saylor:

Q. But you do understand it being said that Proposal A eliminated the need for a vote?

A. I did understand that and I believe that's how I answered.

* * *

MR. SAYLOR: All right.

Q. You understood, sir, that the interpretation you were being given was an interpretation of Proposal A?

A. Yes.

Appendix at 112a (Tr p 80, emphasis added). There is simply nothing in the record to support Briggs' position on appeal that DPS just made all this up after the fact.¹

B. The Assessors Made No Mutual Mistake of Fact and Briggs' Argument to the Contrary is Unsupported.

Briggs cites no support for its statement that the assessors "incorrectly calculated Briggs' tax liability." Appellee's Brief at p. 1. The assessors were presented with a certified tax rate which had been levied by DPS (Appendix at 143a – 145a). The assessors then "calculated" the tax to be placed on the tax roll – flawlessly – by correctly multiplying the certified rate by the applicable taxable value. The assessors' "calculations" were not mistaken.

Briggs contends that certain conclusions are factual in nature but purports to "support" that claim using nothing more than **bold-faced type** when it uses the words "fact" or "factual." Appellee's Brief at p. 15. Briggs' argument offers no definitions to use in distinguishing factual from legal mistakes. DPS set forth definitions, explaining that whether a mistake is one of fact or law can turn on precedent (e.g. *Upper Peninsula*² and *Carpenter*³) or on whether one was construing rights and obligations under a law, such as Proposal A. This reflects the common understanding of the terms and the common law construction of them⁴, and by those definitions the mistake at issue is legal in nature.

¹ Briggs refers to public statements by DPS officials that the mistake was an "oversight" undetected for years, but that does not advance Briggs' case at all. The words "oversight" and "error" can—and in this case do—refer to legal mistakes.

² *Upper Peninsula Generating Co v City of Marquette*, 18 Mich App 516; 171 NW2d 572 (1969).

³ *Carpenter v City of Ann Arbor*, 35 Mich App 608; 192 NW2d 523 (1971).

⁴ See discussion of *Montgomery Ward & Co v Williams*, 330 Mich 275; 47 NW2d 607 (1951) and the long-recognized distinction between illegal taxes and taxes based on mistakes of fact in DPS' Brief on Appeal at p. 17-18, 22, 26, 30.

Briggs repeatedly states that the tax expired in 2002, and that the DPS certifications and Forms L-4029 indicate that the authorization had not expired, as if there is nothing more to consider. The Forms L-4029, however, list 3/15/94 as the date of authorization and “N/A” as the expiration date. Proposal A was adopted on 3/15/94 and does not contain an expiration date. The Forms L-4029 do not list the September 1993 vote that expired in 2002 as the authorization for the tax and then mistakenly state that that authorization had not expired, as Briggs suggests. Thus, if the assessors are deemed to have adopted the error of DPS, the error communicated to the assessors was that Proposal A authorized the tax.

C. *Ford* Supports DPS's Position.

DPS has addressed the case of *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 716 NW2d 247 (2006) in its Brief on Appeal. *Ford*, which addressed mutuality, does not mention, much less overrule, the Court of Appeals' *Upper Peninsula* and *Carpenter* decisions. *Upper Peninsula* and *Carpenter* provide a bright-line test, holding that mistakes by which a tax rate is illegally levied are mistakes of law, not fact. DPS has addressed that and other potential tests in its principal brief. *Upper Peninsula* and *Carpenter* have stood as the precedent for whether an unauthorized tax is a legal or factual mistake for forty years, yet the Court of Appeals failed even to mention them.

Briggs argues that in *Ford*, the assessor relied on an inaccurate personal property statement, which was a "document," and because DPS' mistake in this case was communicated to the assessors in "documents" — the certifications and Forms L-4029 — this case is like *Ford*. Appellee's Brief at p. 12–13. Briggs cites no case law or statutory support for this, beyond the fact that a document was involved in *Ford*. This Court did not hold that the mistake was factual in *Ford* because it was communicated in a document. Rather, the mistake in *Ford* — the

inclusion of property that was not in the taxing jurisdiction — was so clearly factual in nature that its factual nature was not disputed.

Ford specifically addressed mutuality, but it also provided guidance and a common-law rule which DPS has applied. Ironically, while paying lip service to *Ford*, Briggs actually applies only a plain-language approach, and ignores the common law definitions and the consideration of the statutory scheme which *Ford* requires. Briggs wrongly argues that DPS' mistake was not a mistake of law because DPS did not make "legal analysis" or "seek any legal opinion" before issuing the certifications. Under Briggs' view, a mistake is factual, not legal, unless it is made by a lawyer or is based upon legal analysis and unless one obtains a written opinion. There is no authority in Briggs' brief supportive of the illogical position that only lawyers can make legal mistakes, much less that a legal mistake may only be made in writing.

D. *Bridgewater Interiors* Does Not Support Briggs' Position.

Briggs' citation to *Bridgewater Interiors v City of Detroit*, 2003 WL 22796986 (Unpublished, Mich App 2003), for the proposition that a mistake about a tax rate can be a factual mistake subject to § 53a is entirely misleading. First, the *Bridgewater* court analyzed the case under MCL 211.53b, not § 53a. In *Bridgewater*, the assessors themselves made a mistake that was clerical in nature. The assessors knew the subject property was in a renaissance zone (and therefore exempt from certain levies, but not others), and intended to treat it as such by coding it with a 7, which would have caused the computer to not apply the taxes that do not apply in a renaissance zone. The assessors made a clerical error by not coding the property with code 7, and as a result, the wrong tax rate was applied. *Bridgewater* has nothing to do with reliance upon a certified tax rate provided by another taxing unit.

Bridgewater is distinguishable from the present case on numerous grounds. First, the assessors in *Bridgewater* had a duty to code the property correctly. In *Bridgewater*, the assessors themselves made the clerical mistake that caused the tax overpayment. The second and more important distinction is that absolutely no legal conclusions were involved in *Bridgewater*. As a matter of law, because *Bridgewater's* property was in a renaissance zone it was entitled to an exemption. No one misconstrued the law. The assessors in that case would have agreed that the law granted the exemption. They simply used the wrong code.

In the present case, by contrast, it is uncontroverted that in 2002–2004 DPS believed it was authorized to impose the tax at issue on non-homestead properties by Proposal A. That belief was the mistake that ultimately caused the tax overpayment. Even if the mistake in the present case could be attributed to the assessors (and it cannot be attributed if the rule of *Ford* concerning attribution of mistakes is applied), DPS' mistake is legal in nature because it involves the misinterpretation of the law (Proposal A).

E. Briggs' Plain Language Argument Fails.

This Court, in *Ford*, did not actually adopt a plain language approach to the construction of MCL 211.53a. For that reason DPS addressed both the common law approach used in *Ford* and the language of the statute. Briggs inexplicably ignores this Court's common law approach. If a plain language approach, which Briggs advocates, is applied, however, the result will not change. The plain language of §53a does not trigger a three year period whenever a tax is illegal and overpaid. By its plain language, §53a applies only where there is a “mutual mistake of fact,” “by the assessor and the taxpayer,” that “caused” the tax to be overpaid. Unless each of these elements is satisfied, the taxpayer must seek relief under other, shorter jurisdictional periods. Reading the language of §53a broadly causes the three-year period to swallow up the other,

shorter jurisdictional periods in MCL 205.735, contrary to settled rules of statutory interpretation. DPS has showed why these elements of §53a are not met in the present case. The assessor made no mistake because assessors have a duty to place on the tax roll the rates certified to them; the assessor did so. If DPS' mistake is somehow attributed to the assessors, DPS' mistake was not factual; it was a construction of Proposal A, a law.

F. Briggs' Arguments About Mistake and Causation Are Without Merit.

DPS explained that the assessors had no duty to check the legality of the levies certified to them. Beyond that, DPS explained that the City had a duty to use the rates provided. See DPS' Brief on Appeal at pp. 12-14. Briggs responds that the words "affirmative duty" are not in the statute. Appellee's Brief, p 22. This is true; however, §53a does require a mistake, mutuality, and causation, and the assessors' duties affect the analysis of whether those requirements are met.

Concerning mutuality, this Court in *Ford* attributed a taxpayers' mistake to the assessor and thus found mutuality, because the assessor had a duty to determine, for himself, the property to be assessed and its value, and could not simply rely on the taxpayers' statements. With regard to causation⁵, if the assessors have a duty to use the rates provided and are not permitted to substitute their own judgment as to what the correct tax rate should be, then even if they mistakenly assumed or even believed the rates were lawful, one cannot conclude that *but for* that misperception, the tax would not have been placed on the roll, billed, and paid. Stated in the terms of *Ford*, the assessors' claimed misperception cannot have "affected" the substance of the

⁵ Briggs argues that the issue of causation should not be considered because it was not briefed in the Tax Tribunal (Briggs p. 27). This Court has held "that an appellee need not take a cross appeal in order to urge, in support of relief afforded him below, reasons other than those adopted by or those rejected by the lower court." *Middlebrooks v. Wayne County*, 446 Mich 151, 166 at fn 41; 521 NW2d 774 (1994). See also, *Burns v. Rodman*, 342 Mich 410, 414; 70 NW2d 793 (1955) (citing ten supporting Michigan Supreme Court cases). DPS argued that Briggs' § 53a claim must be dismissed. It was dismissed, and DPS may now argue causation. Moreover, DPS briefed and argued the causation issue in the Court of Appeals, without objection by Briggs.

transaction if the assessors were required to place the certified rates on the tax rolls regardless of their perceptions about it.

Briggs finally gets to the issue of whether assessors must apply the tax rates as certified on page 25 of its Brief. Beyond empty rhetoric, Briggs argues that the assessors have the power not to apply the rates certified based on MCL 211.10, 10e, 24, 27a, 41, and their duty to certify the roll. Briggs neither quotes from nor explains how any of these provisions would permit the assessors not to spread the tax rates certified to them by the taxing units that have levied the taxes. Nor does Briggs cite any case law construing any of these sections. None of them provides the assessors with such power. (See DPS' Brief on Appeal at p. 12-16.)

DPS cites MCL 380.432 and MCL 211.24a for the propositions that DPS certifies the tax rate to the city and the city must spread that rate. (See DPS' Brief on Appeal at p. 14). In response, Briggs suggests that MCL 380.432 might advance its case because it states that the city shall apportion the school taxes as city taxes are "apportioned." It does not explain how that is conceivably relevant⁶, and it concludes by stating that "Consequently, nothing in MCL 380.432 alters the assessor's duties as stated in the General Property Tax Act." Appellee's Brief at p. 26, fn 20. Briggs thus concedes the General Property Tax Act is controlling as to the assessors' duties. The applicable provision is MCL 211.24b(2):

⁶ Apportionment of taxes is not relevant because it refers to the apportionment of a total tax amount to be raised based on the value of property. Thus, if taxing units levied \$X Millions in tax, one could apportion that among units based on their total taxable values or an assessor could apportion that among properties based on their taxable values. (See references to apportionment in MCL 211.23a and 211.37.) The reference to apportionment does not grant the city assessors the power to determine that they will not spread the tax on the rolls. See *Quinn* and *Union School District*. As a practical matter tax rates are now stated in mills, *i.e.*, the taxing units determine the dollar amount of tax to be levied and divide it by the total taxable value in the taxing unit to determine the rate and they transmit the tax stated in terms of the rate. MCL 211.37 and MCL 211.214. This is also shown on the Certifications and the Forms L-4029. (Appendix 130a-146a.)

(2) The supervisor or assessor **shall spread the taxes on the tax roll on the taxable value for each item of property.**

(Emphasis added.)

DPS cited *Board of State Tax Commrs v Quinn*, 125 Mich 128; 84 NW 1 (1900) and *Lansing School District v City of Lansing*, 260 Mich 405; 245 NW2d 449 (1932) for the proposition that the assessors must spread the tax provided to them by taxing units. Briggs buries its response to these cases in a footnote (p. 23, n. 19), stating that those cases do not involve §53a or mistake. While that is true, those cases strongly support the proposition for which DPS cited them: that the assessors do not have the power or duty to review and decide not to spread the tax as certified to them. The assessors' role as to the rates is merely ministerial and they can be sued if they do not perform their duties. Also see *Union School District of Rogers Township v Parris*, 97 Mich 593; 56 NW 925 (1893) and *Lansing School District v City of Lansing*, 264 Mich 272; 249 NW2d 848 (1933), for the mandatory nature of the local duty to spread and collect taxes levied by the schools. Apportionment was specifically held in the later case to be a "clerical and administrative" function. In both *Quinn* and *Union Schools*, the supervisor (acting as the assessor) believed the taxes certified to them to be incorrect, but the Court held that the supervisor was bound to spread the tax as certified. Thus the reference to apportionment in the school code does not vest the assessors with the power to review and to decide to not spread the tax levied by the schools.

The last authority cited by Briggs on this topic is Detroit City Charter § 8-402 (which it does not quote). The portion of the Charter cited by Briggs is as follows:

1. The board of assessors shall certify the assessment roll to the board of review on or before the date provided by ordinance.
2. The assessors shall prepare the tax roll by spreading property taxes ratably on the assessment roll on or before the date provided by ordinance and shall deliver the tax roll to the treasurer in the manner provided by law.


Briggs claims that Sec. 8-402(1) requires the "assessor to **certify** the assessment roll which includes the tax roll." Appellee's Brief p. 26 (emphasis in original). Beyond the fact that the assessment roll which is certified is not the tax roll, the cited Charter provision does not suggest that the assessors have the power to spread the taxes on the roll using anything other than the rates certified to them by the taxing units.

G. Briggs' Policy, Propriety, And Morality Arguments Must Be Balanced Against Competing Policies And The Legislature Has Done That.


There is little to be gained from further debate about what Briggs advances as moral and policy reasons for providing it with a refund. The Legislature considered all the pertinent interests and it has provided short periods of limitation in MCL 205.735, with a longer three-year period in §53a that applies only where there is a clerical error or mutual mistake of fact by the assessor and the taxpayer that caused the overpayment. The key point is that the Legislature has made the policy. If the Legislature's words are applied, as they must be, DPS's mistakes about Proposal A, even if attributed to the assessors, are not mistakes of fact and the assessor made no mistake which caused the tax overpayment.

Respectfully submitted,


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