STATE OF MICHIGAN
IN THE SUPREME COURT

GENESEE COUNTY DRAIN COMMISSIONER, JEFFERY WRIGHT,

PLAINTIFF/APPELLEE

v.

GENESEE COUNTY

DEFENDANT/APPELLANT

SUPREME COURT CASE NO. 156579

COURT OF APPEALS CASE NO. 331023
GENESEE COUNTY CIRCUIT COURT
CASE NO. 11-97012-CK

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KICKHAM HANLEY PLLC'S AMICUS CURIAE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF JURISDICTION

Amicus Curiae adopts the Appellee's statement of jurisdiction and seeks leave to file this amicus brief pursuant to MCR 7.312 (H).

STATEMENT OF QUESTIONS INVOLVED

1. Is a claim for unjust enrichment, which Michigan law defines as *quasi* contractual, subject to the defense of governmental immunity?

Amicus Curiae Kickham Hanley states: No.

This Court should state No.

2. Is a claim for unjust enrichment, which does not seek "compensatory damages" but seeks a disgorgement and refund of illicitly retained funds subject to the defense of governmental immunity?

Amicus Curiae Kickham Hanley states: No.

This Court should state No.

I. STATEMENT OF FACTUAL BACKGROUND PERTINENT TO AMICUS BRIEF

Amicus Curiae Kickham Hanley PLLC ("KH") relies upon and incorporates Plaintiff-Appellee, Genesee County Drain Commissioner's ("Drain Commissioner") Counter-Statement of Facts as stated in Plaintiff/Appellee's Answer to Defendant/Appellant's Application for Leave to Appeal, filed with this Court on October 30, 2017 ("Response Brief"), at pp. 1-5. The following facts are most pertinent to the Amicus Curiae's brief:

1. The Drain Commissioner, along with Defendant Genesee County (the "County") and another municipal agency, Genesee County Community Mental Health Agency paid insurance premiums to provide insurance coverage to their respective employees. Response Brief at p. 2.
2. The Drain Commissioner discovered that Blue Cross Blue Shield ("BCBS") had issued surplus refunds for overpayments of the health care premiums that the Drain Commissioner paid into the plan. Response Brief at p. 3.
3. BCBS did not refund the overpayments to the Drain Commissioner, but provided the refunds to the County, which resulted in the County receiving all of the refunds for the over-paid premiums, totaling millions of dollars, for a number of years. Response Brief at pp. 4-5.
4. Instead of distributing proportionate shares of the refunds among the three payors of the insurance premiums, the County simply deposited the refunds into its general fund (a fund that the Drain Commissioner does not have access to and does not benefit from) for the County's sole benefit. *Id.*
5. The County refused to reimburse the Drain Commissioner for his pro rata share of the refunds. Response Brief at p. 5.

6. The Drain Commissioner sued to recover the refunds that the County wrongfully refused to reimburse the Drain Commissioner. *Id.*

On May 30, 2018, this Court entered an order inviting briefing from the parties and other "interested persons or groups interested in the determination of the issue presented in this case."

KH submits this amicus brief to present additional authority in support of the Drain Commissioner's argument that the defense of governmental immunity does not apply to his claim for unjust enrichment for the reasons that: (a) unjust enrichment is not a tort; and (b) the Drain Commissioner does not seek "compensatory damages" but asserts an equitable claim for a refund of the insurance premiums that that County has wrongfully refused to return to the Drain Commissioner.

II. DESCRIPTION OF AMICUS CURIAE

Kickham Hanley PLLC is a law firm that devotes a significant portion of its litigation practice to challenging fees and charges imposed by governmental subdivisions under the Headlee Amendment, as well as various statutes, ordinances, and the common law. KH is an interested entity in the determination of the issues presented in this case, including the determination of the applicability of the defense of governmental immunity to an unjust enrichment claim as presented in this case. KH respectfully submits the following amicus curiae brief to address the issue of governmental immunity and offer supplemental authority in support of the Drain Commissioner which has not been fully addressed in other briefs that have been submitted in this matter.

III. GOVERNMENTAL IMMUNITY DOES NOT APPLY TO UNJUST ENRICHMENT CLAIMS.

The Drain Commissioner's unjust enrichment claim does not "sound in tort" merely because there is no express contract between the Drain Commissioner and the County. The County's assertion that the GTLA applies to the Drain Commissioner's unjust enrichment claim must fail for at least two reasons:

First, as discussed in great length in the Drain Commissioner's briefing to this Court,[1] a claim for unjust enrichment is contractual in nature—specifically, it is the "equitable counterpart of a legal breach of contract." *AFT Michigan v. Michigan,* 303 Mich. App. 651, 677; 846 NW2d 583, 599 (2014). Second, the Drain Commissioner is not seeking compensatory damages but seeks a ***refund*** of insurance premiums that: (a) the Drain Commissioner paid to Blue Cross Blue Shield ("BCBS"); which (b) BCBS refunded to the County; and (c) that County has refused to return to the Drain Commissioner.

A. The Standard For Determining Whether A Governmental Actor Is Entitled To Immunity.

In this Court's latest analysis of governmental immunity, *In re Estate of Bradley,* 494 Mich. 367; 835 N.W.2d 545 (2013), the Court held that "tort liability" as used in MCL 691.1407(1) of the GTLA encompasses all legal responsibility for civil wrongs, **other than a breach of contract**, for which a **remedy may be obtained *in the form of compensatory damages***. *In re Estate of Bradley*, 494 Mich. 371 (emphasis added). Under the doctrine of governmental immunity the State and its subdivisions are "immune from **tort liability** in all cases wherein the government agency engaged in the exercise or discharge of a governmental function." *See generally,* **MCL 691.1401 et seq.; *Rowland,*** *v. Washtenaw County Bd. Comm.*, 477 Mich 197, 202-203; 731 NW2d 41 (2007)(emphasis added)**.** *In re Estate of Bradley* further provides:

> Since Michigan became a state in 1837, Michigan jurisprudence has recognized the preexisting common-law concept of sovereign immunity, which immunizes the "sovereign" state from all suits to which the state has not consented, including suits for tortious acts by the state. This common-law concept of sovereign immunity has since been replaced in Michigan by the GTLA and is codified by MCL 691.1407(1), which limits a governmental agency's exposure to tort liability. Specifically, MCL 691.1407(1)…broadly provides that "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." Under the statute, all suits that seek to impose "tort liability" for an agency's discharge of a governmental function are barred by the GTLA, subject to several exceptions that the Legislature has expressly provided for

[1] *See e.g.* Plaintiff/Appellee's Supplemental Brief, filed on August 15, 2018, at pp. 6-8; 14-16.

in the GTLA and in other statutes authorizing suit against governmental agencies. *In re Estate of Bradley,* 494 Mich. at p. 377-378.

In re Estate of Bradley sets forth a two-prong test to determine the applicability of governmental immunity, providing:

> Courts considering whether a claim involves tort liability should **first focus on the nature of the duty that gives rise to the claim. If the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the Governmental Tort Liability Act (GTLA), MCL 691.1401 et seq., is inapplicable**. However, if the wrong is not premised on a breach of a contractual duty, but rather is premised on some other civil wrong, i.e., some other breach of a legal duty, then the GTLA **might** apply to bar the claim**. In that instance, the court must further consider the nature of the liability the claim seeks to impose. If the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable**. [*In re Estate of Bradley, supra,* 494 Mich at p. 389 (emphasis added).]

Thus, in order for governmental immunity to apply here, (1) the Drain Commissioner's claim must **actually sound in tort**; **and** (2) must seek ***compensatory*** damages. Applying the *In re Estate of Bradley* two-part test, governmental immunity is not applicable in this matter and does not bar the Drain Commissioner's unjust enrichment claim for at least two independent reasons.

B. Plaintiff's Unjust Enrichment Claim Is Analogous to An Assumpsit Claim, Both Lie in Quasi-Contract, Both Are Not Tort-Based, and Governmental Immunity Does Not Apply to Either Cause of Action.

In this case, the Drain Commissioner asserts that the County has wrongfully retained millions of dollars in insurance premium refunds that it is not legally entitled to retain. The Drain Commissioner has asserted, under a theory of unjust enrichment, that he is entitled to a refund of the overpaid insurance premiums—he is not seeking compensatory damages.

Unjust enrichment claims are analogous to assumpsit claims as both are quasi-contractual remedies, and there is no meaningful distinction between pleading an unjust enrichment claim and a claim of assumpsit. Compare *Bond v. Public Schools of Ann Arbor*, 383 Mich. 693, 704, 178 N.W.2d 484 (1970) (quoting *City of Detroit v. Martin*, 34 Mich 170, 174 (1876)) ("There is no doubt but that

where the parties do not stand upon equal terms, as . . . where the plaintiff was entitled to a license, and the defendant to grant it, but refused to deliver it except upon **payment of a sum of money he was not entitled to** . . . 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**.") (emphasis added); *Morris Pumps v Centerline Piping, Inc*, 273 Mich. App. 187, 195; 729 N.W.2d 898 (2006). ("the law will imply a contract to prevent unjust enrichment only if the defendant has been **unjustly or inequitably enriched at the plaintiff's expense**") (emphasis added).

Thus, because an unjust enrichment claim is essentially indistinguishable from an assumpsit claim, a discussion of assumpsit jurisprudence is relevant and warranted because applicable case law clearly holds that governmental immunity does not apply to assumpsit claims.

Under the theory of Assumpsit/Money Had and Received, a plaintiff is entitled to recover back as a refund, the amount of an illegal exaction from a governmental entity, who is required to disgorge the illicitly gained funds it has received. *See, e.g.*, *Bond supra,* at p. 704. Michigan courts have long recognized that "an action seeking a refund of fees paid to [a governmental entity] is properly characterized as a claim in assumpsit for money had and received." *See Service Coal Co v Unemployment Compensation Comm*, 333 Mich 526, 530-531; 53 NW2d 362 (1952); *Yellow Freight Sys, Inc v Michigan*, 231 Mich App 194, 203; 585 NW2d 762 (1998), rev'd on other grounds, 464 Mich 21; 627 N.W.2d 236 (2001), rev'd 537 U.S. 36, 123 S. Ct. 371, 154 L. Ed. 2d 377 (2002). Indeed, the holdings of *Service Coal* and *Yellow Freight* were recently affirmed in *Corey v. Wayne County & Cathy M. Garrett*, 2016 Mich. App. LEXIS 513, fn. 7 (2016)(Exhibit 1, hereto)

Like an unjust enrichment claim, a claim in Assumpsit is *ex contractu* in nature and expressly not subject to the defense of governmental immunity. As made clear in *Yellow Freight* v. *Michigan* 231 Mich App 194:

> **Moreover, because a claim for assumpsit/money had and received is *ex contractu* in nature, it is not a tort claim and does not fall under the**

> **protection of the Governmental Tort Liability Act**. *Yellow Freight, supra,* 231 Mich App at 203. Thus, the defense of governmental immunity is wholly inapplicable to Plaintiff's claims.

The Court of Appeals expressly recognized in *Yellow Freight Sys, supra,* that **there is no governmental immunity for assumpsit claims**, basing this holding on this Court's determination in *Service Coal Co v Unemployment Compensation Comm.*:

> **We also reject the state's argument that governmental immunity, MCL 691.1407; MSA 3.996(107), bars plaintiff's action. The wrong alleged by plaintiff does not fall within the definition of a tort. This action to recover fees paid in excess of the amount allowed by federal law is analogous to an action to recover illegal taxes. "The remedy to recover illegal taxes paid is in assumpsit for money had and received."** *Service Coal Co v Unemployment Compensation Comm,* 333 Mich. 526, 531; 53 N.W.2d 362 (1952), quoting *Salisbury v Detroit,* 258 Mich. 235; 241 N.W. 888 (1932). **An action in assumpsit for money had and received is not an action in tort. Therefore, governmental immunity from tort liability under MCL 691.1407; MSA 3.996(107) does not apply**. [*Yellow Freight Sys.,* 231 Mich. App. 203; 585 N.W.2d 766].

Furthermore, the Michigan courts repeatedly have recognized that a plaintiff may assert an ***equitable*** claim to recover unlawful charges paid to a governmental unit. *See, e.g., Mercy Services for the Aging v. City of Rochester Hills*, 2010 Mich. App. Lexis 2044 at *12 (2010)("[W]here funds are unlawfully collected by a governmental entity, the circuit court is empowered to order a refund.") (citing *Romulus City Treasurer v. Wayne County Drain Com'r*, 413 Mich. 728, 746-47; 322 N.W.2d 152 (1982).[2]

Thus, under the first prong of the *In re Estate of Bradley* test, which requires Courts to consider whether the wrong alleged is premised on the breach of a tort duty, the Drain Commissioner's claim for unjust enrichment, like assumpsit claims, is *ex contractu*, not tort, and the

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[2] In many assumpsit and unjust enrichment cases, plaintiffs seek refund of monies that were illegally obtained by the government in the first place. Kickham Hanley recognizes that this case involves funds that were likely obtained legally in the first place, but that distinction is not meaningful. The point is that when the County received the refunds and did not pay the Drain Commissioner his rightful share, the County's continued possession of those funds became unlawful. The Drain Commissioner's suit to recover those unlawfully detained funds properly relies upon the law of unjust enrichment.

GTLA is inapplicable.

C. The Drain Commissioner's Unjust Enrichment Claim Does Not Seek "Compensatory Damages."

Not only is the Drain Commissioner's unjust enrichment claim not a tort claim, but the Drain Commissioner does not seek "monetary damages" as the County misguidedly argues. Thus, the unjust enrichment claim for a refund does not meet the second prong of the *In re Bradley* standard—further demonstrating that the doctrine of governmental immunity does not apply to this case. Here, the Drain Commissioner seeks to have the County disgorge and refund to him his pro rata share of the insurance premiums refunded to the County by BCBS, but paid by the Drain Commissioner and wrongfully retained by the County.

This Court has held that an action seeking disgorgement and refund of wrongfully retained funds is a wholly separate claim for relief than a claim to recover "money damages." *See Hyde Park Coop., supra,* at p. 966 (a "'claim for money damages' such as the one that was rejected in *Lash v. Traverse City*, 479 Mich. 180, 192; 735 NW2d. 628 (2007) **is not identical to an action for a refund of an allegedly unlawful exaction")**(emphasis added). Simply, the Drain Commissioner's unjust enrichment claim is not a "private cause of action" seeking "compensatory damages" to which the GTLA potentially could apply.

In *Hyde Park Coop., supra* (Exhibit 2 hereto) this Court recognized that there is a clear legal distinction between an action at law for money damages – for which a municipality potentially has tort immunity – and an equitable action to obtain a refund of money that a municipality has obtained unlawfully – for which a municipality may be held accountable in equity. In *Hyde Park Cooperative*, the plaintiff challenged a building inspection fee imposed by the City of Detroit on the grounds that it violated the Housing Law of Michigan because the fee exceeded the "actual, reasonable cost of providing the inspection" under MCL 125.526(12). The Court of Appeals' opinion (Exhibit 3) found that there was a factual issue as to whether the fee was reasonable and

remanded the case to the trial court for a trial on that issue. In disposing of the appeal, however, the Court of Appeals added a footnote ["Footnote 5"], which stated in relevant part:

> We note that plaintiffs would not be entitled to money damages. The Housing Law does not expressly authorize a private cause of action against a municipality for money damages. … [*Hyde Park Coop. v. City of Detroit*, 2012 Mich. App. LEXIS 1408 (Mich. Ct. App. July 24, 2012), fn. 5 at **12-13 (Exhibit 3)].

Plaintiffs sought leave to appeal the Court of Appeals' decision to the Michigan Supreme Court. In lieu of granting leave, this Court specifically vacated the Footnote 5 which stated that the plaintiff could not obtain a monetary recovery. In doing so, the Court stated:

> Moreover, we note that a claim for 'money damages' such as the one rejected by this Court in *Lash v Traverse City, 479 Mich 180, 191-197; 735 N.W.2d 628 (2007)*, **is not identical to an action for a refund of an allegedly unlawful exaction**. *See, e.g.*, *Beachlawn Building Corporation v City of St. Clair Shores,* 370 Mich 128; 121 N.W.2d 427 (1963); *Bolt v City of Lansing,* 459 Mich 152; 587 N.W.2d 264 (1998). [*See* Exhibit 2, emphasis added.]

This Court therefore recognized two important principles that destroy the County's immunity argument here: (1) that where a governmental unit illegally retains money, the person who pays the money has a cause of action to recover it back; and (2) the claim to recover the money is an ***equitable action*** to recover an unlawful exaction and not a legal claim for "compensatory damages." In sum, the County enjoys immunity from the Drain Commissioner's unjust enrichment claim ***only*** if it is a tort claim—which it is not— and seeks compensatory damages—which it does not.

In sum, the Drain Commissioner has an indisputable right to seek equitable relief in the form of a refund for the County's improper retention of the insurance premiums. *See Hyde Park Cooperative et. al. v. Detroit et al,* 493 Mich 966; 829 NW2d 195 (2013)*; Mercy Services, supra; Merrelli v. St. Clair Shores,* 355 Mich. 575; 96 NW2d 144 (Mich. 1959); *Checker Cab Co, v. Romulus*, 371 Mich. 232, 237-238; 123 NW2d 772 (Mich. 1963); *Theatre Control Corp.* 370 Mich. 382; 121 NW2d 828 (Mich. 1963); *Beachlawn Building Co. v. City of St. Clair Shores,* 370 Mich 128; 121 NW2d 427 (Mich 1963);

Beachlawn Building Co. v. City of St. Clair Shores 376 Mich 261; 136 N.W.2d 926 (Mich. 1965); *Bond supra,* 383 Mich. 693. For the reasons stated, this right to seek equitable relief in the form of a refund is not barred by the GTLA.

IV. CONCLUSION AND RELIEF REQUESTED

Amicus curiae, Kickham Hanley PLLC requests that this Court consider the authority cited herein when determining whether the Drain Commissioner's unjust enrichment claim is barred by governmental immunity. Amicus curiae, Kickham Hanley PLLC, requests that the Court conclude that the Drain Commissioner's unjust enrichment claim is not barred by governmental immunity and for this reason deny the County's Application for Leave to Appeal and affirm the Court of Appeals opinion and order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2018, I electronically filed the foregoing pleadings with the Clerk of the Court using the court's electronic filing system.

/s/ Kim Plets
Kim Plets

EXHIBIT - 1

Corey v. Wayne County & Cathy M. Garrett

Court of Appeals of Michigan

March 15, 2016, Decided

No. 325465

Reporter
2016 Mich. App. LEXIS 513 *

JAMES ROBERT COREY, Plaintiff-Appellant, v WAYNE COUNTY and CATHY M. GARRETT, Defendants-Appellees.

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. 14-010111-NZ.

Core Terms

refund, summary disposition, collected, immunity, unjust enrichment, circuit court, trial court, defendants', conversion, tort liability, due process, executive authority, plaintiff's claim, collecting fees, filing fee, custody, executive officials, collection of fees, memorandums, mandates, clerk of the court, county clerk, absolute immunity, final judgment, recommendations, procedures

Judges: Before: SAAD, P.J., and SAWYER and HOEKSTRA, JJ.

Opinion

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition and dismissing his complaint. Because the trial court properly granted defendants' motion for summary disposition, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In March 2012, plaintiff's then-wife filed for divorce in Wayne Circuit Court and paid $230 in filing fees. In June 2012, plaintiff filed a motion regarding custody of his minor child in the divorce action, at which time plaintiff paid an $80 "Friend of the Court" fee, collected by the clerk of the court pursuant to the former *MCL 600.2529(1)(d)*(*i*), which provided:

> (1) In the circuit court, the following fees shall be paid to the clerk of the court:
> * * *
> (d) Before entry of a final judgment or order in an action in which the custody, support, or parenting time of minor children is determined or modified, the party submitting the judgment or order shall pay 1 of the following fees:
>
> (*i*) In an action in which the custody or parenting time of minor children is determined, $80.00.[1]

In August **[*2]** of 2014, plaintiff filed a class action lawsuit in Wayne County Circuit Court, alleging claims of common law conversion, fraud, statutory conversion, unjust enrichment, and violations of due process. This lawsuit pertains to the collection of the $80 fee by the clerk of the court, Cathy Garrett and, in particular, the assertion that Garrett illegally collected this fee contrary to *MCL 600.2529(1)(d)*(*i*) and the directives of the Supreme Court Administrative Office (SCAO). Simply stated, plaintiff contends that Garrett could not collect a fee when he filed his motion because his wife paid any filing fees when she initiated the divorce action and the assessment of a duplicative fee was not appropriate given that the relief plaintiff sought in his motion for custody was temporary and would not have resulted in a final disposition. Plaintiff claims that, after collecting the unauthorized $80 fee, Garrett did not refund the fee to him, but transferred the funds to the Wayne County Treasurer, *MCL 600.2529(4)*, and then appropriated the funds pursuant to *MCL 600.2530(2)*. Plaintiff brought

[1] *MCL 600.2529(1)(d)* was amended by Pub Acts 2014, No. 532, effective April 14, 2015.

this action "on behalf of himself and all other individuals who have been illegally charged the $80 fee contrary to MCL 600.2529(1), and who have not received a refund **[*3]** of that particular fee."

To support his claims, plaintiff relied on two memorandums issued by the SCAO, in 2009 and again in 2012, advising circuit courts that the fee prescribed by MCL 600.2529(1)(d)(*i*) applies only to orders and judgments finally disposing of a specific action or motion in the case and do not apply to interim or temporary orders, which are not final dispositions of an action or motion, or to any orders entered while a final determination is pending. In these memorandums, the SCAO recommended the circuit courts establish policies and procedures governing the collection and management of the fees prescribed by MCL 600.2529(1)(d), including, among other things, establishing procedures (1) to assure that the judgment fee is only collected once per final judgment or order and (2) for refunding the fees in cases in which a final judgment or order is not entered.

After plaintiff filed his complaint, defendants brought a motion for summary disposition under MCR 2.116(C)(7) and (C)(8). Defendants argued that they are immune from tort liability under the Governmental Tort Liability Act, (GTLA) MCL 691.1401 et seq., and that plaintiff's non-tort claims could not be maintained. After conducting a hearing, the court granted defendants' motion for summary **[*4]** disposition with respect to all of plaintiff's claims and dismissed the complaint against defendants. Plaintiff appeals as of right.

II. STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision regarding a motion for summary disposition. Nuculovic v Hill, 287 Mich App 58, 61; 783 NW2d 124 (2010). "Questions of law, such as construction of a statute, are also reviewed de novo." *Id.* "When a claim is barred by governmental immunity, summary disposition is appropriate under MCR 2.116(C)(7)." Petipren v Jaskowski, 494 Mich 190, 201; 833 NW2d 247 (2013). Under MCR 2.116(C)(7), the moving party may support its motion with affidavits, depositions, admissions, or other documentary evidence. *Id.* "In reviewing a motion under MCR 2.116(C)(7), we accept the factual contents of the complaint as true unless contradicted by the movant's documentation." *Id.* When the material facts are not in dispute, courts may decide whether a plaintiff's claim is barred by immunity as a matter of law. *Id.*

Defendant also moved for summary disposition under MCR 2.116(C)(8). However, with respect to this motion, the parties both relied on evidence beyond the pleadings in support of their positions in the trial court. See MCR 2.116(G)(5). Because the trial court considered materials outside of the pleadings, the motion is properly considered under MCR 2.116(C)(10). Hughes v Region VII Area Agency on Aging, 277 Mich App 268, 273; 744 NW2d 10 (2007). A motion under MCR 2.116(C)(10) tests the factual sufficiency **[*5]** of a complaint and is properly granted when no material question of fact remains. Beckett-Buffum Agency, Inc v Allied Prop & Cas Ins Co, 311 Mich App 41; 873 NW2d 117 (2015). In analyzing a motion brought under (C)(10), a reviewing court must consider the affidavits, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. Corley v Detroit Bd of Ed, 470 Mich 274, 278; 681 NW2d 342 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v Gen Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. TORT CLAIMS AND GOVERNMENTAL IMMUNITY

Plaintiff's complaint includes three tort claims subject to the GTLA: common law conversion, statutory conversion,[2] and fraud. The trial court concluded that Garrett and Wayne County were entitled to immunity from tort liability under the GTLA. Plaintiff now contests this determination on appeal with respect to Garrett, asserting that Garrett could not claim absolute immunity under MCL 691.1407(5) because her collection and retention of the fee in question fell outside of her authority as the highest ranking executive official of a level of government.[3] We disagree.

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[2] Although the trial court did not dismiss plaintiff's statutory conversion claim on governmental immunity grounds, **[*6]** statutory conversion is a tort, Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc, 497 Mich 337, 361; 871 NW2d 136 (2015), and the GTLA provides immunity from *all* tort liability, Nawrocki, 463 Mich at 158.

[3] Plaintiff confines his appellate arguments to Garrett's entitlement to immunity and he does not challenge the trial court's determination that the GTLA provided Wayne County with immunity from tort liability. Because plaintiff fails to brief this issue on appeal, we consider it abandoned. See Houghton v Keller, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). In any event, the collection and retention of fees incident to

Under the GTLA, "[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." MCL 691.1407(5). This provision provides the identified high-ranking officials with "absolute **[*7]** immunity from tort liability." Petipren, 494 Mich at 204. The purpose of this broad grant of immunity is to ensure that "these officials and, therefore, their governmental agencies, will not be intimidated nor timid in the discharge of their public duties." Grahovac v Munising Twp, 263 Mich App 589, 595; 689 NW2d 498 (2004) (quotation omitted). To qualify for this absolute immunity, the individual governmental employee must (1) be a judge, legislator, or the elective or highest appointive executive official of a level of government and (2) he or she must have acted within the scope of his or her judicial, legislative, or executive authority. Petipren, 494 Mich at 204.

In this case, Garrett is the Wayne County Clerk, an elected executive official of the County. See Const. 1963, art 7, § 4. In this role of high-ranking executive official in county government, "county clerks are absolutely immune if they are acting within their executive authority." Gracey v Wayne Co Clerk, 213 Mich App 412, 416-417; 540 NW2d 710 (1995), abrogated on other grounds by Am Transmissions, Inc v Attorney Gen, 454 Mich 135; 560 NW2d 50 (1997). Therefore, pursuant to MCL 691.1407(5), Garrett is entitled to absolute immunity from tort liability so long as she was acting within the scope of her "executive authority."

As used in MCL 691.1407(5), the phrase "executive authority" refers to "*all* authority vested in the highest executive official by virtue of his or her role in the executive branch." Petipren, 494 Mich at 193-194, 208 (emphasis is original). **[*8]** This includes the performance of acts that might otherwise be performed by a lower-level employee if those actions fall within the authority vested in the official by virtue of his or her role as an executive official. Id. at 194. "The determination whether particular acts are within their [executive] authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government." Id. at 206, quoting American Transmissions, Inc, 454 Mich at 141. Acts expressly or impliedly authorized by constitution, statute, or other law are part of the actor's "executive authority." See Petipren, 494 Mich at 213; Marrocco v Randlett, 431 Mich 700, 708 nn 7 & 8; 433 NW2d 68 (1988).

In Garrett's case, she undoubtedly had the statutory authority, as a result of her election as Wayne County Clerk, to collect case filing fees, including fees related to cases involving custody or parenting time. See former MCL 600.2529. In particular, by virtue of her position as Wayne County Clerk, Garrett became vested with the authority to act as clerk of the circuit court. See Const. 1963, art 6, § 14; MCL 600.571(a). Thus, as directed by the judiciary, Garrett must perform **[*9]** noncustodial ministerial duties related to court administration. See Lapeer Co Clerk v Lapeer Circuit Court, 469 Mich 146, 149-150, 161-164, 170-171; 665 NW2d 452 (2003). It follows that Garrett's authority included the authority to collect case filing fees, including fees related to cases involving custody or parenting time. See former MCL 600.2529. Indeed, MCL 600.2529(1)(d)(*i*) explicitly directs the clerk of the court to collect the $80 filing fee before entry of a final judgment in an action in which the custody or parenting time of minor children is determined or modified. Thus, as prescribed by MCL 600.2529(1)(d)(*i*), Garrett had the authority to collect such fees.

Plaintiff does not dispute Garrett's authority under MCL 600.2529 to collect fees as a general proposition. Rather, plaintiff contends that the manner in which Garrett carried out this function was improper and illegal in light of the SCAO memorandums advising circuit courts on the proper collection and return of fees. In other words, because of Garrett's purported violation of these memoranda, plaintiff argues that Garrett acted outside the scope of her "executive authority" when she collected duplicative filing fees from plaintiff and failed to refund these amounts. This argument is without merit. It is true that the judiciary possesses the authority to prescribe the clerk **[*10]** of the court's ministerial duties. See Lapeer Co Clerk, 469 Mich at 161-164, 171; MCL 600.571(f); MCR 8.110(C)(1) and (3). But, in this case, neither the Supreme Court, nor the Chief Judge of

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court filings plainly constitutes a governmental function, and Wayne County is immune from all tort liability when engaged in a governmental function. See MCL 691.1407(1); MCL 691.1401(a), (b), and (e). None of the statutory exceptions to this broad grant of immunity apply, and the trial court thus properly granted summary disposition to Wayne County on the basis of governmental immunity. See MCL 691.1407(1); Nawrocki, 463 Mich at 158.

Wayne Circuit Court, mandated or ordered Garrett, in her capacity as the clerk of the court, to collect the fees in accordance with the SCAO's interpretation of MCL 600.2529(1)(d) or in the manner set forth in the SCAO memorandums. Although the SCAO provided guidance and recommendations regarding the collection of the fees under MCL 600.2529(1)(d), an advisory memorandum does not constitute a Supreme Court order.[4] Consequently, unlike the statutory provisions empowering Garrett to collect filing fees, the SCAO recommendations and memorandums do not constitute binding authority. See Chelsea Inv Group LLC v Chelsea, 288 Mich App 239, 260; 792 NW2d 781 (2010). The statute does not prohibit the collection of the judgment fee at the time an action or motion is filed; nor does the statute provide a specific refund mechanism. Absent such a directive from the judiciary, Garrett's collection of fees fell within the scope of her authority as set forth in MCL 600.2529 and it was within her discretion how to discharge these duties. She is therefore entitled to the immunity provided by MCL 691.1407(5), and this immunity applies to all of plaintiff's tort claims, including conversion, statutory conversion, and fraud. **[*11]** Thus, summary disposition was properly granted under MCR 2.116(C)(7) with respect to plaintiff's tort claims.

IV. UNJUST ENRICHMENT

Next, plaintiff argues that the trial court erred in granting summary disposition on his claim for unjust enrichment. According to plaintiff, his pleadings set forth a claim of unjust enrichment and, when viewed in a light most favorable to plaintiff, a question of fact remains regarding this issue. We disagree.

Whether a claim for unjust enrichment can be maintained presents a question of law subject to de novo review. Morris Pumps v Centerline Piping, Inc, 273 Mich App 187, 193; 729 NW2d 898 (2006). "Unjust enrichment is defined as the unjust retention of 'money or benefits which in justice and equity belongs to another.'" Tkachik v Mandeville, 487 Mich 38, 47-48; 790 NW2d 260 (2010) (quotation omitted). A claim alleging unjust enrichment **[*12]** requires a plaintiff to 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." Morris Pumps, 273 Mich App at 195. "[T]he law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id.*

Plaintiff's claim alleging unjust enrichment arises from Wayne County Clerk Garrett's collection of the $80 fee under MCL 600.2529(1)(d)(*i*), which he alleges defendants improperly retained and converted for the County's use and benefit. However, under the statutory scheme, MCL 600.2529(4) mandates that each fee collected under MCL 600.2529(1)(d)(*i*) "shall be paid to the county treasurer and deposited by the county treasurer as provided under section 2530 to be used to fund services." MCL 600.2530(1), in turn, mandates that the county treasurer "shall deposit *all* fees collected under MCL 600.2529(1)(d)" in an interest-bearing account known as the "Friend of the Court fund." MCL 600.2530(2) mandates that the county board of commissioners must appropriate *all* sums in the Friend of the Court fund for the purposes of fulfilling the statutory obligations of the Friend of the Court as provided in the Friend of the Court Act, MCL 552.501 et seq. In short, **[*13]** under the statutory scheme, defendants Wayne County and/or Garrett could not retain any of the fees collected under MCL 600.2529(1)(d)(*i*) for their own benefit; rather, the fees collected must be used to fund the Friend of the Court, an arm of the circuit court. MCL 600.2529(4); MCL 600.2530(1) & (2). See also MCL 552.503; Morrison v Richerson, 198 Mich App 202, 212; 497 NW2d 506 (1992). Without evidence that defendants failed to treat funds in this manner, this mandatory statutory scheme establishes that defendants did not receive a benefit from the fees collected or retained, and it follows that defendants could not have been unjustly enriched by collecting the fees pursuant to MCL 600.2529(1)(d)(*i*).

In response to defendants' motion for summary disposition, plaintiff did not set forth any specific facts or present any evidence to dispute that Garrett acted according to the statutory mandates or otherwise to establish that she benefited from the fees collected. To the contrary, the only evidence on this point is the sworn affidavit of the supervisor of accounting of the Wayne County Clerk's office, who processes the filing fees collected under MCL 600.2529(1). The supervisor

[4] The role of the SCAO is to "supervise and examine the administrative methods and systems employed in the offices of the courts, including the offices of the clerks and other officers, and make recommendations to the Supreme Court for the improvement of the administration of the courts." MCR 8.103(1). Thus, the SCAO memorandums, which were advisory in nature, did not have the effect of an order of the Supreme Court that the chief judge and the clerk of the court must comply with. See MCR 8.110(C)(3); Lapeer Co Clerk, 469 Mich at 162-164.

indicated that the fees collected are transmitted to the circuit court in accordance with the statutory mandates of MCL 600.2529(4) and MCL 600.2530 and are not retained by the County Clerk. **[*14]** Rather than present documentary evidence to the contrary, plaintiff's argument in response to this evidence rests on the unsupported allegation that the benefit to defendants is "obvious." However, in response to a motion for summary disposition, plaintiff's mere allegations of this nature are insufficient to defeat a motion for summary disposition. See Quinto v Cross & Peters Co, 451 Mich 358, 362; 547 NW2d 314 (1996). Given the statutory scheme and the complete dearth of evidence supporting plaintiff's position, plaintiff has not shown the existence of a material question of fact with respect to defendants' receipt of a benefit from these funds.[5] Viewing the evidence in the light most favorable to plaintiff, there is no factual dispute and defendants are entitled to summary disposition under MCR 2.116(C)(10).

V. DUE PROCESS VIOLATIONS

Finally, plaintiff argues that the trial court erred by granting summary disposition to defendants with respect to plaintiff's claims of due process violations. Specifically, plaintiff claims that MCL 600.2529 creates a substantive due process **[*16]** right to the return of fees and that defendants failed to establish a meaningful mechanism for refund of the fees in question thereby violating plaintiff's procedural due process rights. We disagree.

With regard to plaintiff's substantive due process argument, "[t]he underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power.'" Cummins v Robinson Twp, 283 Mich App 677, 700; 770 NW2d 421 (2009) (citation omitted). "In the context of individual government actions or actors . . . to establish a substantive due process violation, the governmental conduct must be so arbitrary and capricious as to shock the conscience." Id. at 701 (quotation and citation omitted). "The Due Process Clause is not a guarantee against incorrect or ill-advised [governmental] decisions." Mettler Walloon, LLC v Melrose Twp, 281 Mich App 184, 206; 761 NW2d 293 (2008) (citation omitted). Rather, under this standard, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." Id. at 197.

In the present case, even if incorrect or ill-advised, Garrett's collection of the fees and defendants' failure to devise a specific process for refunds does not rise to the level of arbitrary and capricious conduct as to shock the conscience. MCL 600.2529(1)(d)(*i*) authorizes the collection of fees in custody matters, meaning that **[*17]** there was some basis for Garrett's collection of the fees in question. Although the SCAO recommended the imposition of procedures for refunding the fee under certain circumstances, MCL 600.2529(1)(d)(*i*) provides no specific refund procedures or mechanisms. Moreover, the undisputed evidence shows that defendants provided a refund of the fees in question to any litigant who requested such a refund.[6] Even if imperfect, the collection of fees and the payment of refunds upon request does not rise to the level of arbitrary and capricious conduct giving rise to a substantive due process claim.

With regard to plaintiff's claim of procedural due process, "[t]he United States and Michigan Constitutions preclude the government from depriving a person of life, liberty, or property without due process of law." Hinky

[5] On appeal, plaintiff contends that the trial court's summary dismissal of his claim, without allowing plaintiff additional discovery to remedy the prejudice caused by the late filing of defendants' affidavits, constitutes reversible error. Plaintiff failed to properly present this issue for our review because he did not separately identify it as a question presented, meaning that the issue need not be considered. See MCR 7.212(C)(5); Michigan's Adventure, Inc v Dalton Twp, 290 Mich App 328, 337 n 3; 802 NW2d 353 (2010). Additionally, plaintiff does not cite **[*15]** any law to support his position, and this failure to properly brief the claim of error constitutes abandonment of the issue. Houghton, 256 Mich App at 339-340. In any event, we find no abuse of discretion in the court's consideration of the late-filed affidavits given that the affidavits assisted in the determination of the motion and were not unfairly prejudicial to plaintiff, particularly in light of the statutes mandating the transmittal of the collected fees. See Prussing v Gen Motors Corp, 403 Mich 366, 370; 269 NW2d 181 (1978). Moreover, contrary to plaintiff's argument, he could not have been unduly surprised by the affidavits because defendants submitted a similar affidavit from the former supervisor of accounting in other recent litigation between the parties. Ultimately, while plaintiff claims additional discovery was warranted, we see no basis for concluding that further discovery would have benefited plaintiff's position. See Village of Dimondale v Grable, 240 Mich App 553, 566; 618 NW2d 23 (2000). The trial court did not err by granting summary disposition without allowing further discovery.

[6] Defendants' undisputed evidence indicated that refunds of the $80 judgment fee have been issued when requested and there has been no litigant who has sought a refund of their final judgment fee that has been denied.

Dinky Supermarket, Inc v Dep't of Community Health, 261 Mich App 604, 605-606; 683 NW2d 759 (2004), citing *US Const, Amend XIV*; *Const 1963, art 1, § 17*. "Procedural due process serves as a limitation on governmental action and requires a government to institute safeguards in proceedings that might result in a deprivation of life, liberty, **[*18]** or property." *Mettler Walloon, LLC, 281 Mich App at 213*. "'A procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient.'" *Hinky Dinky, 261 Mich App at 606* (citation omitted). Generally, due process requires notice and a meaningful opportunity to be heard before an impartial decision-maker. *Id.* In certain circumstances, a meaningful postdeprivation remedy may satisfy due process. See, e.g., *DaimlerChrysler Corp v Mich Dep't of Treasury, 268 Mich App 528, 540; 708 NW2d 461 (2005)*; *Am States Ins Co v State Dep't of Treasury, 220 Mich App 586, 590; 560 NW2d 644 (1996)*.

The actual owner of money has a property interest protected by due process. See *Dow v State, 396 Mich 192, 204; 240 NW2d 450 (1976)*. Thus, in this case, plaintiff has an interest in his $80. In particular, given the plain language of *MCL 600.2529* and the SCAO memoranda, plaintiff arguably had a legitimate claim of entitlement to the return of this $80. Nevertheless, we conclude that plaintiff cannot maintain his claim that defendants' conduct denied him the right to procedural due process. Defendants' failure to establish a mechanism for an automatic refund did not interfere with, or deprive plaintiff of, his right to a refund of the fees or a meaningful opportunity to be heard on the issue because plaintiff could have sought a refund of the allegedly **[*19]** erroneously charged fee. Because there was an adequate remedy available, the trial court properly dismissed plaintiff's due process claim.[7]

Affirmed. **[*20]**

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Joel P. Hoekstra

End of Document

[7] Our opinion today addresses the claims raised by plaintiff in his complaint in the trial court, i.e., conversion, fraud, statutory conversion, unjust enrichment, and due process. However, we note that a claim to recover fees paid to the state in excess of the amount allowed under applicable law is properly filed as an action in assumpsit for money had and received. *Yellow Freight Sys Inc v State of Mich, 231 Mich App 194, 203; 585 NW2d 762 (1998)*, rev'd on other grounds *Yellow Freight Sys, Inc v State, 464 Mich 21; 627 NW2d 236 (2001)*, rev'd *537 U.S. 36 (2002)*. See also *Serv Coal Co v Mich Unemployment Comp Comm, 333 Mich 526, 531; 53 NW2d 362 (1952)*. Thus, when there has been an illegal or excessive collection of fees, it may be possible to maintain a class "action of assumpsit to recover back the amount of the illegal exaction." *Bond v Pub Sch of Ann Arbor Sch Dist, 383 Mich 693, 704; 178 NW2d 484 (1970)*. But, plaintiff did not frame his complaint in this way, and "as a court of review that is principally charged with the duty of correcting errors," we think it inappropriate to rewrite plaintiff's complaint or address unpreserved claims. See *Burns v Detroit (On Remand), 253 Mich App 608, 615; 660 NW2d 85 (2002)*. Consequently, we confine our review to the claims pleaded in plaintiff's complaint, and we offer no opinion on the legality of the fees collected or whether plaintiff should receive a refund of those amounts under *MCL 600.2529*.

EXHIBIT - 2

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, Defendants-Appellees.

SC: 146116

SUPREME COURT OF MICHIGAN

493 Mich. 966*; *829 N.W.2d 195*; *2013 Mich. LEXIS 518

April 26, 2013, Decided

PRIOR HISTORY: [**1]

COA: 303143. Wayne CC: 10-005687-CZ.

Hyde Park Coop. v. City of Detroit, 2012 Mich. App. LEXIS 1408 (Mich. Ct. App., July 24, 2012)

JUDGES: Robert P. Young, Jr., Chief Justice. Michael F. Cavanagh, Stephen J. Markman, Mary Beth Kelly, Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Justices.

OPINION

[*196] **Order**

On order of the Court, the application for leave to appeal the July 24, 2012 judgment of the Court of Appeals is considered and, pursuant to *MCR 7.302(H)(1)*, in lieu of granting leave to appeal, we VACATE footnote 5 of the Court of Appeals judgment because the issue was not properly before the Court of Appeals nor necessary to its decision. Moreover, we note that a claim for "money damages" such as the one rejected by this Court in *Lash v Traverse City, 479 Mich 180, 191-197; 735 N.W.2d 628 (2007)*, is not identical to an action for a refund of an allegedly unlawful exaction. See, e.g., *Beachlawn Building Corporation v City of St. Clair Shores, 370 Mich 128; 121 N.W.2d 427 (1963)*; *Bolt v City of Lansing, 459 Mich 152; 587 N.W.2d 264 (1998)*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

EXHIBIT - 3

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.

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 fee, reasonable cost, buildings, ordinance, summary disposition, regulation, municipal, minimum requirements, requirements, dwellings, engineering department, indirect cost, multi-family, plaintiffs', 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

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

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 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

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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).

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

[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)*.