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)

**DEFENDANT-APPELLANT GENESEE COUNTY'S SUPPLEMENTAL BRIEF**

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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

**Court Rules**



**Statutes**

**Other Authorities**

## STATEMENT OF THE QUESTION PRESENTED

I.

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE PLAINTIFF'S CLAIM OF UNJUST ENRICHMENT WAS NOT SUBJECT TO GOVERNMENTAL IMMUNITY UNDER THE GOVERNMENTAL TORT LIABILITY ACT, MCL 691.1401 *ET SEQ*., SEE *IN RE BRADLEY ESTATE*, 494 MICH 367 (2013), BECAUSE IT WAS BASED ON THE EQUITABLE DOCTRINE OF IMPLIED CONTRACT AT LAW, SEE RESTATEMENTS OF THE LAW 3D, RESTITUTION AND UNJUST ENRICHMENT (2011)?

Defendant-Appellant Genesee County says "yes."

Plaintiff-Appellee Genesee County Drain Commissioner, Jeffrey Wright, says "no."

The Genesee County Circuit Court says "no."

The Michigan Court of Appeals says "no."

## STATEMENT OF FACTS

### A. Introduction

The Court of Appeals' opinion in this case threatens to expose governmental agencies to liability simply because the plaintiff affixes an "unjust enrichment" label to what is clearly a tort claim. In the Court of Appeals' view, unjust enrichment "involves contract liability, not tort liability[,]" and as such is not barred by the Governmental Tort Liability Act, MCL 691.1401 *et seq*. Not only is this flatly inconsistent with this Court's holding in *In re Bradley Estate*, it is also inconsistent with longstanding Michigan principles of law that evaluate the gravamen of a situation, not merely the title. This Court granted a mini-oral argument to consider whether the Court of Appeals erred in holding that the plaintiff's claim of unjust enrichment is not subject to governmental immunity under the Governmental Tort Liability Act, Absent review and a reversal by this Court, opportunistic plaintiffs will use the Court of Appeals' published decision as a roadmap to plead unjust enrichment or some other "equity"-based claim in order to avoid the application of governmental immunity. This will, in turn, significantly undermine the protections of governmental immunity and create a host of problems for governmental agencies.

In this action for damages, Genesee County Drain Commissioner Jeffrey Wright's ("Plaintiff" or "the Commissioner") alleges that Genesee County ("the County") wrongfully retained refunds from Blue Cross Blue Shield otherwise intended for the Commissioner pursuant to a group health plan. The Commissioner and others sued the County, alleging, in addition to breach of contract, the intentional torts of fraud and conversion. See *Genesee Cty Drain Comm'r v Genesee Cty*, 309 Mich App 317, 320; 869 NW2d 635 (2015) (Apx 000021a-00031a). The trial court's order to allow the tort claims to proceed to trial was reversed by

the Michigan Court of Appeals, and the Commissioner was prohibited from seeking compensation for contract damages that accrued before October 24, 2005 (Apx 000029a-000030a).

On remand, the Commissioner moved for leave to file a second amended complaint in order to add a cause of action against the County for unjust enrichment. The trial court rejected the County's argument that the unjust enrichment claim was seeking compensatory damages for a non-contractual civil wrong, and therefore, was barred by governmental immunity. The Court of Appeals affirmed in a published opinion, holding that unjust enrichment is an "equitable doctrine" in which the law implies a contract, and thus "involves contract liability, not tort liability."(Court of Appeals Opinion 8/22/17, p 3) (Apx 000125a). In so doing, the Court of Appeals completely evaded the County's argument that Plaintiff was simply relabeling his conversion and fraud claims as "unjust enrichment" to avoid governmental immunity. While the Court of Appeals cited *In re Bradley Estate*, 494 Mich 367, 387; 835 NW2d 545 (2013) , for its interpretation of the "tort liability", it failed to undertake any meaningful analysis of whether Plaintiff's claim actually sounds in tort – regardless of the language used in the complaint. *Bradley* instructs 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[.]" (*Id*. at 387). Had the Court of Appeals undertaken a proper analysis under *Bradley*, it would have concluded that Plaintiff's claim sounds in tort and reversed the trial court's ruling with instructions to grant summary disposition to the County on the basis of qualified immunity.

The County seeks a reversal of the Court of Appeals' decision and remand for an order granting partial summary disposition and dismissing the Commissioner's unjust enrichment claim on the basis of immunity.

**B. Material facts**

The County, the Commissioner, and the Genesee County Community Mental Health Agency purchased group (or "cluster") health insurance coverage from Blue Cross Blue Shield of Michigan (referred to as the "plan group").[1] (Second Amended Complaint, ¶ 7) (Apx 000056a). Employees of each member of the plan group participated in the Blue Cross Plan. (*Id*., ¶ 11) (Apx 00057a). The Commissioner paid for the health insurance premiums of the Drain Commission employees so that they would be provided health insurance coverage. (*Id*., ¶¶ 13-16, 30) (Apx 000057a, 000059a).

Blue Cross audited the claims under the plan and would then establish premiums for health insurance coverage for the following year. (Second Amended Complaint, ¶ 17) (Apx 000057a). At the end of each plan year, Blue Cross would provide an annual settlement accounting statement of premiums paid and plan expenses incurred. For all of the plan years from 2001 through 2008, the Blue Cross annual settlement accounting revealed that premiums paid for the plan exceeded claims paid, administration expenses, and necessary reserves for such plan year. (*Id*., ¶¶ 19-20) (Apx 000057a). When a surplus occurred, Blue Cross gave the option of a credit toward the next plan year or a refund. (*Id*., ¶ 21) (Apx 000058a). In years where the County opted for a refund, Blue Cross issued

[1] The following facts are taken from the allegations in the Commissioner's complaint and were accepted as true only for purposes of the County's motion for summary judgment and appeal.

refund checks to Genesee County, which were deposited in the County's general fund. (*Id*., ¶¶ 22, 26-27) (Apx 000058a).

## C. Material proceedings

### *1. The plaintiffs' original suit pleaded claims for the intentional torts of fraud and conversion, which the Court of Appeals ultimately held were barred by governmental immunity*

The Commissioner and others sued the County, alleging, in addition to breach of contract, the intentional torts of fraud and conversion. See *Genesee Cty Drain Comm'r v Genesee Cty*, 309 Mich App 317, 320; 869 NW2d 635 (2015) (Apx 000021a-000031a). The trial court determined that (1) the plaintiffs' breach of contract claim could only recover damages for actions that accrued after October 24, 2005, under the six-year limitations period specified in MCL 600.5807(8); and (2) the defendants'[2] status as governmental entities did not give them immunity from intentional tort claims. (Apx 000023a). An appeal followed in which the Court of Appeals considered whether the plaintiffs could assert intentional tort claims "against a governmental-agency defendant that committed the alleged torts while engaged in the exercise of a governmental function." (Apx 000027a-000028a). The Court of Appeals held:

> [T]he provision and administration of health insurance benefits to public employees via an interagency agreement is plainly a governmental function. The alleged intentional torts committed by defendants were specific acts or decisions that occurred as part of the "general activity" of this governmental function. Defendants are therefore immune from tort liability for any intentional torts they committed in the provision and administration of health insurance benefits to public employees, and plaintiffs are barred from asserting intentional tort claims based on defendants' action in this context.

[2] The Genesee County Board of Commissioners was also a defendant.

(Apx 000028a) (citations omitted). The Court of Appeals thus reversed the trial court's order allowing the tort claims to proceed to trial. (Apx 000029a). The Court of Appeals affirmed the trial court's ruling that the plaintiffs' breach of contract claim could not seek compensation for damages that accrued before October 24, 2005 (Apx 000030a).

### *2. Seeking to circumvent the immunity dismissal, the Commissioner relabeled his fraud and conversion claims as a new claim for unjust enrichment*

On remand, the Commissioner moved for leave to file a second amended complaint in order to add a cause of action against the County for unjust enrichment. (Motion for Leave to File Second Amended Complaint and Brief in Support) (Apx 000047a-000054a). The Commissioner asserted that the six-year statute of limitations period under MCL 600.5813 applied to the proposed unjust enrichment claim; and thus the trial court's earlier decision to limit recovery under the existing breach of contract claim to within the six-year statute of limitations period would also apply to the new unjust enrichment claim. (*Id*., p 3) (Apx 000049a). The County responded, arguing that a claim for unjust enrichment could have been included in the original pleading or the first amended complaint. Further such a claim was seeking compensatory damages for a non-contractual civil wrong, and therefore, it was futile because it was barred by governmental immunity. (County's Response to Motion to Amend) (Apx 000063a-000071a). After a hearing on the Commissioner's motion, the trial court determined that a claim for unjust enrichment sounded in contract and thus entered an order granting leave to file the second amended complaint. (10/5/15 Order Granting Leave to File Second Amended Complaint) (Apx 000072a-000073a).

The Commissioner filed the second amended complaint, asserting that the County's failure to provide a portion of the refunds to the Genesee County Drain Commissioner constituted a breach of contract between the County and the Commissioner (Count I). (Second Amended Complaint, ¶¶ 36-41) (Apx 000059a-000060a). The Commissioner also asserted that the County wrongfully and unjustly retained the portion of the refunds that belonged to the Commissioner, and such conduct was inequitable and amounted to unjust enrichment (Count II). (*Id.*, ¶¶ 42-47) (Apx 000060a-000061a).

The County moved for partial summary disposition under MCR 2.116(C)(7) and (C)(8), first arguing that the Commissioner's unjust enrichment claim asserted tort liability and therefore it was barred by governmental immunity under MCL 691.1407(1). (County's Motion for Partial Summary Disposition and Brief in Support) (Apx 000079a-000082a). Even if a claim of unjust enrichment is more in the nature of an implied contract, it was properly dismissed because it was duplicative of the breach of contract claim. (Apx 000081a). Nonetheless, the nature of the allegations plainly demonstrated that the Commissioner was asserting that the County's wrongful conduct harmed the Commissioner, and therefore, he was asserting a tort claim barred by governmental immunity. (Apx 000081a-000082a).

The County also argued that the Commissioner could not establish a claim of unjust enrichment because the County did not receive a benefit to the Commissioner's detriment. (Apx 000082a-000083a). The refund the County received was from Blue Cross pursuant to the contract; the County did not receive and retain a benefit from the Commissioner. (*Id.*). Further, the Commissioner was fully compensated for the funds expended for the health care plan premiums. The Commissioner agreed to pay a certain amount for health care

premiums for health benefits for his workers, and the Commissioner received those benefits. (*Id*.). Therefore, the unjust enrichment claim should be dismissed as a matter of law. (*Id*).

The Commissioner responded that the Governmental Tort Liability Act did not preclude or bar implied contract claims, nor did the act apply to equitable claims, and therefore, the County was not entitled to summary disposition. (Commissioner's Response to Motion for Partial Summary Disposition, pp 6-9) (Apx 000091a-000094a). The Commissioner also argued that he had sufficiently pleaded a case for unjust enrichment because the County kept and used money belonging to the Commissioner. (*Id*., pp 10-11) (Apx 000095a-000096a).

The County replied that, in *In re Bradley Estate*, 494 Mich 367, 386; 835 NW2d 545 (2013), the Supreme Court held that the "tort liability" contemplated in the Governmental Tort Liability Act is "all legal responsibility arising from a non-contractual civil wrong for which a remedy may be obtained in the form of compensatory damages." This definition included a claim of unjust enrichment, which is a non-contractual civil wrong. (County's Reply Brief in Support of Partial Motion for Summary Disposition, pp 1-2) (Apx 000098a-000099a). Tellingly, the Commissioner was not seeking an injunction or other equitable relief, but rather, money damages. (*Id*., p 3)(Apx 000100a). Thus, the commissioner was claiming tort liability, barred by governmental immunity. (*Id*.)

After hearing arguments on the County's motion, the trial court again determined that "in an unjust enrichment claim, the law implies a contract to prevent inequity," and therefore, the "Governmental Tort Liability Act does not apply" to the Commissioner's unjust enrichment claim. (Tr 12/14/15, p 17) (Apx 000118a). The court entered a

corresponding order denying partial summary disposition. (12/28/15 Order Denying Defendant's Motion for Partial Summary Disposition) (Apx 000121a-000122a).

### *3. In a published opinion, the Court of Appeals held that unjust enrichment is an equitable doctrine involving contract – not tort – liability, and that plaintiffs could therefore circumvent governmental immunity simply by relabeling their tort claims as unjust enrichment*

The County appealed to the Court of Appeals, arguing that the trial court erred in not looking behind the label of the Commissioner's pleadings to examine the nature of the allegations, which clearly sound in tort and thus entitle the County to governmental immunity. The County pointed out that under Supreme Court precedent, the focus "must be on the nature of the liability rather than the type of action pleaded[.]" (MCOA Appellant Brief, p 10, citing *In re Bradley Estate*, 494 Mich 367, 385; 835 NW2d 545 (2013)). Under *Bradley's* direction that the application of the Governmental Tort Liability Act is not limited "to suits expressly pleaded as traditional tort claims[,]" *Id*. at 387, the County argued that both the nature of the duty alleged and liability which formed the basis for the Commissioner's "unjust enrichment" claim sound in tort liability because it alleges wrongful conduct which harmed the Commissioner. (MCOA Appellant Brief, pp 12-13). The County stressed that the second amended complaint containing the unjust enrichment claim *does not* seek to recover contract damages from the County by the Commissioner's performance of services that the County agreed to pay for. Rather, the suit seeks damages for purportedly wrongful conduct. Accordingly, because the unjust enrichment claim, when

examined beyond its label, asserted tort liability, the County was entitled to governmental immunity. (*Id*., p 13).[3]

The crux of the Commissioner's argument on appeal was that the "equitable claim of unjust enrichment implies a contract to prevent inequity or unjust enrichment between Plaintiff and Defendant, which does not assert 'tort liability' and is not barred by the GTLA." (MCOA Appellee Brief, p 7). Relying on unpublished case law, the Commissioner claimed that "[t]he restitution Plaintiff seeks is not the type of damages that are sought under 'tort liability' claims." (*Id*., p 11). The Commissioner attempted to distinguish *Bradley* by arguing that it "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." (*Id*.).

In reply, the County argued that the Commissioner's attempt to distinguish *Bradley* from this case is unpersuasive. (MCOA Reply Brief, 8/18/16, p 2). The County stressed that 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. (*Id*.). The County argued that here, as in *Bradley*, where the claimed wrong is not premised on a breach of a contractual duty, but

[3] Additionally, the County argued that any unjust enrichment claim fails as a matter of law because the County did not receive a benefit directly from the Commissioner. (MCOA Appellant Brief, pp 13-17). The Court of Appeals ultimately declined to address this argument, but noted in its opinion that "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." (8/22/17 Court of Appeals Opinion, p 3) (Apx 000125a).

alleges wrongful conduct that causes harm (here, allegedly to the Commissioner), the claim sounds in tort. (*Id*.).

In a published opinion, the Michigan Court of Appeals ruled that unjust enrichment "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" (8/22/17 Court of Appeals Opinion, p 3) (Apx 000125a). Accordingly, the Court of Appeals held that the Commissioner's claim was not barred by governmental immunity. (*Id*.). In so holding, the Court of Appeals completely overlooked this Court's instruction in *Bradley* that the determination of whether a particular claim sounds in tort requires the court to look beyond the label used in a plaintiff's complaint and focus on the nature of the liability. In fact, the Court of Appeals discussed *Bradley* only with respect to its definition of "tort" and "tort liability." (*Id*.). The Court of Appeals did not engage in any meaningful analysis of whether the true nature of the Commissioner's claim, while titled "unjust enrichment," actually alleged a non-contractual civil wrong, and thus a tort for purposes of governmental immunity. (*Id*.).

The County sought leave to appeal from this Court, which granted additional briefing and an oral argument on the question of "whether the Court of Appeals erred in holding that the plaintiff's claim of unjust enrichment was not subject to governmental immunity under the Governmental Tort Liability Act, MCL 691.1401 et seq., see *In re Bradley Estate*, 494 Mich 367 (2013), because it was based on the equitable doctrine of implied contract at law." (5/30/18 Order) (Apx 000133a-000134a).

## ARGUMENT

**The Court of Appeals erred in holding that the plaintiff's claim for unjust enrichment, which was a mere relabeling of fraud and conversion claims, was not subject to governmental immunity under the Governmental Tort Liability Act, MCL 691.1401 *et seq*,[4] because it was based on the equitable doctrine of implied contract at law [5]**

### A. Under Michigan's broad governmental immunity, governmental agencies like Genesee County are immune from tort liability while engaged in the exercise or discharge of a governmental function

Michigan's broad immunity protects governmental parties from the distractions and expenses of defending tort lawsuits filed against them in the same way that the doctrine of sovereign immunity has historically protected the state. See generally *Ross v Consumers Power Co,* 420 Mich 567, 596; 363 NW2d 641 (1984). This Court emphasized that governmental immunity "protects the state not only from liability, but from the great public expense of having to contest a trial." *Odom v Wayne County*, 482 Mich 459, 478; 760 NW2d 217 (2008). The statute also is predicated on the theory that governmental parties engage in a great deal of risky conduct in the course of serving the public, often are seen as deep-pocket defendants, and lawsuits against them may serve to deter useful and socially desirable conduct because of the risk of suit. To guard against this, the Legislature enacted broad protections for governmental parties of all kinds. The statute was intended to protect governmental parties against the burdens of discovery and trial, as well as against the potential for liability. (*Id.* at 47). It is also grounded on the notion that arguments about

[4] See *In re Bradley Estate*, 494 Mich 367 (2013),

[5] See RESTATEMENTS OF THE LAW 3D, RESTITUTION AND UNJUST ENRICHMENT (2011).

the governmental entity's purportedly wrongful conduct have a remedy through the political process.

Pursuant to the Governmental Tort Liability Act, MCL 691.1401, *et seq*., "[e]xcept as otherwise provided . . . all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). MCL 691.1401(f) defines a "governmental function" as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance or other law." Michigan courts have repeatedly held that this definition of governmental function is to be broadly applied. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 97; 494 NW2d 791 (1992); *Herman v City of Detroit*, 261 Mich App 141, 144; 680 NW2d 71 (2004). To show that the activity is a governmental function only requires some constitutional, statutory, or other legal basis for the activity in which the agency was engaged. *Adam*, 197 Mich App at 97.

The Court of Appeals previously determined that "the provision and administration of health insurance benefits to public employees via an interagency agreement is plainly a governmental function." *Genesee Cty Drain Comm'r*, 309 Mich App at 330. Thus, the tort claims brought by the Commissioner – fraud and conversion – were properly dismissed. (*Id*. at 321). The Commissioner then amended his complaint to allege the same wrongful conduct, but under the new label of "unjust enrichment." But the nature of the wrong alleged remains tortious conduct for which the Commissioner seeks money damages.[6]

[6] The Commissioner is clearly re-pleading his previously-dismissed conversion claim in an effort to circumvent immunity. The conversion claim contained in the Commissioner's
*(cont'd next page)*

Therefore, the County is entitled to governmental immunity and the trial court and Court of Appeals erred in denying partial summary disposition.

### B. *In re Bradley Estate* requires the court to engage in a case-by-case analysis to assess the nature of the injury and the relief requested when determining whether the allegations amount to "tort liability"

This Court recently considered the meaning of the phrase "tort liability" for purposes of the Governmental Tort Liability Act and held that the term "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 Bradley Estate*, 494 Mich 367, 371; 835 NW2d 545 (2013). In *Bradley*, deputies from the Kent County Sheriff's Department failed to timely execute an order to take an individual into protective custody and the individual subsequently committed suicide. Patricia Bradley, the decedent's sister who had petitioned for him to be taken into protective custody, then brought a wrongful death action in the circuit court against the Kent County Sheriff and his department. The suit was dismissed on grounds of governmental immunity. (*Id*. at 373-374). Bradley next filed a petition for civil contempt in the probate court alleging that the deputies were grossly negligent in their failure to execute the probate court order and that their negligence was the proximate cause of her brother's death. (*Id*. at 374). The probate court denied the Sheriff's motion for summary disposition on ground of immunity, but the circuit

---

*(cont'd from previous page*)

First Amended Complaint alleged that the County wrongfully "retained the funds" belonging to the Commissioner for its own benefit. (First Amended Complaint, ¶¶ 68-75) (Apx 000041a- 00042a). The Commissioner's unjust enrichment claim as set forth in his Second Amended Complaint pleads that the County "wrongfully and unjustly retained" a portion of the funds that belong to the Commissioner. (Second Amended Complaint, ¶¶ 42-45) (Apx 000060a).

court reversed, concluding that Bradley's civil contempt petition was based in tort because the petition sought damages under the wrongful death statute.

This Court agreed, finding that the term "'tort' as used in MCL 691.1407(1) is a non-contractual civil wrong for which a remedy may be obtained in the form of compensatory damages." (*Id.* at 385). The Court further noted that the statute did not refer merely to "tort" but to "tort liability." (*Id*.). Accordingly,

> Construing the term "liability" along with the term "tort," it becomes apparent that the Legislature intended "tort liability" to encompass legal responsibility arising from a tort. We therefore hold that "tort liability" as used in MCL 691.1407(1) means all legal responsibility arising from a non-contractual civil wrong for which a remedy may be obtained in the form of compensatory damages.

(*Id*.). Importantly, the Court instructed that the focus "must be on *the nature of the liability rather than the type of action pleaded*," and therefore, the application of the Governmental Tort Liability Act is not limited "to suits expressly pleaded as traditional tort claims . . . ." (*Id*. at 387) (emphasis added). 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, under *Bradley*, a court considering whether a claim involves tort liability "should first focus on the nature of the duty that gives rise to the claim." (*Id*. at 389). "[I]f 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." (*Id*.). The court must next 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 non-contractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable." (*Id*.).

Specifically, in *Bradley*, this Court held that the civil contempt action was a tort suit for money damages and thus the Sheriff and his department were entitled to governmental immunity. The contempt statute, MCL 600.1721[7], "requires a showing of contemptuous misconduct that caused the person seeking indemnification to suffer a loss or injury and, if these elements are established, requires the court to order the contemnor to pay 'a sufficient sum to indemnify' the person for the loss." *In re Bradley Estate*, 494 Mich at 391. The Court also noted that the language of the contempt statute "authorizes a court to order a contemnor to 'indemnify' the petitioner for the loss caused by the contemptuous misconduct," and therefore, "the statute clearly sanctions legal responsibility, or liability, in the form of compensatory damages" and allowed for "what is, in essence, a tort suit for money damages." (*Id*. at 392).

In this case, the Commissioner's Count II is labeled unjust enrichment, which the trial court found to be in the nature of contract, or more specifically, implied contract. (Tr 12/14/15, p 17) (Apx 000118a). But as noted, "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-11; 742 NW2d 399 (2007). "Courts are not bound by the labels that parties

[7] MCL 600.1721 provides:

> If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury.

attach to their claims." *Buhalis v Trinity Continuing Care Svcs*, 296 Mich App 685, 691; 822 NW2d 254 (2012). To the contrary, the law requires courts to look past the label chosen by the plaintiff to the substance of the claim asserted. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995) (stating that "in ruling on a statute of limitations defense the court may look behind the technical label…to the substance of the claim asserted."); *Attorney General v Mereck Sharp & Dohme Corp*, 292 Mich App 1, 9; 807 NW2d 343 (2011) ("a court is not bound by a party's choice of labels."). Similarly, courts must look past the title a plaintiff affixes onto a claim to determine whether it falls within the definition of "tort liability." The Court of Appeals' opinion in this case represents a drastic departure from this principle.

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 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 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 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 failed to properly analyze whether the Commissioner's unjust enrichment claim sounds in tort or contract, as *Bradley* requires.

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 Governmental Tort Liability Act 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 Governmental Tort Liability Act. (Answer to Application, p 12). The Commissioner claims that the first step – whether "the wrong alleged is premised on the 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*.

In a complete departure from *Bradley*, the Court of Appeals held in a published opinion that a claim "based upon a theory of unjust enrichment" is not barred by the doctrine of governmental immunity, without so much as a passing glance at the nature of liability alleged. 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.

### C. Both the American Law Institute in RESTATEMENTS OF THE LAW 3D, RESTITUTION AND UNJUST ENRICHMENT (2011) and sister courts have recognized that claims for unjust enrichment oftentimes sound in tort and thus are barred by governmental immunity

The issue of whether all unjust enrichment claims sound in tort is an issue of first impression in Michigan. While *Bradley* determined that the court must review the nature of the liability in order to determine whether a claim sounds in tort, *Bradley* involved civil contempt, not unjust enrichment. The concept of unjust enrichment has been "long shrouded in fogs that linger from an earlier era of the legal system." Douglas Laycock, *Restoring Restitution to the Canon*, Vol 110 Mich Law Rev 929 (2012). But the RESTATEMENTS OF THE LAW 3D, RESTITUTION AND UNJUST ENRICHMENT (2011), sheds light on the subject. "Unjust enrichment" is a "term of art." Restatement (Third), § 1, cmt. b. "The law of restitution is predominantly the law of unjust enrichment[.]" (*Id.*). "The substantive part of the law of restitution is concerned with identifying those forms of enrichment that the law treats as 'unjust' for purposes of imposing liability." (*Id.*). The comment to the Restatement explains why "unjust enrichment" might be more appropriately called "*unjustified enrichment*":

> Compared to the open-ended implications of the term "unjust enrichment," instances of unjustified enrichment are both predictable and objectively determined, because the justification in question is not moral but legal. Unjustified enrichment is enrichment that lacks an adequate legal basis; it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights.

Restatement (Third), § 1, cmt. b.

The very first comment to § 1 of the Restatement (Third) makes clear that unjust enrichment oftentimes sounds in tort: "[t]he identification of unjust enrichment as an independent basis of liability in common-law legal systems – comparable in this respect to

a liability in contract or tort – was the central achievement of the 1937 Restatement of Restitution. That conception of the subject is carried forward here." (*Id*., § 1 cmt. a). The law of restitution and unjust enrichment "creates distinctive remedies with applications to all sorts of causes of action – to claims in contract, tort, and unjust enrichment, and to claims for equitable wrongs and for violation of statutes." Laycock, *supra,* at p 930. It is a "common misperception that restitution is necessarily equitable…." (*Id*. at 931).

The configuration of the Restatement confirms that claims for unjust enrichment are often rooted in tort liability. An entire chapter in the Restatement (Chapter 5), entitled Restitution for Wrongs, addresses "a whole series of commercially significant torts: trespass and conversion (§ 40), misappropriation of financial assets (§ 41), infringement of intellectual property (§ 42), breach of fiduciary or confidential relation (§ 43), and other intentional interference with legally protected interests (§ 44)." (*Id*. at p 937). In particular, Section 44, the "catchall" provision, "includes established torts" such as fraud and intentional interference with contract. Laycock, *supra*, at p 937, citing § 44 cmt. c., illus. 12-13, and § 44 cmt. b., illus. 4-6. "Emerging" torts such as identity theft, and "profitable wrongdoing too unusual to easily classify," are also addressed in Chapter 5. Laycock, *supra*, at p 937. "The payoff is that addressing these torts through restitution can lead to restitutionary remedies, including disgorgement of profits (§ 51) and a constructive trust over identifiable proceeds of the wrong (§55) as alternatives to compensatory damages." (*Id*.). The American Law Institute's discussion, and the manner in which it distinguishes between tort and other causes of action, makes clear that these causes of action are grounded in tort – not contract. (*Id*.). See generally RESTATEMENTS (3RD) OF RESTITUTION (2011), Chapter 5. Restitution for Wrongs (2011).

In addition, the analyses of other courts in the nation have concluded, correctly so, that a claim for unjust enrichment may sound in tort, and not contract, liability. See *Blakeslee v Farm Bureau*, 388 Mich 464, 470-473; 201 NW2d 78 (1972) (in matters of first impression, the court may consider the interpretation of other courts). For example, in *Westwood Pharms, Inc v Nat'l Fuel Gas Distrib Corp,* 737 F Supp 1272, 1284–85 (WDNY1990), the court, applying New York law, held that an unjust enrichment claim predicated on the defendants' intentional or negligent acts sounded in tort. The Iowa Supreme Court similarly concluded that the doctrine of unjust enrichment "may arise from contracts, torts, or other predicate wrongs[.]" *State, Dep't of Human Servs. ex rel Palmer v Unisys Corp,* 637 NW2d 142, 154 (Iowa 2001).

The Court of Appeals of Oregon concluded that the two-year statute of limitations for tort actions, rather than the six-year statute of limitations for actions on contract, applied to the note makers' action against the lender and others for restitution, unjust enrichment, rescission, and money had and not received. *Htaike v Sein*, 269 Or App 284; 344 P3d 527 (2015). In so ruling, the *Htaike* Court looked to the gravamen of the note makers' claims and concluded that the "predominant characteristics" of plaintiffs' claims sounded in tort:

> The "gravamen or the predominant characteristics" of an action, not the plaintiff's election, determines whether the tort or contract statute of limitations applies. *Lindemeier v. Walker*, 272 Or. 682, 685, 538 P.2d 1266 (1975). To determine the predominant characteristics of an action, we examine the legal source of the defendant's liability, the factual setting of the dispute, the injuries asserted by the plaintiff, and the plaintiff's claimed measure of damages. *Securities–Intermountain v. Sunset Fuel,* 289 Or. 243, 258–60, 611 P.2d 1158 (1980). We agree with defendants that the gravamen of plaintiffs' claims is grounded in tort. Contrary to plaintiffs' assertions, plaintiffs' claims do not place the promissory notes at the center of the allegations other than to assert that the notes, because of usurious rates, contributed to the harm that plaintiffs suffered. Plaintiffs did not assert that

> defendants breached any specific contractual obligations, nor can any of their claims fairly be said to turn on contract principles.3 Rather, plaintiffs asserted that the notes should be rescinded because they were "defective at formation" because of the usurious rates. Moreover, at the heart of plaintiffs' allegations was an ongoing course of conduct by defendants that included deceit, misrepresentations, and coercion. Accordingly, we conclude that the predominant characteristics of plaintiffs' claims sound in tort and that ORS 12.110(1) [the statute of limitations for tort actions] applies.

*Htaike*, *supra*, at 294-95.

In *Peddinghaus v Peddinghaus,* 295 Ill App 3d 943; 230 Ill Dec 55; 692 NE2d 1221, 1225 (1998), the Appellate Court of Illinois, First District, rejected the defendants' argument that "the doctrine of unjust enrichment is based on an implied or quasi-contract and, therefore….has no application when, as here, a specific contract (the purchase agreement) exists which governs the relationship of the parties." (*Id*. at 1226). In the *Peddinghaus'* Court's view, "unjust enrichment may be predicated on either quasi-contract or tort." (*Id*.). In that case, which was based on an alleged fraudulent inducement to sell shares of a trust, the Court held that the plaintiff "bases his unjust enrichment claim on a tort theory[.]" (*Id*.). Similarly, in *Blusal Meats, Inc v United States,* 638 F Supp 824, 832 (SDNY 1986), a New York federal court held that the plaintiff's unjust enrichment claim was predicated on tort and that it was therefore subject to the statute of limitations for tort actions. In so ruling, the *Blusal* Court, like the *Peddinghaus* Court, looked to the factual basis underlying the claim. *Id*.; *Peddinghaus,* 230 Ill Dec 55; 692 NE2d at 1225.

*Robinson v Colorado State Lottery Div*, 179 P3d 998 (2008), provides perhaps the best illustration of the analysis the Court of Appeals should have taken in this case. In *Robinson*, the Supreme Court of Colorado, sitting *en banc*, held that a lottery ticket buyer's claim of unjust enrichment sounded in tort and was thus barred by the Colorado Governmental Immunity Act. The plaintiff in *Robinson* contended that the Colorado State

Lottery Division and the Colorado State Lottery Commission (collectively, "the Lottery") continued to sell scratch tickets months after all the represented and advertised prizes were awarded. The plaintiff framed her complaint in both contract and quasi-contract, arguing that she brought scratch tickets with the belief, based on the Lottery's representations, that she had a chance to win certain represented prizes and that she did not receive the chance to win for which she had contracted. (*Id*. at 1001). The Lottery moved to dismiss on the basis that the claims "lie in tort or could lie in tort" and thus were barred by the Colorado Governmental Immunity Act, and the trial court granted that motion. (*Id*.). On appeal, the court of appeals affirmed.

The Supreme Court of Colorado granted certiorari "to review whether [the plaintiff's] claims lie in tort or could lie in tort and are therefore barred" by governmental immunity, and ultimately held that "[b]ecause the underlying injury asserted in [the plaintiff's] claims arises out of the alleged misrepresentation of certain facts by the Lottery, we find that Robinson's claims lie in tort or could lie in tort for the purposes of governmental immunity. Thus, they are barred by the CGIA." (*Id*.). In so ruling, the *Robinson* Court first noted that "the form of the complaint is not determinative of the claim's basis in tort or contract." (*Id*. at 1003). Rather, "a court must consider the nature of the injury and the relief sought." (*Id*.). Turning to the unjust enrichment claim, the *Robinson* Court explained that "[t]he scope of the remedy is broad, cutting across both contract and tort law, with its application guided by the underlying principle of avoiding the unjust enrichment of one party at the expense of another." (*Id*. at 1007). Accordingly, the *Robinson* Court held that in order to determine whether a claim pleaded as unjust enrichment is really predicated in tort, and thus barred by governmental immunity, a "case-by-case

analysis" must be applied in which the court examines "the nature of the injury and the relief requested":

> *Because an unjust enrichment claim can be predicated on either tort or contract, we apply the same case-by-case analysis to an unjust enrichment claim as we have done with other claims, assessing the nature of the injury and the relief requested*. See *Berg*, 919 P.2d at 259; *DeLozier*, 917 P.2d at 715. Here, Robinson's unjust enrichment claim requires a showing that it would be unjust for the Lottery to retain the money spent by Robinson on scratch tickets when the represented prizes were no longer available. However, to show injustice, Robinson necessarily relies on allegations that she was induced into the purchase of scratch tickets by the Lottery's alleged misrepresentations that certain prizes remained available.

(*Id.* at 1008) (emphasis added). Upon careful review of the injury alleged, the *Robinson* Court noted that the plaintiff's claimed was "predicated on tortious conduct" and thus was barred by governmental immunity:

> Once again, we are presented with an injury which appears to be based on tortious conduct or the breach of a duty actionable in tort. *Thus, because this unjust enrichment claim is predicated on tortious conduct and the nature of the injury arises out of a misrepresentation, this claim lies in tort or could lie in tort for the purposes of the CGIA.*

(*Id*. at 1008) (emphasis added).

The *Robinson* Court further explained that the mere fact that the plaintiff requested "equitable relief in the form of recession does not deter our conclusion that this particular unjust enrichment claim for equitable relief lies in tort." (*Id*.). As the *Robinson* Court noted, the relief requested is not dispositive of whether a claim sounds in tort or contract:

> Although the relief requested informs our understanding of whether the injury is tortious in nature, it is not dispositive of the claim's underlying basis in tort or contract. Robinson seeks restitution of the Lottery's profits on scratch tickets sold after the represented prizes were no longer available. Although this relief is labeled restitution, it is in effect the equivalent of damages that Robinson could plead in tort—money expended on lottery tickets when the Lottery misrepresented certain facts in order to induce Robinson to purchase the tickets. Thus, in this particular instance, where the nature of the injury underlying the unjust enrichment claim arguably arises

> out of tortious conduct and the request for relief is effectively equivalent to the damages that Robinson could seek in tort, the claim lies in tort or could lie in tort. Accordingly, Robinson's unjust enrichment claim is barred by the CGIA.

(*Id*. at 1008). In other words, the unjust enrichment claim arose out of tortious conduct, that is, out of the Lottery's misrepresentations.

*Robinson* and the other above-cited cases make clear that a court presented with a "non-traditional tort claim" must examine the nature of the injury and the relief requested to determine whether the claim, however pleaded, sounds in tort. Just as the *Robinson* plaintiff's injury was based on tortious conduct or the breach of a duty actionable in tort, here too the Commissioner's claim is predicated on fraud or conversion, that is, the claimed breach of a duty to provide any refunds to the county health plan participants. Just as in *Robinson*, because the alleged unjust enrichment claim "is predicated on tortious conduct" and the nature of the injury arises out of a non-contractual civil wrong, the Commissioner's claim "lies in tort or could lie in tort" for purposes of Michigan's Governmental Tort Liability Act." *Robinson*, *supra*, at 1008. Moreover, as the *Robinson* Court explained, the specific relief in the Commissioner's second amended complaint is effectively equivalent to the damages that the Commissioner could seek in tort, providing further support that the Commissioner's unjust enrichment claim lies in tort and is barred by governmental immunity. (*Id*.). In short, regardless of how labeled, the Commissioner's claim sets forth a tort claim. Had the Court of Appeals looked past the label affixed to the Commissioner's complaint, and examined the nature of the liability as *Bradley*, *Robinson*, and numerous other cases instruct, it would have seen that the Commissioner alleges a civil wrong. Genesee County therefore should be protected with immunity from tort liability. Only a reversal of the Court of Appeals' erroneous decision can achieve this desired result.

### D. Where, as here, a claim for unjust enrichment rests on the same improper conduct as the underlying tort claim, the unjust enrichment claim may not stand as a substitute for the failed tort claim and thus avoid immunity

Applying these principles to the Commissioner's allegations results in the conclusion that governmental immunity bars his unjust enrichment claim because he has alleged tort liability within the meaning of the statute. The Commissioner has not grounded his claim in contract; he belatedly added a claim for unjust enrichment to his complaint only after the Michigan Court of Appeals issued a decision dismissing his tort claims and prohibiting him 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) (Apx 000021a-000031a). And he did so to circumvent the protection of immunity despite the fact that his unjust enrichment claim sounds in tort, not contract.[8]

The Commissioner alleges that Genesee County wrongfully opted to receive a refund of a health plan surplus and deposited the refund checks into its general fund without communicating to the Commissioner that it was receiving these substantial refunds. (Second Amended Complaint ¶¶ 20-34) (Apx 000057a-000059a). The Commissioner alleged that the County "wrongfully and unjustly retained a portion of the refunds under the Blue Cross Plan that belong to Genesee County Drain Commissioner." (*Id*. at ¶ 43) (Apx 000060a). The Commissioner claims that the County is "not entitled to retain" these funds, and that it has therefore been unjustly enriched. (*Id.* at ¶¶ 44-45) (Apx 000060a). These allegations are the same as those originally styled as conversion and fraud – and fall within

[8] The Commissioner has pleaded a claim for contract damages, so if this were really merely a contract claim, it would be subject to dismissal as redundant.

the categories of "unjust enrichment" labeled as "Restitution for Wrongs." RESTATEMENTS OF THE LAW 3D, RESTITUTION AND UNJUST ENRICHMENT (2011), Chapter 5.

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. Had the Court of Appeals applied the analysis set forth in *Bradley*, it first would have considered the nature of the duty alleged. Here, the Commissioner is alleging that the County had a duty to provide it with a refund that came from Blue Cross. Thus, 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. This is a non-contractual duty.

Next, turning to the nature of the liability, the allegations in Count II of the second amended complaint clearly state that the County engaged in wrongful conduct that harmed the Commissioner, and thus caused damages. The second amended complaint states as follows:

> 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.

(Second Amended Complaint, ¶¶ 43-47) (Apx 000060a-000061a) (emphasis added). The allegations above constitute a classic conversion[9] claim, which the Commissioner pleaded in his First Amended Complaint. (First Amended Complaint, ¶¶ 68-75) (Apx 000041a-000042a). Specifically, the Commissioner pleaded that the County's retention of funds and use of those funds "for its own benefit" amounted to conversion of the funds for its own use. (*Id*.). The Court of Appeals concluded that the Commissioner's conversion claim was an intentional tort and thus was barred by governmental immunity, See *Genesee Cty Drain Comm'r v Genesee Cty*, 309 Mich App 317, 320; 869 NW2d 635 (2015) (Apx 000027a-000029a). Now, the Commissioner attempts, through artful pleading, to recast his tort claim for conversion into one for unjust enrichment, to evade the reach of governmental immunity.

Nevertheless, the nature of the liability asserted in the Commissioner's Count II (labeled as unjust enrichment) is tort liability, because it alleges wrongful conduct which harmed the Commissioner. Further, the complaint clearly seeks compensatory damages for the County's alleged conduct in wrongfully retaining the refunds. The Commissioner asserts that he is entitled to "a portion of the refund based upon its participation in the Blue Cross Plan." (Second Amended Complaint, ¶31) (Apx 000059a). But the Commissioner is

[9] Common law conversion "is any distinct act of dominion wrongfully exerted over another person's personal property." *Pamar Enterprises Inc v Huntington Banks of Mich*, 228 Mich App 727, 734; 580 NW2d 11 (1998).

seeking those funds which came from Blue Cross and which the County allegedly wrongfully retained. The second amended complaint *does not* seek to recover contract damages from the County for some performance by the Commissioner for which the County has agreed to provide compensation. As the courts have "repeatedly recognized . . . when a party breaches a duty stemming from a legal obligation, other than a contractual one, the claim sounds in tort." *In re Bradley Estate*, 494 Mich at 383-84. Count II of the Second Amended Complaint thus asserts tort liability from which the County is entitled to governmental immunity, and therefore, the Court of Appeals erred in denying the County's motion for summary disposition.

**E. Conclusion**

Peremptory reversal, or a grant of leave to appeal, is further necessary to clarify the confusion currently permeating in the Court of Appeals on this issue. Just two days after the Court of Appeals' decision in this case, another panel of the Court of Appeals held that the plaintiff's claim for unjust enrichment sounded in tort and thus was barred by governmental immunity. *Shears v Bingaman*, unpublished opinion per curiam of the Court of Appeals, Docket No. 329976 (August 24, 2017) (Apx 000127a-000132a). The plaintiffs in *Shears* challenged the municipal defendants' decisions to increase water and sewer rates and to increase a readiness-to-serve charge. The plaintiffs' complaint included constitutional due process and other claims including, the plaintiffs' argued, unjust enrichment. The defendants argued that governmental immunity barred all of the plaintiff's claims. (Apx 000129a). With respect to the unjust enrichment theory, the circuit court disagreed, stating that "[b]ecause a claim of unjust enrichment is an equitable claim that sounds in contract, not in tort, Defendants are not entitled to immunity from these claims

under the GTLA." (*Id.*). On appeal, a panel of the Court of Appeals reversed. (Apx 000130a-000132a). Following *Bradley's* directive to examine "the nature of the liability rather than type of action pleaded," the *Shears* Court determined that "it is quite apparent, at least in our view, that plaintiffs' claims constitute constitutional or tort claims based on alleged violations of various ordinance provisions." (Apx 000130a). Accordingly, the *Shears* Court held that governmental immunity applied to the plaintiffs' unjust enrichment theory.

Absent this Court's review and correction, confusion will continue to permeate Michigan's trial and appellate courts. Governmental defendants will have no way of knowing whether plaintiffs will be able to proceed with their tort claims through crafty labeling, since some panels, like the one in *Shears*, will correctly look to the nature of the liability to determine whether it sounds in tort, while others, like the panel in this case, will refuse to look beyond the label affixed to the complaint. This, in turn, will create a host of problems for governmental defendants and have a trickle-down effect on the public. This Court should peremptorily reverse or grant leave to reaffirm the strong protections of governmental immunity and hold that even non-traditional tort claims, like unjust enrichment, are barred by the Governmental Tort Liability Act when they seek monetary damages for allegedly wrongful conduct.

**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)
Attorneys for Defendant-Appellant
Genesee County
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

Dated: July 25, 2018

Open.06002.60091.20487826-1