STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

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

Petitioner/Appellee,

v

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,

Respondents/Appellants

Supreme Court Docket No. 138168
Court of Appeals Docket No. 278865
MI Tax Tribunal Docket No. 00-319592

APPELLANTS DETROIT PUBLIC SCHOOLS AND DETROIT BOARD OF EDUCATION'S

REPLY TO AMICUS BRIEF SUBMITTED BY BUILDING OFFICE MANAGERS ASSOCIATION OF METROPOLITAN DETROIT(BOMA)

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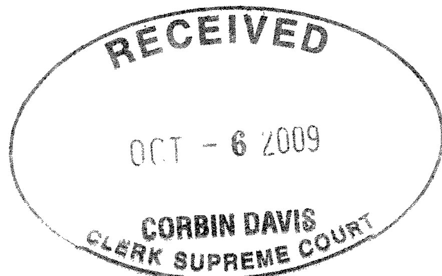

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**APPELLANTS DETROIT PUBLIC SCHOOLS AND
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DETROIT(BOMA)**

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I. INTRODUCTION

Whether Briggs "timely appealed" turns on whether there was a mutual mistake of fact between Briggs and the assessors, which caused the tax to be placed on the roll by the assessors and paid by Briggs. BOMA brings nothing new or useful to the table on those topics.

II. ARGUMENTS IN REPLY TO BOMA'S AMICUS BRIEF

A. BOMA Offers No Authority To Establish That The Assessors' Claimed Reliance Upon DPS Mistake Constituted a Factual Mistake which Caused the Tax Overpayment.

BOMA—like Briggs—would like to avoid consideration of DPS' mistake, but the claimed mistake of the assessors is their claimed reliance on the mistake of DPS[1]. DPS's mistake is relevant because it is the mistake claimed to have been communicated to and relied upon by the assessors. See Amended Petition at ¶ 49. Therefore, if DPS's mistake was legal in nature—which it surely was, given the positions DPS uniformly took in its Certifications to the assessors since Proposal A was approved, and the deposition testimony confirming DPS' reliance on Proposal A—then the assessors relied upon a legal mistake.

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[1] Briggs never actually claimed there to be a mutual mistake of fact in its Amended Petition. See Appendix at 65a. The Amended Petition first describes the error as the "mistaken belief that the illegal levy was lawful" (First Amended Petition, ¶17). That plainly describes a mistake of law, not fact. In Count III specifically addressing MCL 211.53a, Briggs' Amended Petition refers not to a mutual mistake of fact but to a "mutual mistake that the illegal levy was authorized." (¶49) See also ¶ 51 (referring to a "mistake of the parties"). Briggs did not allege that DPS or the city assessors were mistaken about any material historical facts. The mistake described in Count III was that the assessors and taxpayer relied on DPS' certification believing it was valid. (See ¶ 49.) The City's Answer denied the claim:

> 49. ...Respondent, City of Detroit, denies as untrue the allegation that it relied upon or formed any mistaken belief regarding the validity or legality of the non-homestead tax levy. **The City of Detroit was statutorily mandated to place the non-homestead ad valorem property tax levy on the City of Detroit Tax Roll after the levy was certified.**

City's Answer, at¶ 49 (Appendix at 82a, emphasis added).

BOMA's argument that the mistake is factual mischaracterizes the DPS certifications and then claims that the factual nature of the mistake is so obvious as to need no analysis[2]. BOMA even claims that it is "undisputed" that the DPS certification was based on a factual mistake. (BOMA Brief p. 17.) That is a serious misrepresentation. DPS's certifications, which BOMA quotes, told the assessors that "based upon the prior approval of the electors, the Board is **authorized by law** to levy 18.00 mills for school operating purposes on all taxable nonhomestead property" (emphasis added). DPS thus explicitly certified that the "law" authorized it to levy 18 mills. If that statement is wrong, it represents a legal mistake.

BOMA is wrong when it states that no legal analysis is required to determine whether the certification is correct or mistaken. (BOMA Brief at p. 17). This Court granted leave, to consider legal analyses. In the context of the record, the words "approval of the electors" in the certifications refer to the vote on Proposal A, which is referenced in the Forms L-4029 that DPS also sent to the assessors each year. DPS made this statement believing that Proposal A, which the voters had approved, authorized the tax. To determine whether the statement was correct or mistaken, one must analyze the law to determine whether Proposal A actually provided the perceived legal authorization to impose the tax. DPS's conclusion was by that test, a mistake of law, not fact[3]. MCL 211.53a and this Court's decision in *Ford Motor Co v City of Woodhaven*,

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[2] BOMA twice quotes the language in DPS' certifications, re-characterizes what was stated, and then claims without analysis or supporting authority that DPS' statements are factual. (BOMA Brief pp. 7, 15). Where Briggs has offered only bold-faced type to support the factual nature of the claimed mistake, its ally BOMA now merely offers repetition for the proposition that a mistake about what Proposal A meant—which is clearly legal in nature, according to the case law and common meaning of a mistake about the legality or validity of a tax—is factual.

[3] DPS did not misunderstand the facts about what proposals were passed or when they expired. The voters approved a 32 mill tax in 1993, the approval for which would expire in 2002. When the voters approved Proposal A on March 15, 1994, DPS believed that Proposal A authorized an 18 mill tax that would never expire, so no further voter approval was required. DPS' mistake was in construing Proposal A—a law—not the dates or effective dates of votes.

475 Mich 425, 716 NW2d 247 (2006), both require a "factual" mistake. If the mistake of DPS is deemed to have become the mistake of the assessors[4], then the mistake is one of law, not fact and § 53a does not apply.

BOMA argues that if there is a mistake about whether the voters approved a tax rate, the mistake must be factual. Beyond the logical flaw in this argument described above, existing authority supports exactly the opposite conclusion.

- In *Upper Peninsula Generating Co v City of Marquette*, 18 Mich App 516; 171 NW2d 572 (1969) and *Carpenter v City of Ann Arbor*, 35 Mich App 608; 192 NW2d 523 (1971), the Court of Appeals considered mistakes about whether a tax was authorized to be legal in nature. These decisions are directly on point. BOMA criticizes those decisions because the Courts in those cases did not "justify their holdings" and because *Ford* "repudiated those holdings" (BOMA p 18). First, BOMA's criticism of the Court of Appeals is unfair. The Court in *Carpenter* set forth substantial legal background citing over a dozen cases and then explained that for both "historical" and "practical" reasons, <u>mistakes about the validity of a tax are questions of law</u>, not fact. See *Carpenter*, 35 Mich App at 611–612. The *Carpenter* reasoning is particularly helpful in this case because the Court quoted Justice Smith's dissent in *Consumers Power v Muskegon*, 346 Mich 243 (1956), which was adopted as the majority position in *Spoon Shacket v Oakland County*, 356 Mich 151; 97 NW2d 25 (1959), and which was likely the case that prompted the enactment of §53a. Judge Smith's dissent describes the state of the common law when §53a was enacted and *Ford* instructs that the common law should apply. According to

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[4] DPS' mistake should not be attributed to the assessors, because applying the *Ford* mutuality rule, a mistake is not imputed from another to the assessor unless the assessor had a duty to determine the matter. The inference from Ford is that if an assessor relies on a statement of another which the assessor has no duty to review or power to change, the mistake in the information transferred will not be attributed to the assessor. See DPS' Brief on Appeal at p.12.

Justice Smith and the Court in *Carpenter*, void taxes are mistakes of law not fact. Comment A to the *Restatement of Restitution* §45 which was referenced in *Consumers Power,* specifically provides that: "taxes levied without proper authorization" are mistakes of law. 346 Mich at 262. *Carpenter* also cited *Hertzog v City of Detroit*, 378 Mich 1 (1966) for the proposition that voluntary payment of an invalid tax is not a mistake which would make possible a restitutionary action. See *Carpenter,* 35 Mich App at 612.

Next, BOMA's assertion that *Ford* addressed the distinction between factual and legal mistakes so as to repudiate prior precedent is wrong. This Court in *Ford* did not have to consider the factual nature of the mistake. The issue presented in *Ford* was "mutuality." The factual or legal nature of the mistakes was not in question. *Ford* did state that common law rules would apply. Applying the *Consumer's* dissent which was adopted in *Spoon Shacket,* situations like that present in this case and *Upper Peninsula* and *Carpenter* are not mistakes of fact for which restitutionary relief would be granted[5].

- *Eltel Associates LLC v City of Pontiac*, 278 Mich App 588; 752 NW2d 492 (2008), concluded that the city raised a legal issue after-the-fact. Briggs and BOMA both strive mightily to characterize DPS's reliance on Proposal A as "post facto." (BOMA Brief at p.3.) Their efforts fail, however, because the annual Forms L-4029 document that since 1994 DPS' mistake was the legal conclusion that Proposal A authorized the tax at issue.

- BOMA's description of *Bridgewater Interiors v City of Detroit,* COA Docket No. 241136 (Unpublished, 11-25-03) is misleading because it fails to explain that the error in that case was an error in coding an exemption; it had nothing whatever to do with an unauthorized

[5] DPS' Brief on Appeal describes two alternative tests: one based on the case law, by which invalid or unauthorized taxes are mistakes of law; and one that looks to whether the underlying mistaken premise was legal (e.g. misapprehension of legal rights or obligations) or factual. Under either test, the mistake in this case is legal.

tax. Bridgewater's property was in a Renaissance Zone and as such was exempt from certain taxes. The schools had certified the tax rate to be applied to property generally, but the school tax did not apply to Bridgewater's property. It was the assessors' responsibility to code the property to reflect its exempt status. The assessor admittedly made a mistake in coding, which caused the property to be treated as if it were not in a Renaissance Zone. The City assessors did not set "an excessive tax rate" in either *Bridgewater* or in the present case. The tax rate was set by the schools. The City assessors in this case spread the tax exactly as they were required to do, whereas in *Bridgewater*, the assessors made a mistake in carrying out their coding duties.

B. BOMA's Argument Concerning the Assessors' Duty is Incorrect.

DPS cited MCL 380.432 for the proposition that the City "shall" place the tax on the roll as certified by DPS. The language is mandatory. BOMA, like Briggs, fails to cite any section of the GPTA which requires assessors to determine whether tax rates are or are not authorized. Instead, BOMA first substitutes labels such as "shameful" and "outrageous" for authority and it then cites three sections as "examples" of assessors' duties. But BOMA never claims that any of those sections actually imposes a duty on assessors to review the tax rates certified to them before spreading the tax rates on the roll. Examining the proffered sections reveals that no such duty to review exists on the part of the assessors:

- MCL 211.41 provides:

> Before the supervisor or assessing officer delivers the roll to the township treasurer or city collector, he or she shall **carefully foot the several columns of valuation and taxes, and make a detailed statement,** which he or she shall give the clerk of his or her township or city, and the clerk shall immediately charge the amount of taxes to the township treasurer or city collector. . . .

(Emphasis added.) This language does not call for assessors to review or rule on the legality of taxes before they spread them.

- BOMA next cites MCL 211.42, which provides:

> The supervisor shall prepare a tax roll**, with the taxes levied as provided in this act,** and **annex to the roll a warrant signed by him** or her, commanding the township or city treasurer to collect the several sums mentioned in the last column of the roll but the warrant shall not refer to the total or aggregate of the several sums mentioned.... The copy of the roll with the warrant annexed shall be known as "the tax roll."

(Emphasis added.) This statutory language does not call for assessors to rule on the legality of taxes levied by others pursuant to the Act, before they spread them.

- Finally, BOMA cites MCL 21.42(d), which it quotes out of context. BOMA's citation is a mistake. It appears to be referring to MCL 211.42a(2)(d), which provides:

> (2) The state tax commission shall authorize the use of a computerized data base system as the tax roll if the local tax collecting unit or the county treasurer demonstrates that the proposed system has the capacity to enable a local unit to comply and the local unit complies with all of the following requirements:
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> * * *
>
> (d) The local tax collecting treasurer and the assessor shall produce a final computer printed settlement tax roll to certify taxes collected to the county treasurer under section 55. **The assessor shall certify that taxable values, state equalized valuations, adjusted valuations, and the spread of taxes and adjusted taxes are correctly recorded in the settlement tax roll.** The local tax collecting treasurer shall certify delinquent taxes and certify that all tax collections are posted on the settlement tax roll. Those certifications and the settlement tax roll shall be transmitted to the county treasurer. The affidavit attached to the settlement tax roll shall include documentation that authorizes and reports all changes in the precollection tax roll.

(Emphasis added.) This language does not call for assessors to rule on the legality of taxes before they spread them[6]. On the other side of BOMA's argument is the clear statement in MCL 380.432(3) that:

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[6] This section refers to verification of the rates in the "settlement roll," which is the roll after the local treasurer collects the taxes. The assessor, under this section, checks to see that the numbers that were on the tax roll when delivered to the Treasurer have not been changed when the Treasurer has finished collecting the tax.

> 3) The proper officials of the city shall apportion the school taxes in the same manner as the other taxes of the city are apportioned, and the amount apportioned **shall be assessed, levied, collected, and returned for the school district in the same manner as taxes of the city.** The tax levied by the school district, in the discretion of the legislative body of the city, may be stated separately on each tax bill.

(Emphasis added.) Apportionment, in this context, refers only to the spreading of dollar amounts to individuals or to units of government, based on values.[7] Nothing in this or any other provision raised in this case gives the assessors the authority to not spread a tax certified to them.

BOMA (and Briggs) cite to sections that do not create a duty on the part of assessors to review tax rates and seek to have this Court recognize a new duty to review tax rates that is not in the Act. The Legislature knows how to write a review provision; it provided such a provision in MCL 211.37.[8] None of the provisions about the assessors cited by BOMA (or Briggs) express

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[7] Taxes are now no longer apportioned but are stated as millage rates. See MCL 211.37.

[8] MCL 211.37 provides:

> The county board of commissioners...at a session held not later than October 31 in each year, shall also **examine all certificates**, statements, papers, and records submitted to it, showing the money to be raised in the several townships for school, highway, drain, township, and other purposes. **It shall hear and consider all objections made to raising that money by any taxpayer affected. If it appears to the board that any certificate, statement, paper, or record is not properly certified or is in any way defective, or that any proceeding to authorize the raising of the money has not been had or is in any way imperfect, the board shall verify the same, and if the certificate, statement, paper, record, or proceeding can then be corrected, supplied, or had, the board shall authorize and require the defects or omissions of proceedings to be corrected, supplied, or had**...This action and direction shall be entered in full upon the records of the proceedings of the board and shall be final as to the levy and assessment of all the taxes, except if there is a change made in the equalization of any county by the state tax commission upon appeal in the manner provided by law. The direction for spread of taxes shall be expressed in terms of millages to be spread against the taxable values of properties and shall not direct the raising of any specific amount of money.

(Emphasis added.)

a duty on the part of the assessors to review tax rates[9]. The Tax Tribunal recognized that assessors do not review rates and that they are not trained to do so. (MTT Opinion at p. 38.) The Tribunal found that the assessors made no mistake. Whether viewed as the lack of a mistake, mutuality or causation, the lack of any duty on the part of assessors to review tax rates precludes relief under §53a.

BOMA states that even if the assessors must spread the tax rate as certified, the claimed mistake about the tax could still be a mutual mistake of fact. (BOMA Brief at p. 23.) The point BOMA misses is that if the assessors must spread the tax rate as certified, the assessors' mental impressions about the legality of the tax could not "cause" the tax overpayment. Unless the assessors had the duty to review and the authorization to not spread the tax, any mistaken impression that the tax was legal would not have affected what they did; it could not have "caused" the tax overpayment. Cause is an obligatory element of a § 53a claim, one wholly unaddressed by BOMA. Further, mutuality is affected by the lack of duty to review; applying *Ford*, absent such a duty, the mistake of DPS would not be attributed to the assessors.

C. BOMA's Other Arguments

DPS welcomes BOMA's observation that a class action is not and should not be available in this matter, even if it were remanded. (BOMA Brief at p. 5.) Nevertheless, Briggs still claims that class action is appropriate. The amounts at issue are clearly more than Briggs' $3,000 claim, as there are 119 cases in abeyance awaiting the outcome of this case. But the amount at issue, the general economic conditions, and BOMA's concern for the business environment are not

[9] Entities levying summer taxes certify their own taxes to the collector. See MCL 380.1611 which allows school districts to levy a summer tax which the school board then certifies to the City for collection. As a first class school district, DPS levied its tax pursuant to MCL 380.432, and the City is required by MCL 380.432(3) to collect that tax as it collects its own tax. There is no review language in that provision and the City is without authority to reduce the taxes levied by the schools. *Union School District v City of Saginaw*, 232 Mich 639; 206 NW 573 (1925).

relevant to how to construe § 53a. What is relevant is a legal analysis of § 53a, and the definition of "fact", "mutual" and "cause" as used in that provision. DPS is not asking the Court to engage in judicial legislation, as BOMA suggests. (BOMA Brief at p. 26). § 53a applies only if the mistake was factual; the type of mistake at issue has been held to not be "factual" by any cited case-based test. The mistake must also have been mutual between the assessor and the taxpayer, and it must have "caused" the tax overpayment. Unless the assessor could have refused to place the tax on the roll, neither the "but for" test of causation, nor the *Ford* mutuality tests are met.

BOMA argues that if DPS' literal construction of § 53a is adopted, the tax system would be "outrageously burdensome to taxpayers" who would besiege the system with requests for information to protect themselves. (BOMA Brief at p.26.) That, of course, has not happened, and if taxpayers wish to inquire about tax levies, they are free to do so. But such inquiries should be made sooner rather than later. BOMA's policy argument is a back-door plea that this Court judicially legislate a longer period of limitation than the Legislature provided, by stretching the meaning of 'factual mistake' to fit BOMA's claims, because it failed to review and appeal the tax rates before its 30-day period expired.

BOMA also references ill-gotten gains (BOMA Brief at p. 26), but to be clear, no one has claimed that DPS intentionally levied the wrong tax rate. DPS levied the same 18 mill operating rate that most Michigan school districts impose.[10] DPS did so without seeking voter approval because it honestly believed that Proposal A provided the authorization needed. When its error concerning Proposal A was discovered, DPS promptly asked the voters for approval, which they granted. If Briggs or any other taxpayer had brought this matter to the attention of DPS in 2002,

[10] One of the purposes of Proposal A was to make the school tax more uniform. Only school districts levying less than 18 mills at the time of Proposal A can now levy less than 18 mills. Thus, there is generally an 18 mill rate for school operating tax across the state, from which homestead property is exempt, subjecting only business property to the tax.

DPS could have requested approval earlier. The possibility that taxpayers could sit on their claims of this nature, and spring three or more years of such claims on DPS all at one time, is contrary to equitable principles and contrary to the way claims like these have been treated when situations like this have arisen in the past.

III. CONCLUSION

For the reasons stated above and in its Brief on Appeal and Reply Brief, DPS requests that this Court reverse the decision of the Court of Appeals and reinstate the decision of the Tax Tribunal dismissing the petition.

Respectfully submitted,

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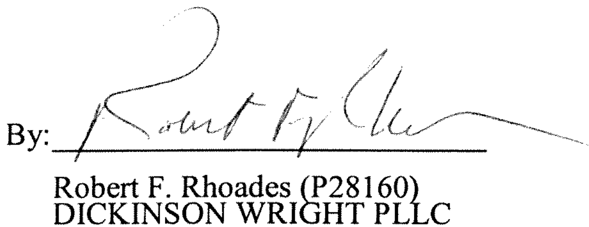

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