IN THE MICHIGAN SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

Genesee County Drain Commissioner, Jeffrey Wright Plaintiff-Appellee v Genesee County Defendant-Appellant	Michigan SC No. Michigan COA No. 331023 Genesee County Circuit Court No. 11-97012-CK

PLAINTIFF/APPELLEE'S ANSWER TO DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT

Submitted by:

HENNEKE, FRAIM & DAWES, P.C.
By: Scott R. Fraim (P35669)
By: Brandon S. Fraim (P76350)
Attorneys for Plaintiff/Appellee
2377 S. Linden Rd., Ste. B
Flint, MI 48532
(810) 733-2050
sfraim@hfdlawfirm.com
bfraim@hfdlawfirm.com

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COUNTER-STATEMENT IDENTIFYING ORDER APPEALED FROM AND DATE OF ENTRY

Plaintiff/Appellee concurs with Defendant/Appellee's Statement Identifying Order Appealed From and Date of Entry to the extent that it correctly identifies the Michigan Court of Appeals' opinion at issue in this matter and that this Court may, in its discretion, review said opinion pursuant to MCR 7.303(B)(1). However, as set forth more fully in its Answer, Plaintiff/Appellee denies that there are grounds under MCR 7.305(B) for this Court to review said Michigan Court of Appeals' opinion.

COUNTER-STATEMENT OF QUESTION PRESENTED

1. The Michigan Court of Appeals, relying on previous published Michigan law including *In re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013), determined that Plaintiff's unjust enrichment claim is premised on a breach of an implied contractual duty and that it sounds in contract rather than tort liability, as defined under the Michigan Governmental Tort Liability Act. Thus, Plaintiff's unjust enrichment claim is not barred by government immunity. Should this Court grant leave to appeal the Michigan Court of Appeals decision that Plaintiff's claim for unjust enrichment is not barred by the Michigan Governmental Tort Liability Act?

Plaintiff/Appellee states:	No.
Genesee County Circuit Court states:	No.
Michigan Court of Appeals states:	No.
Defendant/Appellant states:	Yes.

COUNTER-STATEMENT OF FACTS

1. Introduction

This case involves Plaintiff/Appellee Genesee County Drain Commissioner Jeffrey Wright ("Plaintiff") seeking recovery of health insurance premium refunds belonging to Plaintiff but retained by Defendant/Appellant Genesee County ("Defendant") under the parties' group health insurance plan. Plaintiff brought a breach of contract claim and unjust enrichment claim against Defendant. Defendant moved for partial summary disposition under MCR 2.116(C)(7) and (C)(8), requesting that the trial court determine that Plaintiff's unjust enrichment claim was barred by government immunity or that Plaintiff failed to state a claim for unjust enrichment. The trial court denied Defendant's motion and Defendant appealed. In a published opinion, the Michigan Court of Appeals (the "COA") agreed with and affirmed the trial court's denial of Defendant's motion for partial summary disposition, holding that Plaintiff's claim for unjust enrichment was not barred by government immunity. Defendant now seeks leave to appeal the Michigan Court of Appeals decision to this Court.

It should be noted that the case caption provided by Defendant is incorrect. The only remaining parties in this lawsuit are Genesee County Drain Commissioner, Jeffrey Wright, as Plaintiff, and Genesee County, as Defendant. The remaining parties named by Defendant were previously dismissed.

2. Counter-Statement of Facts

Defendant neglected to provide a full summary of the facts of this matter, which are set forth in Plaintiff's Second Amended Complaint (the "Complaint").[1] Defendant brought

[1] As Defendant argues, the gravamen, or the entirety, of Plaintiff's Complaint should be examined.

its Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(7) and (8), meaning all factual allegations made by Plaintiff under its Complaint are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from those facts, and are construed in favor of Plaintiff. *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211, 224 (2010); *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882, 884 (1995). In order to provide this Court with a more complete view of the facts, allegations, and events surrounding this lawsuit, Plaintiff provides the following counter-statement of facts.

Plaintiff, Defendant, and Genesee County Community Mental Health Agency ("Mental Health") entered into an agreement to purchase a group health care plan (the "Group Plan") through Blue Cross Blue Shield of Michigan ("BCBS"), for the benefit of their respective employees. *Second Amended Complaint, attached as* ***Exhibit A****,* ¶ *7.* BCBS labeled the Group Plan as the "Genesee County" plan. The Group Plan provided health care benefits for Plaintiff's, Defendant's, and Mental Health's respective employees. *Id.* ¶¶ *7-11.* The purpose of the Group Plan was to create a large pool of participating employees in order to lower the overall premium expenses for Plaintiff, Defendant and Mental Health and to increase the efficiency of the administration of the Group Plan. *Id.,* ¶¶ *7-8.*

Plaintiff, Defendant, and Mental Health each paid into the Group Plan the premiums required to provide health insurance coverage for their respective employees. *Id.,* ¶¶ *12-16, 37.* BCBS would determine the monthly and/or annual premium rate to be paid by each participant of the Group Plan. Plaintiff, Defendant, and Mental Health would then each pay their separate premiums for their own employees. *Id.,* ¶¶ *12-16, 37-38.* Each member of the group had its own obligation to pay premiums assessed for their employees

that participated in the Group Plan. *Id.* Defendant acted as the Group Plan administrator. *Id., ¶¶ 18-19.*

The Group Plan was administered as an "Experience Rated Service Contract". At the end of each policy period, BCBS would perform an audit of the Group Plan. *Id., ¶¶ 17, 19-20, 23-24.* If the premiums paid into the plan in a particular year were insufficient to cover claims and administrative expenses, BCBS would recover the deficit by adding the deficit to the premiums each of the three participants would be required to pay the next plan year. If the premiums paid into the plan in a particular year exceeded the amount of claims paid and administrative expenses, a portion of this surplus was to be returned to the group as a refund. *Id., ¶¶ 20, 38.* Thus, the participants of the plan would either share in any surplus left over, or be responsible to cure any deficit. *Id., ¶¶ 17, 19-20, 23-24.* Under this type of Group Plan, the refund of the surplus is made available by BCBS by either a refund check paid to the Group Plan or by issuing a credit against premiums that would be due for the following plan year. *Id., ¶¶ 20-22.*

During an internal audit of its employee health care benefits under the Group Plan, Plaintiff discovered that BCBS had been issuing surplus refunds to the Group Plan participants and sending them to Defendant. *Id., ¶¶ 20-23.* The participants of the Group Plan, including Plaintiff, had been overpaying premiums, which created a surplus in the Group Plan for at least years 2001 through 2008. *Id., ¶ 20.* This entitled the Group Plan to receive either a refund check or a credit against premiums due for the following plan year. *Id., ¶¶ 20-21, 29.* These refunds or credits belonged jointly to the participants of the Group Plan as it was the over-payment of premiums to the Group Plan from each of the three participants that created the surplus. *Id., ¶¶ 30-31, 38, 43-46.*

Unbeknownst to Plaintiff, Defendant directed BCBS to issue refunds of the surplus from the Group Plan for at least the plan years ending in 2005 through 2007. *Id., ¶¶ 21-22, 25-29.* At Defendant's direction, BCBS issued refund checks for these years and sent the checks to Defendant. *Id.* Defendant never notified Plaintiff, nor was Plaintiff aware, of the existence of the refunds or Defendant's receipt of the refund checks. *Id.*

The refund checks amounted to millions of dollars. BCBS confirmed that the refund checks were made payable to the group as a whole, which was coincidently named "Genesee County". Instead of distributing the proportionate shares of the refund checks to the Group Plan participants, including Plaintiff, Defendant, again without notifying Plaintiff, deposited each refund check into its general fund and used the refunds for its own benefit. *Id., ¶¶ 22, 25-27, 30-32, 43-46.* Plaintiff does not have access to Defendant's general fund, Plaintiff does not financially benefit from Defendant's general fund, and Defendant does not provide any funding for payment of Plaintiff's employee wages or payment of their health care insurance. *Id., ¶¶ 32, 47.*

In addition, for plan year ending in 2008, which was the last year Plaintiff participated in the Group Plan, there remained a surplus in the plan. *Id., at ¶ 33.* Defendant, again without Plaintiff's knowledge, directed BCBS to issue the refund but this time as a credit to the health care plan that Defendant was continuing with BCBS without Plaintiff. *Id.* This likewise resulted in Defendant receiving and retaining the entire refund amount without providing Plaintiff with its share of the refund for the previous plan year. *Id.* For plan years ending in 2005 through 2008, Defendant received and solely retained a total of at least $4,677,767.00 in refunds under the Group Plan, while Plaintiff has received

nothing. *Id.,* ¶ *25.* A large portion of the refunds was created through the overpayment of premiums by Plaintiff. *Id.,* ¶¶ *20, 30-31.*

Despite knowing about these Group Plan surplus refunds, Defendant admittedly failed to notify, inform, or discuss with Plaintiff the existence of the refunds or the fact that Defendant was depositing the cash refunds into its own account. *Id.,* ¶ *21, 28.* As a result of Defendant's retention of Plaintiff's portion of the surplus refund, Plaintiff was deprived of the use and benefit of the money belonging to it and Defendant caused Plaintiff to pay higher annual premiums than if the refund had been used as a rate credit. *Id.,* ¶ *24.* Furthermore, by Defendant intentionally withholding and depositing Plaintiff's portion of the refund into Defendant's general fund for Defendant's sole use, Defendant benefitted from funds belonging to Plaintiff. *Id., at* ¶ *27, 45.* Both Plaintiff and Defendant hired consultants to determine the portion of the refunds belonging to Plaintiff, and Plaintiff's consultant calculated that the portion belonging to Plaintiff exceeded $2.8 million. When Plaintiff requested that Defendant reimburse Plaintiff for its portion of the refunds, Defendant refused. *Id.,* ¶ *34.*

3. Procedural Background of Case

Plaintiff initially brought a breach of contract claim and intentional tort claims against Defendant to recover its share of the surplus refunds. Defendant denied the existence of a contract and immediately moved to dismiss the intentional tort claims, arguing that the Michigan Governmental Tort Liability Act (the "GTLA") barred Plaintiff from bringing such claims. The trial court ruled that the GTLA did not bar Plaintiff's intentional tort claims, but on appeal the Court of Appeals ruled that Plaintiff's intentional

tort claims were barred by the GTLA because the administration of health insurance benefits to public employees is a governmental function.

Subsequently, after Defendant denied the existence of an express contract between the parties, Plaintiff moved to amend its First Amended Complaint[2] to add an alternative claim of unjust enrichment, and the trial court, over Defendant's objection, granted Plaintiff leave to file its Second Amended Complaint. Defendant did not appeal the trial court's decision to allow the filing of the Second Amended Complaint. Contrary to Defendant's claims, Plaintiff did not move to amend its complaint simply to reallege tort claims; rather, it was after Plaintiff filed its complaint that Defendant denied the existence of a written contract between the parties regarding the Group Plan. Accordingly, Plaintiff sought to amend its complaint to add unjust enrichment as an alternative claim to its breach of contract claim due to Defendant's denial of the existence of a written contract. After Plaintiff's amendment, there are only two claims against Defendant being asserted – breach of contract and unjust enrichment. **Exhibit A.** If an express contract is found to exist, Plaintiff contends Defendant breached the contract by failing to return Plaintiff's portion of the Group Plan refunds, and if an express contract is found not to exist, then Plaintiff is seeking restitution from Defendant for its share of the refunds based on unjust enrichment implying a contract between the parties. These claims are pled in the alternative to each other.[3]

[2] After first filing the lawsuit against Defendant, Plaintiff immediately amended its original complaint simply to add additional parties to the lawsuit. No claims or allegations were added to the First Amended Complaint and the First Amended Complaint was filed in the infancy of the lawsuit prior to the parties litigating the issues.

[3] *See* MCR 2.111(A)(2); *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 199; 729 NW2d 898 (2006).

Shortly thereafter, and well before discovery has been completed in the case, Defendant again filed a Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(7) and (8) seeking dismissal of Plaintiff's unjust enrichment claim. *Defendant's Motion for Partial Summary Disposition, attached as* ***Exhibit B.***

In its Motion for Partial Summary Disposition, Defendant presented two arguments. First, Defendant argued that "unjust enrichment is a claim for tort liability" under MCL 691.1407(1) and that the theory of unjust enrichment seeks compensation for "a noncontractual civil wrong." *Id.* Thus, Defendant argued, Defendant was immune from Plaintiff's claim for unjust enrichment under the GTLA. Second, despite bringing its second argument under MCR 2.116(C)(8), which only tests the legal sufficiency of a claim by the pleadings, Defendant argued that Plaintiff failed to establish its unjust enrichment claim because "it is not supported by the facts" and that "Defendant did not receive a benefit from Plaintiff." *Id., p 9.* Additionally, Defendant argued that Plaintiff was not entitled to any refunds for overpayment of premiums because Plaintiff obtained the "benefit of the bargain" when it received health care insurance in exchange for the premiums it paid, despite overpaying the premiums which Defendant retained as a refund. *Id., p 9-10.*

Plaintiff responded by arguing that the GTLA does not preclude Plaintiff's unjust enrichment claim because such a claim is the equitable counterpart to a breach of contract claim which implies a contractual duty or obligation on a party in order to prevent inequity, and therefore does not assert "tort liability" under MCL 691.1407(1). *Plaintiff's Response to Defendant's Motion for Partial Summary Disposition, attached as* ***Exhibit C.*** Plaintiff, referencing and quoting the Complaint, further responded that it had sufficiently stated a claim for

unjust enrichment and that Defendant did receive a benefit from Plaintiff when Defendant withheld and used money belonging to Plaintiff. *Id., p 10-11.*

The trial court denied Defendant's Motion for Partial Summary Disposition and ruled that "in an unjust enrichment claim the law implies a contract to prevent inequity" and that "government tort liability act does not apply on the unjust enrichment claim". *Transcript of December 14, 2015 Hearing, attached as* ***Exhibit D****, p 17.* Defendant then appealed the trial court's decision.

On appeal to the COA, Defendant made two assertions: (1) that the trial court erred in not barring Plaintiff's unjust enrichment claim under the GTLA and (2) that Plaintiff failed to state a valid claim for unjust enrichment because Plaintiff also pled a breach of contract claim and Defendant did not receive the benefit of the refunds directly from Plaintiff. *Defendant's Appellant Brief to COA, attached as* ***Exhibit E.*** Plaintiff again responded by showing that, among other things, its unjust enrichment claim is the equitable counterpart of a legal claim for breach of contract, and that such a claim implies a contractual duty or obligation on Defendant in order to prevent inequity. *Plaintiff's Appellee Brief to COA, attached as* ***Exhibit F.*** Since Plaintiff's unjust enrichment claim implies a contractual obligation to make restitution for the refunds received by Defendant that belonged to Plaintiff to ensure justice is obtained, Plaintiff argued that its claim for unjust enrichment is, by its very nature, contractual and does not fall within the definition of "tort liability" under the GTLA. *Id.* Plaintiff further responded by showing that Michigan caselaw and court rules clearly allow it to plead inconsistent or alternative claims, including both a breach of contract claim and an unjust enrichment claim, as alternate claims. *Id.* Plaintiff also showed that (1) Plaintiff properly pleaded, and Defendant did receive, the

benefit of the refunds directly from Plaintiff and (2) the purported authority relied on by Defendant is a nonbinding unpublished opinion that contradicts other published caselaw. Plaintiff again referenced and quoted numerous allegations within its Complaint to support its arguments.

After reviewing the extensive briefs filed by the parties, as well as the pleadings provided to the COA, and hearing oral argument, the COA issued a published opinion affirming the trial court's decision. *Court of Appeals Opinion, attached as* ***Exhibit G***. In its published opinion, the COA, relying on Michigan caselaw including this Court's decision in *In re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013), unanimously made the following relevant findings, determinations, and rulings:

> "We are asked in this appeal to determine whether a claim based upon a theory of unjust enrichment is barred by the doctrine of governmental immunity. We conclude that it is not."
>
> "This is the second time that this case is before us. See *Genesee Co Drain Comm'r v Genesee Co,* 309 Mich App 317; 869 NW2d 635 (2015). That opinion fully sets out the relevant facts of this case. Briefly, plaintiff Wright is the Genesee County Drain Commissioner and, along with the other plaintiffs, participated in a county health plan through Blue Cross and Blue Shield. Premiums were paid both by the county and the participants. Those premiums were set annually and were based upon an estimate of the amount that the claims would be for the upcoming year along with the administrative costs of the plan. Unbeknownst to plaintiffs, at the end of each year, Blue Cross would refund to the county the amount by which the premiums exceeded the amount necessary to pay the claims and costs. The instant suit was instituted to recover the portion of the refunds that represented the participants' share of the premiums paid."
>
> "Defendant again moved for partial summary disposition, arguing that governmental immunity barred the unjust enrichment claim and that plaintiffs' failed to state a claim for unjust enrichment. The trial court concluded that governmental immunity did not bar the unjust enrichment claim. The trial court allowed the matter to continue, though without explicitly ruling on whether plaintiffs properly stated a claim for unjust enrichment."

> "We review de novo both the grant of summary disposition under MCR 2.116(C)(7) and questions of statutory interpretation. *In re Bradley Estate*, 494 Mich 367, 376-377; 835 NW2d 367 (2013). And we look first to *Bradley* for assistance in answering the question whether a claim based upon unjust enrichment constitutes one for "tort liability" that comes under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. *Bradley* does not directly answer this question as it involved a claim based upon civil contempt rather than unjust enrichment. But it does provide guidance in determining whether a particular claim falls under the GTLA."
>
> "We conclude that a claim under the equitable doctrine of unjust enrichment ultimately involves contract liability, not tort liability. It merely involves a situation in which the contract is an implied one imposed by the court in the interests of equity rather than an express contract entered into by the parties. Accordingly, the claim is not barred by the GTLA."
>
> "Defendant also argues that plaintiffs have failed to state a claim under unjust enrichment. It does not appear that the trial court addressed this issue. Accordingly, we decline to do so on appeal. Defendant is, however, free on remand to renew its motion for summary disposition under MCR 2.116(C)(8) based upon a failure to state a claim for unjust enrichment so that the trial court may address it in the first instance."
>
> Defendant then filed its current Application for Leave to Appeal to this Court.

Defendant has only appealed the COA's decision regarding whether Plaintiff's unjust enrichment claim is barred by government immunity. Defendant does not appeal the COA's decision regarding Defendant's arguments that Plaintiff failed to state a claim of unjust enrichment. However, as shown, Defendant has failed to establish justifiable grounds for this Court to review the COA's valid published opinion in this matter pursuant to MCR 7.305(B). Moreover, even if this Court deems the requirements of MCR 7.305(B) to be satisfied and takes this matter on appeal, the trial court and COA were still correct in determining that Plaintiff's unjust enrichment claim is not barred by the GTLA.

LAW & ARGUMENT

1. Defendant has failed to satisfy its burden in establishing justifiable grounds for this Court to review the COA's valid published opinion in this matter pursuant to MCR 7.305(B).

Defendant fails to specify the grounds under MCR 7.305(B) in which it claims the COA published opinion is properly reviewed by this Court. It appears that Defendant bases its Application for Leave to Appeal to this Court on the assertion that the COA's published opinion directly conflicts with *In re Bradley*, supra, and, perhaps more importantly according to Defendant, the recent unpublished case *Shears v Bingaman*, unpublished opinion per curiam of the Court of Appeals, Docket No 329976 (August 24, 2017). However, the COA's published opinion does not conflict with either *In re Bradley* or *Shears*, and in fact directly quotes and uses *In re Bradley* to support its decision. Thus, Defendant has not shown that there exists, nor does there exist, justifiable grounds under MCR 7.305(B) for this Court to take this matter on appeal.

a. The Court of Appeals' published decision in this matter does not conflict with *In re Bradley* and *Shears*, and Defendant is misplaced in attempting to use such opinions as grounds for this Court to review this matter.

Although *In re Bradley*, supra, is factually distinguishable to the case at hand, as noted by the COA, the COA still used this Court's decision in *In re Bradley* to support its determination that Plaintiff's claim for unjust enrichment does not sound in "tort liability", but rather "contractual liability". *In re Bradley* involved a petitioner who submitted a civil contempt petition under MCL 600.1721 against a governmental employee in an effort to hold the employee responsible for an alleged wrongful death claim. *In re Bradley*, at 373-74. The court determined that the civil contempt statute, MCL 600.1721, coupled with the allegations of wrongful death, sought a *noncontractual* remedy of compensatory damages

against a governmental employee and was therefore barred as a tort claim under the GTLA. *Id*. at 397-98. *In re Bradley* only addressed the applicability of the GTLA under a civil contempt statute, coupled with wrongful death allegations, which are not relevant to the claim in this action. *In re Bradley* never addressed an unjust enrichment claim or similar claim. In fact, the only reference that *In re Bradley* made in relation to a claim for unjust enrichment is that while the GTLA bars a negligence claim, it does not bar a breach of an implied contract claim in the same matter. *Id*. at 386-88.

However, contrary to Defendant's claim, the COA used *In re Bradley* for the guidance on what constitutes "tort liability" under the GTLA. *In re Bradley* set forth a two-step analysis for determining whether a claim asserts "tort liability" under the GTLA:

> "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 GTLA 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 Bradley*, at 389 (emphasis added).

In sum, if a court determines that the wrong alleged is premised on the breach of a contractual duty, then the claim at issue does not assert "tort liability" and the analysis is complete. The COA examined the nature of the duty and wrong alleged under Plaintiff's unjust enrichment claim and determined that unjust enrichment is premised on the breach of a contractual duty – that it merely involves a situation in which the contract in implied by the court. ***Exhibit G****, p3.* Under *In re Bradley's* two step analysis, the first step – whether the wrong alleged is premised on the breach of a contractual duty – was satisfied and Plaintiff's

claim for unjust enrichment does not fall under the definition of "tort liability." Again, as this Court has already noted, claims concerning implied contracts are not barred by the GTLA and unjust enrichment implies a contract. *In re Bradley*, at 386; *Belle Isle Grill Corp v City of Detroit,* 256 Mich App 463, 478; 666 NW2d 271, 280 (2003).

Defendant's supposed grounds for claiming that the COA contradicted *In re Bradley's* decision is that the COA did not give "so much as a passing glance at the nature of liability alleged" and that "[c]ompletely missing from the Court of Appeal's analysis is a careful examination of the nature of the liability alleged by the Commissioner in order to determine whether the claim actually sounds in tort." *See Defendant's Application for Leave to Appeal to this Court, p 11.* In other words, Defendant complains that the COA did not conduct an in-depth examination of the second step of the *In re Bradley* analysis, and thus conflicts with *In re Bradley*.

However, as shown, *In re Bradley* provides for a two-step analysis but if the first step is satisfied ("[i]f the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable"), then the Court does not move onto the second step. Since the COA determined that the wrong alleged is premised on a breach of an implied contractual duty, the analysis under *In re Bradley* is complete and an in-depth analysis of the nature of the liability, which Defendant demands, is forgone. In contradiction to *In re Bradley*, Defendant demands that the COA ignore the first crucial step of the analysis because, as shown throughout this brief, Defendant's legal position is defeated by the first step of the *In re Bradley* analysis.

Furthermore, contrary to Defendant's claim, there is no evidence that the COA did not consider Plaintiff's allegations contained in its Complaint as a part of its analysis of

whether the wrong alleged is premised on breach of an implied contract, especially since the parties' specifically cited and quoted the Complaint, the parties attached the Complaint to their briefs, and the COA regurgitated the facts derived from the Complaint. Thus, Plaintiff's legal position, and the trial court's and COA's determination, are supported by the decision in *In re Bradley* and there exists no conflict.

In addition, Defendant's reliance on the unpublished case of *Shears* to attempt to create a conflict with the COA's decision in this matter is misplaced and inappropriate. Generally, reliance on unpublished decisions by parties is disfavored, as those decisions are not binding precedent. MCR 7.215(C)(1). "Unpublished opinions should not be cited for propositions of law for which there is published authority." *Id.* Conversely, a published opinion of the Court of Appeals has precedential effect under the rule of stare decisis and the filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2). Thus, the unpublished decision in *Shears* cannot be used in an attempt to create a conflict with the binding and published decision from the COA in this matter. To the extent that the decisions do conflict, the COA published opinion in this matter takes precedent over the unpublished decision in *Shears* and the conflict ends. Yet, the court in *Shears* did not declare a conflict with the COA's published opinion in this matter. MCR 7.215(J)(2).

Lastly, the *Shears* case is highly distinguishable from the case at hand and should not be used as guidance. In *Shears*, the COA acknowledged that a claim for unjust enrichment implies a contractual relationship and sounds in equity and contract. However, the plaintiffs in *Shears* did not allege a count for unjust enrichment, nor did they even reference the phrase

"unjust enrichment" or anything similar to that phrase. Instead, the plaintiffs' claims were based on ordinance provisions, which by law do not involve or create contractual rights. In fact, the COA commented that even the form of the plaintiff's complaint did not provide for an unjust enrichment claim. The facts, analysis, and aspects of *Shears* differ substantially from the case at hand.

In sum, Defendant has failed to establish justifiable grounds under MCR 7.305(B) for this Court to take this matter on appeal.

b. Contrary to Defendant's assertion, there are no justifiable grounds under MCR 7.305(B) for this Court to take this matter and the Court of Appeals' published decision on appeal.

Defendant erroneously and ominously contends that the COA's decision in this matter threatens to expose governmental agencies to opportunistic plaintiffs who will plead "unjust enrichment or some other 'equity'-based claim in order to avoid the application of governmental immunity." *See Defendant's Application for Leave to Appeal to this Court, p 11-12.* Aside from the fact that the COA opinion in this matter in no way exposes governmental agencies to a flood of frivolous lawsuits as Defendant implies, long-established caselaw requires that in order to maintain an action against a governmental agency, *a plaintiff must plead in avoidance of* governmental immunity. *Mack v City of Detroit*, 467 Mich 186, 198; 649 NW2d 47, 54 (2002)(emphasis added). Pleading "unjust enrichment or some other 'equity'-based claim in order to avoid the application of governmental immunity" is precisely what a party bringing an action against a government agency must do. Even this Court in *In re Bradley* noted that it has been, and will continue to be, routine that plaintiffs attempt to avoid governmental immunity by pleading theories other than tort and if a plaintiff successfully pleads an action that falls outside of the definition of tort liability, the GTLA

will not bar recovery simply because the underlying facts could have also established a tort cause of action. *In re Bradley*, at 386. Plaintiffs are entitled to plead legally cognizable claims to avoid governmental immunity.

In addition, there is no foundation or justifiable basis for this Court to review the COA's published opinion or this matter. Defendant demands that this Court conduct an in-depth examination of the specific and unique allegations contained within Plaintiff's Complaint, which the trial court and COA already did. In other words, Defendant is seeking a third review on the fact-specific nature of this case, which would not materially effect other cases in Michigan. Further yet, there is ample binding Michigan law that guides this matter, evidenced by the numerous published Michigan cases and the GTLA statutes cited and used by Plaintiff, Defendant, and the COA. As shown, no conflict exists among these published Michigan cases. Lastly, Defendant omitted the COA's holding concerning Defendant's argument that Plaintiff failed to state a claim for unjust enrichment. The COA determined that the trial court did not directly address this issue so the COA could not review this topic. The COA continued to hold that Defendant is free on remand to renew its motion for summary disposition concerning whether Plaintiff did properly state a claim for unjust enrichment. Defendant is still provided yet another chance to review Plaintiff's Complaint with the trial court.

In sum, there are no justifiable grounds under MCR 7.305(B) for this Court to take this matter on appeal.

2. **Even assuming *arguendo* that this Court determines that the requirements under MCR 7.305(B) are satisfied and that this Court will review this matter on appeal, the law still requires, and both the trial court and Court of Appeals agreed, that Defendant's Motion for Partial Summary Disposition must be denied as Plaintiff's unjust enrichment claim does not assert "tort liability" as defined under the GTLA.**

Defendant asserts four points in its Application for Leave to Appeal to this Court: (1) that the GTLA provides broad governmental immunity to Defendant, (2) that a claim based on unjust enrichment can be predicated on either tort or contract law, (3) that Plaintiff's unjust enrichment claim asserts tort liability, and (4) some foreign courts have held that unjust enrichment claims oftentimes sound in tort.[4] As Plaintiff will show herein, Defendant's assertions are meritless, unsupported, and do not compel this Court to overturn the COA's published decision in this matter.

The Court of Appeals reviews de novo a trial court's decision on a motion for summary disposition. *Dybata vWayne Co*, 287 Mich App 635, 638; 791 NW2d 499 (2010). Pursuant to MCR 2.116(C)(7), "[s]ummary disposition may be granted when, among other things, a claim is barred by governmental immunity." *Id*. at 637. "When considering a motion brought under subrule (C)(7), the trial court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact precluding summary disposition." *Id*. "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred by governmental immunity is an issue of law." *Id*. When a motion for summary disposition is submitted under either MCR 2.116(C)(7) or (8), all well-pled factual allegations must be accepted as true, as well as any reasonable inferences or conclusions that can be drawn from those facts, **and construed in favor of Plaintiff**. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817, 823 (1999)(emphasis added). Furthermore, generally the granting of a motion for summary

[4] Defendant does not address the COA's decision concerning Defendant's argument(s) that Plaintiff failed to state a claim for unjust enrichment. Therefore, Defendant has abandoned this issue and Plaintiff will not address herein.

disposition before discovery on a disputed issue is complete is considered premature. *Bayn v Dept of Nat. Res*, 202 Mich App 66, 70; 507 NW2d 746, 747 (1993).

a. Although the GTLA generally provides broad immunity to governmental agencies, there are well-established exceptions from agency governmental immunity, such as claims sounded in contract or equity.

The GTLA, under MCL 691.1407(1), only operates to bar damages from "*tort liability* if the governmental agency is engaged in the exercise or discharge of a governmental function". As Defendant concedes, the GTLA does not bar claims sounded in contract. ***Exhibit E****, p 10 (*quoting *In re Bradley Estate,* 494 Mich 367; 835 NW2d 545 (2013): "tort liability as used in MCL 691.1407(1) means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages."). "The language of [MCL 691.1407(1)], however, speaks only to immunity from tort liability; it does not grant immunity from contract claims." *In re Bradley*, at fn 47 (quoting *Ross v Consumers Power Co.*, 420 Mich 567, 647-648; 363 NW2d 641 (1984)). "[G]overnmental immunity does not extend to contract actions, even when the contract action arises out of the same facts that would support a tort action." *Koenig v City of S Haven*, 460 Mich 667, 675; 597 NW2d 99, 103 (1999). Furthermore, the GTLA does not preclude or bar implied contract claims. *See In re Bradley,* at 386; *Rocco v Michigan Dept of Mental Health*, 114 Mich App 792, 799; 319 NW2d 674, 677 (1982). In accordance with long established Michigan law, claims sounded in contract, such as implied contract claims, fall outside of the definition of "tort liability" and are not barred by the GTLA.

In addition, Plaintiff's claim for unjust enrichment seeks to remedy unjust retention of money or benefits through equitable relief and Michigan courts have repeatedly held that claims seeking equitable relief do not fall under the operation of the GTLA. *See Lash v City*

of Traverse City, 479 Mich 180, 197, 735 NW2d 628 (2007); *Mercer v City of Lansing*, 274 Mich App 329, 330-331, 733 NW2d 89 (2007); *Wayne Co Sheriff v Wayne Co Bd of Commissioners*, 196 Mich App 498, 510, 494 NW2d 14 (1992). Unjust enrichment is defined as the unjust retention of money or benefits which **in justice and equity** belong to another and even if the "defendant received the property 'absolutely,' he is still unjustly enriched if he is obligated by **equity** to make restitution." *Tkachik*, at 47-49 (emphasis added). "Our Supreme Court has long recognized **the equitable right of restitution** when a person has been **unjustly enriched** at the expense of another." *Morris Pumps*, at 193 (emphasis added). Furthermore, the equitable nature of the relief sought is not altered by the fact that restitution would entail the disgorgement of refund money unjustly retained by Defendant. *See Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 90, fn 38; 445 NW2d 61, 76 (1989) (Holding that seeking compensation under a condemnation or "takings" action is not barred by governmental immunity "[s]ince the obligation to pay just compensation arises under the constitution and not in tort.").

In sum, it is well established in Michigan that claims sounding in contract or equity are outside of the definition of "tort liability" and not barred by the GTLA.

b. Defendant erroneously, and for the first time, argues that unjust enrichment can be predicated on either tort or contract; however, Michigan law is clear that a claim for unjust enrichment is based on contract liability, not tort liability.

Michigan law has long held that the theory of unjust enrichment is based on equity and contractual principles. Unjust enrichment is defined as the unjust retention of money or benefits which in justice and equity belong to another. *Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260, 266 (2010). Unjust enrichment is an equitable doctrine and "**is the equitable counterpart of a legal claim for breach of contract**". *AFT Michigan v Michigan*,

303 Mich App 651, 677; 846 NW2d 583, 599 (2014)(emphasis added). As Defendant acknowledges in its COA Brief, under an unjust enrichment claim, the law **implies a contract** in order to prevent inequity. *Belle Isle Grill Corp*, at 478 (emphasis added). "Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, a person who has been unjustly enriched at the expense of another is required to make restitution to the other" and "the remedy is one by which the law sometimes indulges in the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received to ensure that exact justice is obtained." *Kammer Asphalt Paving Co, Inc v E China Tp Sch*, 443 Mich 176, 185-86; 504 NW2d 635, 640 (1993) (citations and quotations omitted). As the COA recognized, unjust enrichment is contractual by its very nature. The contract is implied, written in after-the-fact by the court in order to prevent the inequity of the defendant wrongfully retaining a certain ill-gotten benefit.

The COA in this matter, citing and quoting from numerous long-standing caselaw, emphasized that under the equitable doctrine of unjust enrichment, a contract is implied or imposed on the parties. ***Exhibit G***. Relying and quoting previous caselaw, the COA correctly stated that "[u]just enrichment is an equitable doctrine," that "the law *imposes a contract* to prevent unjust enrichment, which occurs when one party receives a benefit from another the retention of which would be inequitable," and that "our Supreme Court specifically has held that a breach of implied contract action is not barred by the GTLA." *Id., p 3* (citations omitted). The COA's holding that "a claim under the equitable doctrine of unjust enrichment ultimately involves contract liability, not tort liability," and that "[i]t merely involves a situation in which the contract is an implied one imposed by the court in

the interests of equity rather than an express contract entered into by the parties" continues the long-established precedent set by previous courts. *Id.*

Since the first step of the *In re Bradley* analysis was satisfied ("[i]f the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable"), there is no need to conduct an in-depth examination of the relief sought. *In re Bradley*, at 389. Regardless, the relief sought under Plaintiff's unjust enrichment claim – equity and restitution – still illustrates that such a claim falls outside of the definition of "tort liability". Contract damages, equitable remedies, and other non-compensation remedies, are not barred or precluded by the GTLA. *Id.*, at fn 53-54. A person who has been unjustly enriched at the expense of another is required to make **restitution** to the other. *Morris Pumps*, 193 (emphasis added). The remedy sought by unjust enrichment mirrors the remedy sought in a breach of express contract claim. Restitution rests on an implied contract or promise to pay for a wrongfully obtained benefit, and under a claim of unjust enrichment, the courts impose this implied contract or promise, even when there was no intended contract. Under a claim for unjust enrichment, restitution is not measured by actual damages to Plaintiff, but rather the value of what Defendant has gained. *See B & M Die Co v Ford Motor Co*, 167 Mich App 176, 183; 421 NW2d 620, 623 (1988). There is no distinction in damage remedies between implied contracts and express contracts and restitution is a remedy under a breach of contract claim. *Avery v Arnold Home, Inc*, 17 Mich App 240, 243-44; 169 NW2d 135, 136-37 (1969) (holding "[t]he courts do not have two different sets of damage remedies, one for express and the other for implied contracts."); *Phillips v Butterball Farms Co, Inc*, 448 Mich 239, 256; 531 NW2d 144, 151 (1995). Unjust enrichment and

breach of contract share the same sought-after remedy, illustrating that unjust enrichment is sounded in contract rather than tort.

Although Defendant argues that "[a] claim based on unjust enrichment can be predicated on either tort or contract law," *Defendant's Application for Leave to Appeal to this Court, p 14*, Defendant provides no Michigan law, whether published or unpublished, supporting its argument. "A party may not leave it to this Court to search for authority to sustain or reject its position." *Staff v Johnson*, 242 Mich App 521, 529; 619 NW2d 57, 62 (2000). Instead, Defendant simply reiterates *In re Bradley's* interpretation of the term "tort liability." Yet, as previously shown, *In re Bradley* never addressed a claim for unjust enrichment, other than referencing that an implied contract claim is not barred by the GTLA. *In re Bradley*, at 386-88. Furthermore, Defendant's assertion directly contradicts long-standing Michigan law and reasoning providing that unjust enrichment sounds in contract. An unjust enrichment claim *implies a contract*. Michigan law even precludes an unjust enrichment claim when there exists an express valid contract between the same parties on the same subject matter, demonstrating that Michigan considers unjust enrichment to be contractual at its core. *Morris Pumps*, at 194.

Lastly, it should be noted that Defendant makes the argument that unjust enrichment can be predicated on either tort or contract law for the first time in its Application for Leave to Appeal to this Court. "Issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422, 432 (1993).

c. Contrary to Defendant's claim, the gravamen of Plaintiff's Complaint and the claim for unjust enrichment do not assert tort liability, but rather is premised on contractual liability.

Defendant erroneously argues, against Plaintiff, the trial court, and the COA, that Plaintiff's Complaint and its unjust enrichment claim assert tort liability and that Plaintiff simply relabeled a conversion claim. However, an examination of Plaintiff's Complaint, which was performed by both the trial court and the COA, establishes that not only did Plaintiff sufficiently plead a claim for unjust enrichment, but its unjust enrichment claim is premised in contract liability, not tort liability.

All alleged facts and reasonable inferences under Plaintiff's Complaint are accepted as true and construed in favor of Plaintiff. *Dextrom,* at 428; *Maiden v Rozwood*, at 119. Furthermore, the "primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758, 762 (1993).

Both Plaintiff and Defendant agree that unjust enrichment is defined as the unjust retention of money or benefits which in justice and equity belong to another. *Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260, 266 (2010); ***Exhibit E****, p 20.*. The two elements of an unjust enrichment claim are (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. *Belle Isle Grill Corp,* at 478. In examining the gravamen of Plaintiff's Complaint, Plaintiff has clearly alleged that Defendant received a benefit from Plaintiff when it retained and used Plaintiff's refund money, resulting in Plaintiff losing the benefit it was entitled to. Plaintiff now seeks to recover that lost benefit by implying a contractual obligation or duty requiring Defendant to reimburse or return such benefit.

Defendant omitted from its brief a substantial portion of the allegations made by Plaintiff in its Complaint. Plaintiff has only pled two counts against Defendant, breach of

contract and unjust enrichment, as alternative claims. Instead of providing all of the relevant allegations of the Complaint, Defendant only selectively references a few allegations which mischaracterizes Plaintiff's claims. Aside from the factual allegations that are referenced in the fact statement of this brief, which are directly derived from Plaintiff's Complaint, Plaintiff pled the following in its Complaint (***Exhibit A***):

> 7. At a date unknown to Plaintiffs, Genesee County, Genesee County Community Mental Health Agency ("Mental Health") and the Genesee County Drain Commissioner entered into an agreement to purchase as a group or cluster, health insurance coverage from Blue Cross/Blue Shield of Michigan ("Blue Cross") for the benefit of their respective employees. Genesee County, Mental Health, and the Genesee County Drain Commissioner are collectively referred to as the "Plan Group".
>
> 16. Each member of the Plan Group paid Blue Cross the premiums invoiced for their employees that participated in the Blue Cross Plan.
>
> 20. For all plan years from 2001 through 2008, the Blue Cross annual settlement accounting revealed that premiums paid for the Blue Cross Plan substantially exceeded claims paid, administration expenses, and necessary reserves for such plan year. It is currently unknown by Plaintiffs if settlement accounting in years prior to 2001 likewise revealed substantial surpluses.
>
> 21. Unbeknown to the Genesee County Drain Commissioner, Blue Cross gave Genesee County the option of whether to leave the surplus in the Blue Cross Plan for the next plan year so as to reduce premiums chargeable for the next plan year or to receive a refund of the surplus.
>
> 22. Each year of the Blue Cross Plan, Genesee County opted to receive a refund of the surplus from the plan.
>
> 27. On information and belief, Genesee County deposited the refund checks from the Blue Cross Plan into its general fund.
>
> 30. The Genesee County Drain Commissioner, for the life of the Blue Cross Plan, paid its proportionate share of premiums assessed for health care insurance.
>
> 31. As a member of the Plan Group, the **Genesee County Drain Commissioner was entitled to a portion of the refund** based upon its participation in the Blue Cross Plan.

38. Because each of the members of the Plan Group paid premiums based upon their respective employees that participated in the Blue Cross Plan, **all refunds received by Genesee County would belong jointly to the Plan Group and not solely to Genesee County**.

43. **Genesee County wrongfully and unjustly retained a portion of the refunds under the Blue Cross Plan that belong to Genesee County Drain Commissioner**.

44. Genesee County **is not entitled to retain Genesee County Drain Commissioner's portion of the refunds** issued under the Blue Cross Plan.

45. Due to Genesee County's **wrongful retention of Genesee County Drain Commissioner's portion of the refunds**, Genesee County has been unjustly enriched.

46. It is **inequitable for Genesee County to retain Genesee County Drain Commissioner's portion of the refunds** issued under the Blue Cross Plan.

47. Genesee County Drain Commissioner has been harmed by Genesee County's **inequitable retention** of its refunds.

As *In re Bradley* held, "[c]ourts considering whether a claim involves tort liability should first focus on the nature of the duty that gives rise to the claim" and "[i]f the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable." *In re Bradley*, at 389 (emphasis added). Examining the gravamen of the Complaint, Plaintiff's pleadings are clearly premised on contractual duty, whether express or implied.

In sum, Plaintiff pled that: (1) Plaintiff paid for health care premiums under the Group Plan, (2) due to Plaintiff's overpayment of premiums, it was entitled to a refund, (3) BCBS issued a refund, of which a substantial portion belonged to Plaintiff due to its overpayments, (4) Defendant received, retained, and used the Plaintiff's refund, which benefited Defendant, (5) the relevant refunds did not belong to Defendant but rather to

Plaintiff, and (6) since Defendant unjustly retained and used Plaintiff's money for Defendant's benefit, Plaintiff was precluded from benefiting from its refund and paid higher premiums. These allegations are taken as the truth and construed in Plaintiff's favor, as well as any reasonable inferences that can be made from said allegations. These allegations and facts satisfy the two elements of Plaintiff's unjust enrichment claim and parallel the definition of unjust enrichment: "[u]njust enrichment is defined as the unjust retention of money or benefits which in justice and equity belong to another". *Tkachik*, at 47-48.

In an effort to push Plaintiff's unjust enrichment claim into the scope of "tort liability" under MCL 691.1407(1), Defendant mistakenly claims that Plaintiff is "alleging that the County [Defendant] had a duty to provide it with a refund that came from Blue Cross", and that providing restitution for an unjustly retained benefit is a noncontractual duty. *See Defendant's Application for Leave to Appeal to this Court, p 17.* However, nowhere under Plaintiff's unjust enrichment claim does Plaintiff allege that Defendant had a noncontractual duty to provide it with a portion of the refund. Rather, Plaintiff clearly alleges that Defendant unjustly retained money that belonged to Plaintiff, that it was inequitable for Defendant to retain the money belonging to Plaintiff, and that Defendant was unjustly enriched and benefited by its retention of Plaintiff's money. Defendant further acknowledges that "the nature of any duty owed by the County to the Commissioner is one to provide restitution for a benefit that was, allegedly, unjustly retained by the County," which comports to the definition and elements of unjust enrichment and, as determined by the COA, consequently involves contract liability, not tort liability. *Id.* In other words, a contractual obligation or duty is implied, requiring Defendant to pay for benefits received. *Kammer Asphalt Paving Co, Inc*, at 185-86. This is an implied contractual duty, not a

noncontractual duty, and is not encompassed within the definition of "tort liability" under MCL 691.1407(1).

Moreover, Defendant is again mistaken when it argues that Plaintiff's claim for unjust enrichment is merely a relabeled conversion claim. First, "governmental immunity does not extend to contract actions, **even when the contract action arises out of the same facts that would support a tort action**." *Koenig*, at 675 (emphasis added). Thus, just because the current fact pattern may give rise to additional tort claims, does not mean that Plaintiff's claims, which involve contractual liability, must be barred by the GTLA. Second, as shown, Plaintiff's allegations mirror and satisfy the elements of unjust enrichment. As the COA in this matter held, as well as previously cited cases, unjust enrichment, which implies a contractual duty, is not barred by the GTLA.

Lastly, Defendant mistakenly claims that Plaintiff is seeking compensatory money damages, which pushes Plaintiff's unjust enrichment claim into the definition of "tort liability". First, as *In re Bradley* provides, only if it is first determined that the wrong alleged is not premised on a breach of a contractual duty then the court considers the nature of the liability the claim seeks to impose and the relief sought to determine whether the claim asserts tort liability under the GTLA. *In re Bradley*, at 389. As shown, the wrong alleged is premised on an implied contractual duty, and therefore the court need not then also determine the nature of the liability the claim seeks to impose. Even so, Plaintiff is not seeking tort-like compensatory damages for an injury caused by a noncontractual civil wrong. Rather, as noted by the COA, Plaintiff is seeking to recover the portion of refunds that belong to Plaintiff that benefited Defendant. ***Exhibit G**, p 2* ("The instant suit was instituted to recover the portion of the refunds that represented the participants' share of the

premiums paid."). Plaintiff seeks equity and restitution, which is distinguishable from compensatory damages that a tort claim would seek. *See De Long v Palm Beach Polo Holdings, Inc*, No. 284444, 2010 WL 2541089, at *3 (Mich Ct App June 24, 2010) (Holding "[r]estitution is generally an alternative to damages. If the purpose of damages is, first and foremost, to compensate a victim of a breach, the purpose of restitution is disgorgement of a wrongdoer's ill-gotten gain. Courts impose restitution when it is determined as a matter of justice and equity that the wrongdoer should be required to pay for the benefit derived.") (citations and quotations omitted), *attached as* ***Exhibit H***.[5] Moreover, as previously shown, restitution is premised in contract and mirrors contractual relief or damages.

As Defendant concedes, "[i]f the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable." *In re Bradley*, at 389. The COA, using the analysis and clarification provided by *In re Bradley*, as well as other published Michigan law, determined that Plaintiff's unjust enrichment claim is premised on an implied contractual duty, and so the GTLA did not apply to Plaintiff's unjust enrichment claim.

d. Defendant's selective foreign cases, which are distinguishable to the case at hand, are contrary to well-established Michigan law, are not binding on Michigan courts, and do not justify a review or a reversal of the Court of Appeals' published opinion.

Defendant's reliance on a few selective foreign cases, which are not binding on this Court or this matter, is misplaced, especially considering there exists ample published Michigan authority to guide the COA's decision on this matter. Defendant erroneously

[5] Plaintiff cites and quotes this unpublished opinion as it explains the difference between compensatory damages and restitution. Defendant argues that Plaintiff is seeking compensatory damages which should factor into a determination that Plaintiff's unjust enrichment claim seeks "tort liability". Plaintiff contradicts Defendant's claim by showing that its unjust enrichment claim seeks restitution and this unpublished case distinguishes the two types of remedies.

attempts to use these foreign cases to support its argument that this Court should determine that the theory of unjust enrichment can sound in tort, and is thus barred by government immunity. However, these cases from foreign jurisdictions are non-binding, do not control this state's court decisions, and may only be considered as persuasive if they do not conflict with Michigan law. *People v Niver*, 7 Mich App 652, 657; 152 NW2d 714, 716 (1967). An examination of these foreign cases shows that they are distinguishable and either contradict long-established Michigan law or do not address the same issues that are present in this matter.

Westwood Pharms, Inc v Nat'l Fuel Gas Distrib Corp, 737 F Supp 1272 (WDNY 1990) involved a court determining which statute of limitations to use when the plaintiff alleged that the defendant acted negligently. *State Dep't of Human Servs ex rel Palmer v Unisys Corp*, 637 NW2d 142 (Iowa 2001) involved whether an unjust enrichment or subrogation claim was precluded due to the existence of a written contract. *Peddinghaus v Peddinghaus*, 692 NE2d 1221 (1998) also involved whether a claim for unjust enrichment was precluded by the existence of a written contract.[6] None of these cases addressed government immunity, nor did any of them address similar circumstances under similar laws as the case at hand.

Furthermore, Defendant's heavy reliance on *Robinson v Colorado State Lottery Div,* 179 P3d 998 (Colo 2008) is misplaced. The court in *Robinson*, interpreting Colorado's government immunity statute, examined the plaintiff's breach of contract claims and unjust

[6] In *Peddinghaus*, the Illinois Appellate Court ruled that under Illinois law, a claim for unjust enrichment can be based on either quasi-contract or tort. Therefore, the court ruled that the existence of an express contract covering the subject matter would not defeat the plaintiff's claim for unjust enrichment since one claim was based on contract while the other based on tort. This is contrary to Michigan law. In Michigan, unjust enrichment *implies a contract* and therefore, if an express contract already exists covering the same subject matter between the same parties, a claim for unjust enrichment would be precluded. *Morris Pumps*, at 194. This again illustrates that Michigan treats unjust enrichment as a contractual-based claim.

enrichment claims. The plaintiff's claims, which are highly distinguishable from Plaintiff's claims, revolved around allegations that a governmental agency negligently misrepresented to the plaintiff that she could win lottery prizes, which fraudulently induced the plaintiff into purchasing lottery tickets. The court in *Robinson* reiterated Colorado's law concerning precluding claims under government immunity: that Colorado's government immunity statute is less concerned with what the plaintiff argues and is more concerned with what the plaintiff *could argue*. In other words, if the facts could give rise to *both* contract claims and tort claims, then all claims are barred under Colorado's government immunity statute. *Robinson*, at 1006. The court in *Robinson* held that although the plaintiff brought certain breach of contract claims, the allegations or facts could also give rise to tort claims, and based on Colorado law, the court barred all of the plaintiff's claims, including her breach of contract claims and unjust enrichment claim. *Id.*, at 1006-1008. The court further noted that in Colorado, unjust enrichment can be a tort or contract, and that the plaintiff's allegations clearly alleged negligent misrepresentation and fraud in the inducement, which pushed her unjust enrichment claim into a tort.

Robinson's ruling directly contradicts and significantly expands Michigan's well-established law. "[G]overnmental immunity does not extend to contract actions, **even when the contract action arises out of the same facts that would support a tort action**." *Koenig*, at 675. This Court in *Ross*, supra (reviewing *Rocco*, supra), *Koenig*, supra, and even *In re Bradley*, supra, held and recognized that claims sounded in contract will not be barred by government immunity simply because the underlying facts and allegations could have also established a tort cause of action, even if the allegations between the contract claim and

tort claim are nearly identical. *See In re Bradley*, at 386 (quoting *Ross v Consumers Power Co*, 420 Mich 567, 648; 363 NW2d 641, 674 (1984)); *Koenig,* at 675.

Since *Robinson* is factually highly distinguishable and because it's rulings conflict with already well-established and binding Michigan precedent, Defendant's reliance on *Robinson* for support is misplaced. To accept Defendant's request to use *Robinson* as persuasive authority would require this Court to re-define the long-standing Michigan laws concerning unjust enrichment and move away or completely disregard its previous rulings made on the issue.

Defendant's use of a few distinguishable and nonbinding foreign cases demonstrates that Defendant's legal position lacks supporting Michigan authority. The limited foreign cases cited by Defendant do not address similar facts or legal circumstances, and further, those foreign jurisdictions' treatment of unjust enrichment claims differ from Michigan's treatment. Conversely, Plaintiff, as well as the COA, has provided and relied on numerous binding Michigan cases to support their legal positions and decisions.

CONCLUSION & RELIEF REQUESTED

Defendant has failed to establish the required grounds under MCR 7.305(B) for this Court to take this matter on appeal. Furthermore, as shown, there simply does not exist any such justifiable grounds under MCR 7.305(B). Therefore, the COA's published decision in this matter should not be reviewed on appeal by this Court.

Even if it is determined by this Court that the grounds under MCR 7.305(B) are established for this Court to review the COA's decision, the trial court's and COA's decision is still correct. Defendant ignores the well-established law that the equitable doctrine of unjust enrichment is the equitable counterpart to breach of contract claims and implies

contractual obligations and duties to prevent unjust gain. By attempting to stretch the definition of "tort liability" to cover Plaintiff's unjust enrichment claim, Defendant is expanding the immunity provided under the GTLA to claims grounded in both equity and contract, both of which have been held to be outside the scope of immunity afforded under the GTLA. Notably, Defendant fails to provide any authority which holds that claims for unjust enrichment, implied contracts, or similar claims, are barred by the GTLA. The trial court and COA, relying and using on well-established Michigan law, both correctly found that Plaintiff's unjust enrichment claim involves an implied contractual duty and is outside of the definition of "tort liability."

For the reasons set forth herein, Plaintiff respectfully requests that this Court deny Defendant's Application for Leave to Appeal to this Court.

Respectfully submitted,
HENNEKE, FRAIM & DAWES, P.C.

/s/ Scott R. Fraim Date: October 30, 2017

By: Scott R. Fraim (P35669)
By: Brandon S. Fraim (P76350)
Attorneys for Plaintiff/Appellee
2377 S. Linden Road, Suite B
Flint, Michigan 48532
(810) 733-2050
sfraim@hfdlawfirm.com
bfraim@hfdlawfirm.com