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STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT,

Plaintiff-Appellee,

and

CHARTER TWP OF FENTON, DENNIS BOW, KARYN MILLER, BONNIE MATHIS, PAULA ZELENKO, MARILYN HOFFMAN, LARRY GREEN, JAKE LaFURGEY, RAY FOUST, DAVID GUIGEAR, ROBERT M. PALMER, RICK CARUSO, WILLIAM W. KOVL, and MAXINE ORR, VILLAGE OF GOODRICH, VILLAGE OF GAINES, VILLAGE OF LENNON, CHARTER TOWNSHIP OF MUNDY, TOWNSHIP OF ARGENTINE, CHARTER TOWNSHIP OF FLINT, CHARTER TOWNSHIP OF MT. MORRIS, TOWNSHIP OF GAINES, AND CITY OF FLUSHING,

Plaintiffs,

v

GENESEE COUNTY, a Michigan municipal corporation

Defendant-Appellant

and

THE GENESEE COUNTY BOARD OF COMMISSIONERS,

Defendant. /

MSC No. 156579

MCOA No. 331023

LC No. 11-97012-CK
(Genesee County Circuit Court)

REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

MARY MASSARON (P43885)
HILARY A. BALLENTINE (P69979)
AUDREY J. FORBUSH (P41744)
PLUNKETT COONEY
Attorneys for Defendant-Appellant
Genesee County
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

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ARGUMENT

This Court Should Grant Leave To Appeal To Consider Whether A Claim For Unjust Enrichment Can Be Predicated On Either Tort Or Contract Law, Depending On The Nature Of The Liability Involved, Thus Requiring Courts To Undertake A Case-By-Case Analysis To Determine Whether A Particular Unjust Enrichment Claim Sounds In Tort And Thus Is Barred By Governmental Immunity

A. The Commissioner knew from the County's answer to the first complaint filed in 2011 that the County denied the existence of a contract that would give rise to any breach thereof

In an effort to downplay the suspect timing in which he first asserted an unjust enrichment claim, the Commissioner argues that he was not prompted to move for leave to amend the complaint to add a claim for unjust enrichment until the County "denied the existence of a written contract." (Answer to Application, p 6). [1] However, review of the pleadings makes clear that the County denied the existence of a contract which would give rise to any breach thereof when the County filed its answer to the Commissioner's original complaint. (Answer to Complaint, 12/20/11). To be sure, the Commissioner included a claim for breach of contract in its original complaint filed in 2011. (Complaint, 10/24/11, ¶¶ 53-58) (alleging that the "[f]ailure to pay over to the Genesee County Drain Commissioner his proportionate share of all refunds constitutes a breach of contract."). But the County, in its answer to that complaint, denied the allegations of the Commissioner's breach of contract claim. (Answer, 12/20/11, ¶¶ 53-58) (denying each allegation of

[1] The Commissioner filed his complaint on October 24, 2011. No unjust enrichment claim was included in that complaint. The Commissioner moved for leave to file a first amended complaint on February 21, 2012. No unjust enrichment claim was included in the amended complaint. The Commissioner moved for leave to file a second amended complaint on September 9, 2015. In the second amended complaint, the Commissioner asserted for the first time a claim for unjust enrichment – even though that claim could have been included in his original pleading. Nor did the Commissioner include unjust enrichment as an alternative claim in his first amended complaint, even though he was on notice that the County was denying the allegations of his breach of contract claim.

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Plaintiff's breach of contract claim "as untrue."). Again, the Commissioner included a breach of contract claim in its First Amended Complaint filed in March 2012, and the County also denied those allegations as untrue. (First Amended Complaint, 3/5/12, ¶¶ 62-67; Answer to Amended Complaint, 3/23/12).

Yet the Commissioner did not include a claim for unjust enrichment in his complaint until *after* the Michigan Court of Appeals issued a decision dismissing the Commissioner's tort claims and prohibiting the Commissioner from seeking compensation for contract damages that accrued before October 24, 2005. See *Genesee Cty Drain Comm'r v Genesee Cty*, 309 Mich App 317, 320; 869 NW2d 635 (2015). The Court of Appeals' decision was issued on March 3, 2015; the Commissioner's second amended complaint – which asserted an unjust enrichment claim for the first time –was filed on October 7, 2015. (Second Amended Complaint, 10/7/15). The Commissioner points to no conduct on the part of the County in this seven-month time frame, or new information, which prompted the decision to file his third complaint in this case–clearly, the impetus was the Court of Appeals' limitation on the breach of contract claim. The Commissioner's attempt to add a claim for unjust enrichment nearly four years after the case was originally filed constitutes undue delay.

B. The Court of Appeals' published decision conflicts with *In re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013), in which this Court instructed that the court must examine the nature of the liability alleged in order to determine whether a claim actually sounds in tort

The Commissioner's argument is contradictory. On one hand, he argues that the Court of Appeals' opinion in this case does not conflict with *Bradley*; but on the other hand, he argues that *Bradley* "only addressed the applicability of the Governmental Tort Liability Act ("GTLA") under a civil contempt statute" and thus "is not relevant to the claim in this

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action." (Answer to Application, pp 11-12). The Commissioner is wrong on both points. Not only is *Bradley* applicable to this case, but the Court of Appeals also failed to properly analyze whether the Commissioner's unjust enrichment claim sounds in tort or contract, as *Bradley* requires. Accordingly, peremptory reversal, or alternatively leave to appeal, is proper.

First, the Commissioner adopts an overly simplistic approach to argue that *Bradley* does not apply; in the Commissioner's view, because *Bradley* "never addressed an unjust enrichment claim or similar claim[,]" (Answer to Application, p 12), it is not relevant. The takeaway from *Bradley* is not whether the Supreme Court specifically ruled that unjust enrichment is a tort; instead, what *Bradley* instructs is that when determining whether a claim sounds in "tort," the focus "must be on *the nature of the liability rather than the type of action pleaded*" in the plaintiff's complaint. *Bradley,* 494 Mich at 387 (emphasis added). Therefore, the application of the GTLA is not limited "to suits expressly pleaded as traditional tort claims . . . ." *Id.* The Court referenced well-established law that "the gravamen of a plaintiff's action is determined by considering the entire claim." *Id*. at 388 n 49 (citation and punctuation omitted). Thus, "some causes of action that are not traditional torts nonetheless impose tort liability within the meaning of the GTLA." *Id*. Accordingly, here, as in *Bradley*, where the claimed wrong is not premised on a breach of a contractual duty, but alleges wrongful conduct that causes harm (here, allegedly to the Commissioner), the claim sounds in tort. *Id*.

The Commissioner argues that *Bradley* creates a "two-step analysis for determining whether a claim asserts 'tort liability' under the GTLA. (Answer to Application, p 12). The Commissioner claims that the first step – whether "the wrong alleged is premised on the

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breach of a contractual duty" – was satisfied here because he pled unjust enrichment, and thus the need to "analyze the nature of the liability" (the second step of *Bradley*) was "forgone." *Id*., p 13. The Commissioner's argument demonstrates his lack of understanding of *Bradley*. Simply because some courts have said that unjust enrichment implies a contract, *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006), does not mean that pleading unjust enrichment makes it a contract claim. It is the very absence of a contract that allows for some obligation to be imposed by the court – and thus the liability is more akin to tortious liability. Under the Commissioner's argument, a plaintiff would always plead a traditional non-tort based claim in order to avoid governmental immunity. However, *Bradley* requires more. The court must examine the gravamen of an action to determine the exact nature of the claim. Regardless of the label the Commissioner attached to his claim, where the substance of the claim asserts a tort-based theory of recovery, governmental immunity applies.

The *Bradley* analysis cannot be conducted in separate and distinct pieces, as the Commissioner contends. The *Bradley* Court announced "several principles" which "guide courts charged with the task of determining whether a cause of action imposes tort liability for purposes of the GTLA." 494 Mich at 388. Among these principles is the task of focusing on the nature of the duty that gives rise to the claim. The Commissioner's contention that the nature of the duty alleged was for unjust enrichment simply because it was pled as such is far too superficial; the mere labeling of the count as one for unjust enrichment does not come remotely close to satisfying *Bradley*.

Second, the Commissioner completely disregards whether the Court of Appeals actually analyzed the nature of the liability of his unjust enrichment claim. In the

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Commissioner's view, "since the parties specifically cited and quoted the Complaint" and "attached the Complaint to their briefs[,]" the "second step" of *Bradley* was satisfied. (Answer to Application, pp 13-14). However, the Court of Appeals completely failed to determine whether the nature of the liability sounded in tort. Instead, it made a sweeping conclusion that "a claim under the equitable doctrine of unjust enrichment ultimately involves contract liability, not tort liability." *Genesee County Drain Commissioner v Genesee County*, p 2 (attached to Application for Leave to Appeal as Exhibit 1). This is simply wrong. Under the theory of unjust enrichment, a person who has received a benefit from another person is liable to pay for the benefit *only if* the circumstances of the retention of the benefit are such that, as between the two persons, it is unjust for the person to retain the benefit. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991), citing, *Restatement Restitution*, § 1, comment c, p 13.

Moreover, where a claim for unjust enrichment rests on the same improper conduct as the underlying tort claim, the unjust enrichment claim cannot stand as a substitute for the failed tort claim. See, e.g., *Whitaker v Herr Foods*, 198 F Supp 3d 476, 493 (ED Penn July 29, 2016), citing *Zafarana v Pfizer, Inc*, 724 F Supp 2d 545, 561 (ED Penn 2010) ("[i]n other words, unlike the quasi-contract theory of unjust enrichment, which acts as an equitable stand-in for a failed breach of contract claim, an unjust enrichment claim based on wrongful conduct cannot stand alone as a substitute for the failed tort claim."). See also *Steamfitters Local Union No 420 Welfare Fund v Philip Morris, Inc*, 171 F3d 912, 936 (3d Cir 1999) ("[i]n the tort setting, an unjust enrichment claim is essentially another way of stating a traditional tort claim (i.e., if defendant is permitted to keep the benefit of his tortious conduct, he will be unjustly enriched)."). But this is exactly what the Commissioner

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attempts to do here – recast his failed tort claims as a claim for unjust enrichment. To reiterate, the Commissioner did not even include unjust enrichment as a count in the complaint until after the Court of Appeals held that his tort claims were barred by governmental immunity. Had the Court of Appeals looked past the label affixed to the Commissioner's second amended complaint, and examined the nature of the liability alleged as *Bradley* and numerous other cases instruct, it would have seen that the Commissioner alleges a civil wrong. Genesee County should therefore be protected with immunity from tort liability.

The Court of Appeals' sweeping conclusion that unjust enrichment "ultimately involves contract liability, not tort liability[,]" will allow plaintiffs to label a claim alleging a civil wrong (tort) as "unjust enrichment" in order to defeat governmental immunity. This Court's intervention is therefore needed now, before the floodgates of litigation are opened by the Court of Appeals' allowance of all claims pled as "unjust enrichment" to proceed, even though the true nature of the liability claimed sounds in tort. As numerous courts have observed, "[t]he scope of th[e] equitable remedy of [unjust enrichment] is broad, 'cutting across both contract and tort law[.]" *Harris Group v Robinson*, 209 P3d 1188, 1205 (Colo 2009). Accordingly, *Bradley* requires the courts to undertake a case-by-case analysis to determine whether the nature of liability sounds in contract or in tort; that analysis was not done in this case. Moreover, the issue of whether all unjust enrichment claims sound in tort is an issue of first impression. The Commissioner's attempt to distinguish the many decisions of sister states on this issue is in vain. The cases cited on pages 20-23 of the County's Application for Leave to Appeal clearly demonstrate that a claim, even if pled as one for unjust enrichment, may actually sound in tort.

Peremptory reversal, or alternatively leave to appeal, is proper.

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RELIEF

WHEREFORE, Defendant-Appellant Genesee County respectfully requests this Court peremptorily reverse the August 22, 2017 opinion of the Court of Appeals and grant summary disposition to Genesee County. Failing that, Defendant-Appellant requests this Court grant this application for leave to appeal, and after full briefing and argument, issue a decision reversing the Court of Appeals' opinion and remanding the case to the Genesee County Circuit Court for entry of an order granting summary disposition in the County's favor, and enter all other relief which is proper in law and equity.

Respectfully submitted,

PLUNKETT COONEY

By: /s/Mary Massaron

MARY MASSARON (P43885)
HILARY A. BALLENTINE (P69979)
AUDREY J. FORBUSH (P41744)
Attorneys for Defendant-Appellant
Genesee County
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

Dated: November 20, 2017

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