STATE OF MICHIGAN
IN THE 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.156579
Michigan COA No. 331023
Genesee County Circuit Court No.
11-97012-CK

PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF PURSUANT TO MSC ORDER DATED MAY 30, 2018

Submitted by:

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STATEMENT OF QUESTION PRESENTED

1. 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. See *Restatements of the Law 3d, Restitution and Unjust Enrichment* (2011).

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

STIPULATION TO DEFENDANT'S APPENDIX AND PLAINTIFF'S SUPPLEMENTAL APPENDIX

Plaintiff stipulates to Defendant's Appendix filed with its Supplemental Brief; however, Plaintiff also provides a supplement appendix containing pleadings and other documents not provided by Defendant in its Appendix.

INTRODUCTION

This Court explicitly instructed the parties in its May 30, 2018 order requesting supplemental briefs to "not submit mere restatements of their application papers." *Michigan Supreme Court Order Apx 000133a-134a*. Despite this instruction, Defendant's Supplemental Brief is largely a restatement of its Application for Leave to Appeal and its Reply to Plaintiff's Answer. In fact, most of Defendant's Supplemental Brief is a verbatim restatement of the arguments already submitted in its application papers. *Defendant's Application for Leave to Appeal Apx 001b-036b*. Because Plaintiff has already addressed most of these restated arguments in its Answer to Defendant's Application for Leave to Appeal, Plaintiff will not restate its arguments already submitted to this Court in its application papers. *Plaintiff's Answer to Defendant's Application for Leave to Appeal Apx 037b-076b*. Plaintiff will instead focus this Supplemental Brief on this Court's specific question of whether the Court of Appeals erred in holding that Plaintiff's claim of unjust enrichment was not subject to governmental immunity under the Governmental Tort Liability Act ("GTLA"), 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. Plaintiff will also address Defendant's limited new arguments made by Defendant in its Supplemental Brief.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The entre factual background, including all of the allegations contained in Plaintiff's Second Amended Complaint (the "Complaint"), are provided in Plaintiff's Answer to Defendant's Application for Leave to Appeal. *Apx 045b-054b*. Notably, in Defendant's Supplemental Brief, it omits material background facts and allegations, and mischaracterizes the procedural history of this case.

First, Defendant omits material aspects concerning the relationship and agreement between the parties concerning the group heath care plan. As alleged by Plaintiff[1], Plaintiff and Defendant entered into an agreement to procure health insurance coverage for their employees as a group, and pursuant to the parties' agreement, Plaintiff and Defendant were obligated to pay the premiums for their respective employees. *Plaintiff's Second Amended Complaint Apx 000056a-000057a.* The parties' agreement and group arrangement continued in effect for many years, with Defendant and Plaintiff each paying the premiums due for their own employees. *Id.* When premiums paid by Plaintiff and Defendant during a plan year exceeded claims paid out and expenses of administering the plan, Blue Cross issued annual refunds, which, unbeknownst to Plaintiff, were sent to Defendant and Defendant retained all refunds, unjustly benefiting from Plaintiff's portion of the refund. *Apx 000057a-000059a.* This agreement between the parties to jointly purchase health insurance benefits as a group is the backdrop of this action and provides the foundation to the claims asserted by Plaintiff.

Second, Defendant asserts that Plaintiff sought to amend its complaint to add a claim of unjust enrichment simply because the Court of Appeals determined that the intentional tort claims pled by Plaintiff were barred by the Governmental Tort Liability Act. Contrary to Defendant's assertion, Plaintiff's amendment of its complaint to add a claim of unjust enrichment was in reality filed in response to Defendant denying that there existed any express contractual relationship between the parties. Defendant's answers to Plaintiff's complaints admitted that the parties participated jointly in a group health care plan for the purpose of lowering premiums and expenses, yet Defendant denied that the parties agreed

[1] All factual allegations made by Plaintiff in its Complaint are accepted as true, as well as any reasonable inferences or conclusion 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).

to purchase health insurance together as a group.[2] *Defendant's Answer to Original Complaint Apx 081b-082b; Defendant's Answer to First Amended Complaint Apx 097b-098b.* Defendant then stated in its responses to Plaintiff's first discovery requests that it was unaware of any contracts or agreements entered into between Plaintiff and Defendant concerning the formation, administration, operation, funding, or termination of the parties' health care group plan. *Defendant's Responses to Plaintiff's First Discovery Requests, Interrogatory No. 9 Apx 113b.*

It was only when Defendant filed its first Motion for Summary Disposition concerning governmental immunity a few months later, and well before discovery was completed (in fact, before any depositions were conducted or other document requests or interrogatories were exchanged), that Defendant then asserted that there was no contractual relationship of any kind between Plaintiff and Defendant. *Defendant's First Motion for Summary Disposition ¶4 Apx 123b.* The trial court denied Defendant's motion and Defendant appealed that decision to the Court of Appeals. This action was stayed during the pendency of the appeal for approximately 2 ½ years, preventing Plaintiff from seeking leave to file an amended complaint adding a cause of action for unjust enrichment claim.

After the stay on this action was lifted following the Court of Appeals' decision, Plaintiff filed its motion for leave to amend its complaint to add a claim for unjust enrichment. *Plaintiff's Motion for Leave to File Second Amended Complaint Apx 000047a-000054a.* In its motion, Plaintiff specifically requested to add the claim of unjust enrichment as the equitable counterpart, and alternative claim, to its breach of contract claim, as Defendant

[2] Plaintiff's First Amended Complaint was filed in the infancy of the case simply to add additional interested parties. No new claims or defenses were raised, and it was filed before preliminary discovery was exchanged in the case.

now denied the existence of an express contract between the parties, and if no express contract were to be found, then the law would imply the contractual relationship between the parties. *Apx 000052a-000054a*.[3] Plaintiff also noted that the delay in amending the complaint was solely caused by the 2 ½ year stay of the case while Defendant's first appeal was pending with the Michigan Court of Appeals. Defendant objected, claiming that such a claim was still barred by governmental immunity. The trial court disagreed with Defendant and granted Plaintiff leave to file its Second Amended Complaint. Subsequently, Defendant filed another Motion for Partial Summary Disposition, which the trial court denied, and the Court of Appeals affirmed the denial. The actual rulings by the trial court and Court of Appeals, and the arguments made therein, are detailed more fully in Plaintiff's Answer to Defendant's Application for Leave to Appeal to this Court.

LAW & ARGUMENT

1. Relying on well-established Michigan law, and utilizing the guidance provided by this Court's decision in *In re Bradley Estate*, 494 Mich 367 (2013), the Court of Appeals correctly determined that a claim of unjust enrichment is not barred by the Governmental Tort Liability Act because it is based on the equitable doctrine of implied contract at law.

The Court of Appeals correctly found that the factual background and allegations examined in *In re Bradley* are not directly on point with the factual background and allegations made in this current case. As the Court of Appeals recognized, *In re Bradley* did not directly answer whether a claim based upon unjust enrichment constitutes one for "tort liability" that comes under the Governmental Tort Liability Act (the "GTLA"). *MCOA Opinion and Order Apx 000123a-000132a.* Even Justice McCormack, in her dissent in *In re*

[3] *See Keywell & Rosenfeld v Bithell,* 254 Mich App 300, 329; 657 NW2d 759, 776 (2002)(holding that it is proper for a jury to determine whether an express contract exists, and thus a claim for breach of express contract survives, or no express contract exists, and thus a claim for unjust enrichment survives).

Bradley, stated "[t]he practical import of this case is probably limited, given that civil contempt is fairly rare and that the facts of a case giving rise to the possibility of indemnification damages for civil contempt are rarer still." *In re Bradley Estate*, 494 Mich 367, 422; 835 NW2d 545, 575 (2013). Plaintiff's distinction of *In re Bradley* from this current case is contained within Plaintiff's Answer to Defendant's Application for Leave to Appeal. However, as Plaintiff proffered and the Court of Appeals agreed, the important aspect of the opinion in *In re Bradley* was the guidance that it provides concerning the term "tort liability" and how a court determines whether a claim falls within "tort liability" under MCL 691.1407(1). Specifically:

> "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).

Following the guidance in *In re Bradley*, the Court of Appeals first examined the nature of the duty that gives rise to the claim of unjust enrichment. Relying on binding Michigan precedent, the Court of Appeals correctly stated that in a claim for unjust enrichment, "the law will *imply a contract* to prevent unjust enrichment," that under unjust enrichment "*a contract will be implied* only if there is no express contract covering the same subject matter," and 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." *MCOA Opinion and Order Apx 125a; see also Morris Pumps v Centerline Piping, Inc,*

273 Mich App 187, 193; 729 NW2d 896 (2006); *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993); *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992); *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991); *Landstar Express Am, Inc v Nexteer Auto Corp*, 319 Mich App 192, 204; 900 NW2d 650, 657 (2017)(holding "[a]n equitable claim of unjust enrichment is grounded on the theory that the law will imply a contract to prevent the unjust enrichment of another party.")

Furthermore, as Plaintiff has noted, a claim for unjust enrichment "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), and that the remedy for a claim of unjust enrichment 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). Using these well-established published Michigan cases, the Court of Appeals determined that a claim of unjust enrichment ultimately involves contract liability, not tort liability. In other words, according to Michigan law, a claim for unjust enrichment implies a contractual duty onto the defendant to reimburse or return the unjustly retained benefit received by the defendant. Accordingly, the wrong alleged (unjust enrichment) is premised on the breach of a contractual duty, albeit an implied contractual duty. Consequently, the Court of Appeals held that, under the guidance of *In re Bradley* and other binding precedent, a claim for unjust enrichment is not barred by the GTLA.

The Court of Appeals determination that an unjust enrichment claim implies a contractual duty onto the defendant follows previous rulings from this state, as well as other jurisdictions as well. *See Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 198; 596

NW2d 142, 151 (1999)("The essential elements of a quasi contractual obligation, upon which recover may be had, are the receipt of a benefit by a defendant from a plaintiff, which benefit it is inequitable that the defendant retain."); *Hofmann v Auto Club Ins Ass'n*, 162 Mich App 424, 429, 413 NW2d 455, 457 (1987)("Restitution may be imposed under the equitable theory of implied contract or quasi-contract to prevent the unjust enrichment of one party at the expense of another," citing 66 AM Jur 2d, *Restitution & Implied Contracts*, §§ 1-3 pp 942-946, and "[a] quasi-contractual obligation arises when a defendant receives a benefit from a plaintiff which is inequitable for the defendant to retain."); *FDIC v Jeff Miller Stables*, 573 F3d 289, 295 (CA 6, 2009)(holding that under Ohio law "[u]njust enrichment arises out of a contract implied in law."); *Cincinnati Ins Co v Grand Pointe, LLC*, 501 F Supp 2d 1145, 1167 (ED Tenn, 2007)("A contract implied in law, also referred to as a quasi-contract, is created by law without the assent of the parties based upon considerations of reason and justice," and "[a] court can impose a quasi-contract based upon various theories, including, but not limited to, unjust enrichment."); *Paschall's, Inc v Dozier*, 219 Tenn 45; 407 SW2d 150, 154 (1966)("[a]ctions brought upon theories of unjust enrichment, quasi contract, contracts implied in law, and quantum meruit are essentially the same," and "[c]ourts frequently employ the various terminology interchangeably to describe that class of implied obligations where, on the basis of justice and equity, the law will impose a contractual relationship between the parties, regardless of their assent thereto.").

The only instance in which Defendant addresses this implied contractual obligation or relationship arising from a claim for unjust enrichment is when Defendant argues that "[i]t 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." *Defendant's Supplemental Brief,*

p18 Apx 149b. In fact, at oral argument in the Court of Appeals, Plaintiff argued that all claims concerning an implied contract are always to be considered solely a tort action, and thus barred by the GTLA. However, Defendant's unsupported claim is directly refuted by established Michigan law. As both Plaintiff and the Court of Appeals previously noted, and as *In re Bradley* recognized and acknowledged, this Court specifically held that a claim asserting breach of an implied contract is not barred by the GTLA. *In re Bradley,* at 386; *Rocco v Michigan Dept of Mental Health*, 114 Mich App 792, 799; 319 NW2d 674, 677 (1982); *see also Cannon v Bernstein*, 144 Mich App 604; 375 Nw2d 773 (1985). Furthermore, as shown, this Court in *In re Bradley* reasoned that the Legislature intended the term "tort liability" under the GTLA to "encompass legal responsibility arising from a tort," *In re Bradley,* at 385, and the legal responsibility arising from a claim of unjust enrichment arises from an implied contractual duty or obligation. Defendant has not provided any binding precedent that would overcome all of the previous binding and published decisions relied on by both Plaintiff and the Court of Appeals.

Defendant's assertion is overreaching and seeks to expand the definition of "tort liability" into a realm in which it has not been before. Following Defendant's assertions and logic, not only would claims based on unjust enrichment be barred by the GTLA, but also claims based on quantum meruit. Michigan courts use the terms "unjust enrichment" and "quantum meruit" interchangeable. *See Morris Pumps*, at 194-196. "Once a contract is implied-in-law, courts applying Michigan law—unlike courts in other jurisdictions—have used both the phrase 'quantum meruit' and 'unjust enrichment' to describe the theory of recovery." *See Daimler-Chrysler Services N Am, LLC v Summit Nat, Inc*, 289 Fed Appx 916, 925 (CA 6, 2008). In fact, claims based on unjust enrichment or quantum meruit satisfy the

same required elements and both involve an equitable remedy. *Morris Pumps*, at 195 ("in order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant."); *Daimler-Chrysler*, at 925 ("Thus, under Michigan law, part of the rationale for implying a contract-in-law—whether it is called unjust enrichment or quantum meruit—is to prevent unjust enrichment."). Claims based on the theory of quantum meruit, similarly to unjust enrichment, sound in contract rather than tort. *See Vanderhoef v Parker Bros Co*, 267 Mich 672, 680; 255 NW 449, 452 (1934)(holding that recovery under the theory of quantum meruit is available where the plaintiff has performed services under an express agreement which is not enforceable). This analogous relationship between "unjust enrichment" and "quantum meruit" further illustrate that unjust enrichment claims are based on contractual liability rather than tort liability.

Defendant also restates its same argument that the Court of Appeals erred because it did not focus on the injury and relief requested. Yet, Defendant continues to ignore the explicit and clear instructions from this Court in *In re Bradley*, that the courts must "first focus on the nature of the duty" and if the claim alleged is premised on some kind of contractual duty, then the claim does not assert tort liability and is not barred by the GTLA, and no further analysis is necessary. *In re Bradley,* at 389. To the extent that Defendant restates its argument that the Court of Appeals did not examine Plaintiff's allegations contained within its Complaint, Plaintiff has addressed this argument in its Answer to Defendant's Application for Leave to Appeal. *Apx 066b-072b*.

Lastly, Defendant again restates, virtually verbatim, its assertion that the Court of Appeals' decision would result in a flood of frivolous litigation. Again, Plaintiff addressed the reason this argument is baseless in its Answer to Defendant's Application for Leave to Appeal. *Apx 059b-060b.* Furthermore, this Court in *Ross v Consumers Power Co*, 420 Mich 567, 647-48; 363 NW2d 641 674 (1984), rejected such an argument and reasoned:

> "We recognize that plaintiffs have and will attempt to avoid §7 of the governmental immunity act by basing their causes of action on theories other than tort. Trial and appellate courts are routinely faced with the task of determining whether the essential elements of a particular cause of action have been properly pleaded and proved. If a plaintiff successfully pleads and establishes a non-tort cause of action, §7 will not bar recover simply because the underlying facts could have also established a tort cause of action."[4]

2. Nonbinding persuasive authority, including the Restatement of the Law Third on Restitution and Unjust Enrichment, does not conflict with the Court of Appeal's decision and well-established Michigan law concerning a claim of unjust enrichment.

a. Nonbinding persuasive authority supports the Court of Appeals decision that a claim for unjust enrichment implies a contractual obligation onto a defendant to make restitution for its ill-gotten benefit, and thus does not assert tort liability.

The Restatement of the Law Third on Restitution and Unjust Enrichment (2011) (the "Restatement") provides the complicated history of the remedy of restitution and claim of unjust enrichment. The Restatement discusses that the equitable conception of unjust enrichment was crystallized by Lord Mansfield in *Moses v Macferlan*, 2 Burr 1005, 1012, 97 Eng Rep 676, 681 (KB 1760) when he stated: "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." *Restatement (Third) of Restitution and Unjust*

[4] *In re Bradley* acknowledged this reasoning from *Ross*. *In re Bradley* did not overturn or reject this reasoning, but rather simply recognized that this Court in *Ross* did not consider the meaning of "tort liability" under the GTLA. *In re Bradley*, at 386-87.

Enrichment §1 p4 (2011). As Defendant pointed out, the Restatement, in claiming that the term "unjustifiable enrichment" defines the claim more accurately, reasoned that 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,* at §1 p5. Continuing to use Lord Mansfield's reasoning as the basis for a claim of unjust enrichment, the Restatement provides that the theory of liability concerning a claim for unjust enrichment is framed in equitable terms as: "If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('quasi ex contractu,' as the Roman law expresses it)." *Restatement,* at §4 p29. Michigan law, which has been previously cited, parallels this reasoning – that unjust enrichment imposes a contractual duty or obligation onto the defendant. *See AFT Michigan,* supra; *Kammer Asphalt*, supa; *Morris Pumps,* supra; *Martin*, supra.

Defendant misconstrues the comments within the Restatement to support its assertion that unjust enrichment is grounded in tort and not contract. *Defendant's Supplemental Brief, p20-21 Apx 151b-152b.* Defendant cites the Restatement's comment that "[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," and claims that this "makes clear that unjust enrichment oftentimes sounds in tort." *Id., at p20 Apx 151b.* Yet, such comment from the Restatement makes no such statement. Rather, the Restatement simply shows that a claim for unjust enrichment was developed as a stand-alone claim, like a claim for breach of contract or tort, in 1937. In fact, the Restatement recognized that unjust

enrichment and torts are readily distinguishable: "[t]he law of torts identifies those circumstances in which a person is liable for injury inflicted, measuring liability by the extent of the harm; the law of restitution identifies those circumstance in which a person is liable for benefits received, measuring liability by the extent of the benefit." *Restatement,* at §1 p7.

Defendant further erroneously concludes that since there is a chapter within the Restatement titled "Restitution for Wrongs" that addresses when the remedy of restitution may be available under certain tort claims, it confirms that unjust enrichment is rooted in tort liability. *Defendant's Supplemental Brief, p21 Apx 152b.* However, the chapter that Defendant refers to simply focuses on illustrations where the *remedy of restitution* may be available, as an alternative to compensatory damages, under certain tort claims. It does not state or reason that the claim of unjust enrichment sounds in tort, and in fact the chapter reiterates that restitution is an alternative remedy to compensatory damages. *Restatement,* at Introductory Note of §40 p3. Moreover, Defendant omits the fact that the very preceding chapter, which is titled "Restitution and Contract," provides numerous illustrations of circumstances when restitution is an available remedy in express contractual relationships. *Restatement,* at §31-39 p480-663. Again, the layout of these chapters in no way confirms that claims for unjust enrichment are grounded in tort, as asserted by Defendant.

Simply put, nowhere does the Restatement hold that unjust enrichment is grounded in tort and not contract, and it is clear from binding Michigan precedent that the contrary is the case. Tort liability, as shown by the Restatement and Michigan law, is distinguishable from a claim for unjust enrichment. While tort liability, and claims that fall within it, concentrate on the injury and the compensable damages that arise from that injury, unjust

enrichment concentrates on the benefit conferred to the defendant and why it is inequitable for the defendant to retain such benefit. *Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260, 266 (2010); *Kammer Asphalt*, at 185-186.

Notably, the factual background of this case is mirrored in an illustration under §48e of Chapter 6 of the Restatement, not under Chapter 4 which Defendant claims contains those actions that are grounded in tort. This illustration provides that unjust enrichment can be "[w]here the claimant [Plaintiff] has furnished the value for which the defendant [Defendant] is compensated or reimbursed." *Restatement,* at §48 p148. The Restatement further illustrates this point with an example:

> "Buyer purchases 100,000 gallons of sweet cider from Seller. The contract price is $1.45 per gallon plus 10 percent federal tax. Seller collects the tax in respect of these sales from Buyer and remits $14,500 to the United States. A subsequent ruling in a case involving other taxpayers establishes that sweet cider is not subject to the 10 percent tax. Seller applies for a refund, and the United States pays Seller $14,500 plus $500 interest. Buyer is entitled to recover $15,000 from Seller." *Restatement,* at §48, illus e, p148-149.

Similar to the case at hand, the above illustration provided by the Restatement shows that this type of unjust enrichment (i.e. refund), like the one brought by Plaintiff in this case at hand, is tied to an underlying agreement or arrangement between the parties. As shown more further in Plaintiff's Answer to Defendant's Application for Leave to Appeal, as well as herein, Plaintiff's unjust enrichment claim stems from the parties' agreement and arrangement to procure health insurance benefits as a group plan.

In sum, Defendant's contention that the Restatement somehow supports the contention that a claim for unjust enrichment is only grounded in tort and not contract is misplaced. As shown, the Restatement solidifies the Court of Appeals' decision that a claim

for unjust enrichment is grounded in contract, not tort liability, as it implies a contractual obligation on the defendant to disgorge its unjustly retained benefit.

b. Even to the extent that a claim for unjust enrichment does not squarely fit within the confines of tort or contract, the principles behind unjust enrichment, as well as how Michigan treats such claims, fall outside of "tort liability".

Without belaboring the point, Michigan law has consistently and continually held that a claim for unjust enrichment *implies a contract*, that unjust enrichment is the equitable counterpart of a legal claim for breach of contract, and that the law imposes a *contract* to prevent unjust enrichment. *See AFT Michigan,* supra; *Kammer Asphalt*, supra; *Morris Pumps,* supra; *Martin*, supra. In fact, unjust enrichment in Michigan is only available if an express contract does not already cover the subject matter. *Barber*, supra. Conversely, tort-like claims are generally available in addition to contract claims. Unjust enrichment is so similar to a breach of contract claim, that it is commonly referred to as a quasi-contract claim. *See* E. Allan Farnsworth, *Contracts Section 2.20*, at 103 (2d ed 1990)("Since…claims for the redress of unjust enrichment did not fit comfortably into either the category of contract or that of tort, they came to be described as claims in quasi-contract."); "Quasi" is commonly defined as "resembling" or "nearly." *Black's Law Dictionary* 1278 (8th ed 2007). The term quasi "negatives the idea of identity, but implies a strong superficial analogy, and points out that the conceptions are sufficiently similar for one to be classed as the equal to the other." 74 CJS *Quasi*, at 2 (1951). Consequently, if unjust enrichment is to be weighed as to whether it sounds more in tort or contract, it clearly and heavily favors contract.

Importantly, however unjust enrichment is defined, it is clear that is does not fit within the definition of "tort liability" as interpreted in *In re Bradley*. "The term 'tort,' therefore, describes the type of liability from which a governmental agency is immune," and

"[c]onstruing 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." *In re Bradley,* at 385. Assuming, *in arguendo*, that a claim for unjust enrichment is not premised on an implied contractual obligation or duty, the nature of the liability is then examined, and it is determined whether unjust enrichment seeks damages in compensation for an injury. *In re Bradley*, at 389.

It is well-established that unjust enrichment does not seek compensatory damages for an injury. As cited in the parties' application papers, "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**." *Morris Pumps*, at 193 (emphasis added). Per Black's Law Dictionary, "unjust enrichment" is defined as "[t]he retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected, and "a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense." *Black's Law Dictionary* 1573-1574 (8th ed 2007). Restitution is distinguishable from, and is an alternative remedy to, compensatory damages. Restitution seeks the return or restoration of the status quo. *See Porter v Warner Holding Co*, 328 US 395, 402; 66 S Ct 1086, 1091 (1946). Restitution "differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss." Dobbs, *Law of Remedies*, at 555 (2d ed 1993). "Restitution involves a wrongdoer's disgorgement of ill-gotten gain," and "[t]o prevent the wrongdoer's unjust enrichment at the victim's expense, restitution implies that the parties had a contract, making the wrongdoer pay for the benefit that a contract would have supplied." Baraba A. Patek, et al, *Damages and Remedies in Michigan* §2.5 (4th ed

2018)(citing *Dumas*, supra, and *Morris Pumps*, supra). The Sixth Circuit in *Helfrich v PNC Bank, Kentucky, Inc*, 267 F3d 477, 481–82 (CA 6, 2001) distinguished the two different types of remedies:

> "The basic distinction between equitable restitution and compensation focuses on the genesis of the award sought by the plaintiff. A restitutionary award focuses on the defendant's wrongfully obtained gain while a compensatory award focuses on the plaintiff's loss at the defendant's hands. Restitution seeks to punish the wrongdoer by taking his ill-gotten gains, thus, removing his incentive to perform the wrongful act again. Compensatory damages on the other hand focus on the plaintiff's losses and seek to recover in money the value of the harm done to him." *Id.*

Furthermore, as Plaintiff previously provided, it is well established that a "quasi-contract is an equitable remedy imposed to prevent unjust enrichment." *Wrench LLC v Taco Bell Corp,* 36 F Supp 2d 787, 790–91 (WD Mich, 1998). Governmental immunity generally does not extend to equitable actions. *See Lash v City of Traverse City*, 479 Mich 180, 197, 735 NW2d 628 (2007).

Examining the nature of the liability imposed by a claim for unjust enrichment shows that it does not seek compensatory damages for an injury, and therefore does not seek to assert tort liability, as defined in *In re Bradley*.

c. Unlike Plaintiff and the Court of Appeals, outside of *In re Bradley*, Defendant has proffered no binding precedent to support its assertions that a claim of unjust enrichment asserts tort liability, as defined under MCL 691.1407 and *In re Bradley*.

Both Plaintiff and the Court of Appeals support their analysis on well-established Michigan law, including using the guidance of *In re Bradley*. Defendant instead restates its same argument that distinguishable and mostly irrelevant foreign caselaw should direct this Court's decision. Yet, these foreign cases 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). Plaintiff addressed Defendant's cited foreign cases (i.e. *Westwood Pharms, Inc v Nat'l Fuel Gas Distrib Corp*; *State Dep't of Human Servs ex rel Plamer v Unisys Corp*; *Peddinghaus v Peddinghaus*; and *Robinson v Colorado State Lottery Div*) in its Answer to Defendant's Application for Leave to Appeal, and has shown how they are not relevant, not applicable, and are distinguishable. *Plaintiff's Answer to Defendant's Application for Leave to Appeal, at p28-31 Apx 072b-075b*. Plaintiff will not restate them herein other than to reiterate the distinction between this case and *Robinson v Colorado State Lottery Div*, 179 P3d 998 (Colo 2008) as Defendant again restated, verbatim, its misplaced heavy reliance on this case.

As shown in Plaintiff's Answer to Defendant's Application for Leave to Appeal, *Apx 073b-075b*, the court in *Robinson*, interpreting Colorado's specific government immunity statute and applicable state caselaw, examined the plaintiff's breach of contract claims and unjust enrichment claims. These 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.

Robinson's ruling directly contradicts and would significantly expand 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 v City of S Haven*, 460 Mich 667, 675; 597 NW2d 99, 103 (1999) (emphasis added). This Court in *Ross*, supra (reviewing *Rocco*, supra), *Koenig*, supra, *Canon*, 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*, at 648; *Koenig,* at 675; *Canon*, at 610. To accept Defendant's request to use *Robinson* as persuasive authority would require this Court to re-define long-standing Michigan laws concerning unjust enrichment and move away or completely disregard its previous rulings made on the issue.

In addition to its other foreign cases, Defendant now cites the Pennsylvania case of *Whitaker v Herr Foods*, 198 F Supp 3d 476, 493 (ED Penn July 29, 2016) in its attempt to claim unjust enrichment cannot stand as a substitute for a failed tort claim. *Defendant's Supplemental Brief, p16 Apx 147b*. However, *Whitaker* references Pennsylvania specific law, which is completely distinguishable from Michigan law on the subject. Moreover, the case bears no relevance to the case at hand. The court in *Whitaker* provides that Pennsylvania has two different unjust enrichment claims: one that is considered a quasi-contract claim such as the one Michigan recognizes, and one that is an ancillary claim that is wholly-based

and dependent on an underlying tort claim, which Michigan does not recognize. *Whitaker*, at 492. As *Whitaker* explains, Pennsylvania's quasi-contract unjust enrichment claim is an alternative claim to a breach of contract claim (acts as an equitable stand-in), and the requisite circumstances for such a claim to exist is that the defendant must have been unjustly enriched, whereby the unjust enrichment claim could then remedy the wrongful retention. *Whitaker*, at 493-94. Conversely, Pennsylvania's other unjust enrichment claim is instead a companion claim to a separate tort claim, and cannot exist independently of that tort claim. *Id*. This would be comparable to Michigan's civil conspiracy claim. *See Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich. App. 365, 384–85, 670 N.W.2d 569, 580 (2003)("A claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort. If a plaintiff failed to establish any actionable underlying tort, the conspiracy claim must also fail.").

Defendant's reliance on *Whitaker* is misplaced as the holding cited by Defendant refers to the unique Pennsylvania tort-companion unjust enrichment claim, rather than the quasi-contract unjust enrichment claim that Michigan recognizes. Furthermore, *Whitaker* dealt with a class action lawsuit concerning whether the plaintiff failed to adequately state a claim for unjust enrichment (and other actions), which is not at issue here.

Defendant's use of these foreign cases, which are distinguishable or not relevant, do not overturn the binding precedent set by Michigan, as cited by Plaintiff and the Court of Appeals and should not direct this Court's analysis or decision.

3. As the Court of Appeals recognized, when the gravamen of Plaintiff's allegations is examined, the nature of the duty and lability giving rise to Plaintiff's claim of unjust enrichment does not fall within the definition of "tort liability."

Defendant again restates its same argument that the Court of Appeals erred when it failed to look past Plaintiff's label of "unjust enrichment" and did not determine that Plaintiff's unjust enrichment claim is merely a relabeled conversion claim. In contradiction to its own assertion that the gravamen of Plaintiff's Complaint must be examined, Defendant isolates a few words within Plaintiff's Complaint to purportedly support its claim that Plaintiff's unjust enrichment claim is nothing more than a conversion claim seeking compensatory damages for an injury.

As previously shown, Plaintiff's unjust enrichment claim arises from the alleged agreement and arrangement between Plaintiff and Defendant concerning the parties' group health care plan and their respective payments of premiums into the group health care plan that created a surplus resulting in issuance of annual refunds. Plaintiff clearly alleges throughout its Complaint that: (1) Plaintiff and Defendant entered into an agreement to procure health insurance coverage for its employees as a group, (2) pursuant to the parties' agreement, Plaintiff and Defendant were obligated to pay the premiums for their own employees, (3) Plaintiff did in fact pay its agreed-to proportionate share of the group plan expenses, (4) the parties' agreement and group arrangement continued in effect for many years, (5) both Plaintiff and Defendant overpaid their employees' premiums for certain years and were due a refund, (6) Defendant received the total refund, which comprised both Defendant's portion and Plaintiff's portion, and (7) Defendant retained and benefited from Plaintiff's portion of the refund, which was inequitable. *Plaintiff's Second Amended Complaint, ¶¶5-35, 43-46, Apx 000056a-000060a.* As also noted by Plaintiff, its unjust enrichment claim was brought as the equitable counterpart and alternative to its breach of contract claim.

The alleged wrong arises from the contractual relationship and arrangement between Plaintiff and Defendant whereby the parties agreed, and were obligated, to pay premiums assessed for their respective employees that participated in the group health care plan. As alleged by Plaintiff in its breach of contract claim, Defendant had a contractual duty to pay to Plaintiff, Plaintiff's portion of the refund since it was Plaintiff's payment of excess premiums on Plaintiff's employees that, in part, created the surplus and refund from Blue Cross Blue Shield of Michigan. Since Defendant denies the existence of any express contract between the parties relating to this subject matter, as the equitable counterpart of its breach of contract claim, Plaintiff alleged that Defendant received and used a benefit from Plaintiff (via Plaintiff's portion of the refunds) and Defendant's retention of this benefit was inequitable. Thus, Plaintiff is requesting that, if no express contract is found to exist concerning the return of Plaintiff's portion of the refunds, the court impose an implied contractual obligation onto Defendant to disgorged itself of this inequitable benefit in order to prevent unjust enrichment. These claims are pled in the alternative to each other – if there is an express contract covering the subject matter, then Plaintiff's breach of contract claim survives, but if there is no express contract covering the subject matter, then Plaintiff's unjust enrichment claim survives. Both claims are premised on a contractual duty, whether between the parties or imposed and implied by the court. Accordingly, Plaintiff's claim for unjust enrichment does not assert "tort liability" as defined by *In re Bradley*.

Even if it were to be determined that Plaintiff's claim for unjust enrichment was not premised on an implied contractual duty imposed by the court, such action does not seek an award of tort-like compensatory damages for an injury as asserted by Defendant. As

previously shown, unjust enrichment does not seek compensatory damages for an injury, but rather seeks restitution, which focuses on the ill-gotten benefit of Defendant.

Plaintiff's allegations focus on the wrongfully obtained gain by Defendant, i.e. the portion of refunds that belong to Plaintiff. Under Plaintiff's unjust enrichment claim, it is clear that Plaintiff alleges that Defendant unjustly retained and benefited from these refunds and it was inequitable for Defendant to do so. *Plaintiff's Second Amended Complaint, ¶¶43-46, Apx 000060a.* In other words, Plaintiff seeks the restoration of the status quo – the return of its portion of the refunds and the disgorgement of Defendant's ill-gotten gain. Contrary to Defendant's assertions, while the type of remedy being sought may be relevant to the nature of the liability being sought, seeking a money judgment itself is not dispositive of the issue. Accordingly, Plaintiff's claim of unjust enrichment does not seek tort-like compensatory damages for an injury, and is thus not asserting tort liability as defined in *In re Bradley*.

Defendant is mistaken in its contention that because the facts of the case could potentially give rise to a tort claim, such as conversion, it confirms that Plaintiff is asserting tort liability. However, this Court has rejected such an argument. "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). Defendant also omits from its analysis any allegations made by Plaintiff concerning the parties' agreement and arrangement concerning the group health care plan, and instead improperly isolates a few words of Plaintiff's allegations rather than examining the Complaint as a whole. Likewise, Defendant fixates on the term "wrongful" used in Plaintiff's allegations as supposed direct evidence that Plaintiff is really asserting tort liability; however, as previously pointed out by Plaintiff, the term "wrongful" may be used to explain various actions not

related to tort liability. In fact, *In re Bradley* used such term when explaining what claims do not assert tort liability. *In re Bradley*, at 389 ("If the *wrong* alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable.").

In addition to *Ross*, the court in *Cannon v Bernstein,* 144 Mich App 604; 375 NW2d 773 (1985), has addressed and rejected Defendant's argument. In *Canon*, the defendants argued that the plaintiffs' implied contract claim was simply a restated negligence claim, and thus was barred by the GTLA. *Cannon*, at 606, 609-10. The court in *Canon* rejected this argument, holding that the requisite elements of implied contract were sufficiently pled by the plaintiffs, and thus were not barred by the GTLA. *Id.,* at 610-11. The court in *Cannon* further recognized and agreed with *Ross's* reasoning that "although this may have merely been an attempt to avoid governmental immunity…[i]f a plaintiff successfully pleads and establishes a non-tort cause of action, [the GTLA] will not bar recovery simply because the underlying facts could have also established a tort cause of action." *Id.* (quoting *Ross*, supra).

Finally, it should be noted that the Court of Appeals did not address Defendant's contention that Plaintiff did not adequately state a claim for unjust enrichment because the trial court never explicitly addressed it. Plaintiff has disputed Defendant's contention, and the arguments have been fleshed out before the Court of Appeals. To the extent that Defendant continues to argue that Plaintiff failed to state a claim for unjust enrichment, Plaintiff relies on its arguments made in the Court of Appeals. Furthermore, it is clear that Plaintiff's allegations contained within its Complaint satisfy and meet the two necessary elements of a claim for unjust enrichment. Defendant's rationale is that there is no independent claim for unjust enrichment, but rather it is simply a redressed claim for

conversion. However, Michigan law, as provided for herein and in Plaintiff's Answer to Defendant's Application for Leave to Appeal, does not agree with Defendant's rationale.

CONCLUSION & RELIEF REQUESTED

Defendant is attempting to improperly stretch the boundaries of "tort liability" to cover Plaintiff's claim for unjust enrichment to avoid having to pay for its unjustly retained benefit. This is not a comparable claim like the claim *In re Bradley* addressed. Rather, it stems from the parties' agreement and arrangement to pay premiums into a group health care plan and the refunds at issue arose from the overpayment of those premiums. The Court of Appeals did not err in determining that Plaintiff's claim of unjust enrichment is not barred by the GTLA because it is based on the equitable doctrine of implied contract at law and further that it does not fit within the definition of "tort liability," as interpreted by *In re Bradley*.

For the reasons set forth herein, as well as Plaintiff's Answer to Defendant's Application for Leave to Appeal, Plaintiff respectfully requests that this Court deny Defendant's Application for Leave to Appeal to this Court or affirm the Court of Appeals' opinion and order.

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

/s/ Scott R. Fraim Date: August 15, 2018

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