STATE OF MICHIGAN

IN THE SUPREME COURT

(On Application for Leave to Appeal from the Michigan Court of Appeals)

GENESEE COUNTY DRAIN COMMISSIONER JEFFREY WRIGHT,
Plaintiff-Appellee,

and

CHARTER TOWNSHIP OF FENTON, et. al
Plaintiffs,

v.

GENESEE COUNTY,
Defendant-Appellant,

and

GENESEE COUNTY BOARD OF COMMISSIONERS,
Defendant.

Supreme Court No. 156579
Court of Appeals No. 331023
Genesee Circuit Court No. 11-097012-CK

_____/

***AMICUS CURIAE*, CITY OF FLINT'S BRIEF IN SUPPORT OF DEFENDANT-APPELLANT GENESEE COUNTY**

Christopher M. Trebilcock (P62101)
Robert N. Dare (P79207)
CLARK HILL, PLC
500 Woodward Ave., Suite 3500
Detroit, MI 48226
(313) 965-8575
ctrebilcock@clarkhill.com
Attorneys for *Amicus Curiae* City of Flint

TABLE OF CONTENTS

STATEMENT OF INTEREST 1
STATEMENT OF THE BASIS OF JURISDICTION 2
STATEMENT OF QUESTION PRESENTED 2
STATEMENT OF FACTS 3
I. STANDARD OF REVIEW 3
II. ARGUMENT 3
A. The Court of Appeals Mis-Applied *In Re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013) 3
B. The Court Of Appeals Decision Ignores The Strong Presumption That Public Bodies Cannot Enter Into Implied Contracts At Law 5
C. Equitable Claims Are By Definition Non-Contractual and Are Thus Barred by the GLTA 9
D. The Court of Appeals Ignored Persuasive Decisions of Other Jurisdictions Addressing the Same Question 10
III. CONCLUSION AND RELIEF REQUESTED 13

TABLE OF AUTHORITIES

Cases

AFT Mich v Michigan, 303 Mich App 651, 660; 846 NW2d 583 (2014) 6
Baker v Kalamazoo, 269 Mich 14, 20; 256 NW 606 (1934) 7
Blevins v Denny, 114 NC App 766 (1994) 12
Borg-Warner Acceptance Corp v Dept of State, 433 Mich 16, 17-18; 444 NW2d 786 (1989) 7
Bradley v Saranac Community Schs Bd of Ed, 455 Mich 285, 298; 565 NW2d 650 (1997) 9,12
Collins v City of Flint, COA docket no. 345203..... 1
Costella v City of Taylor, Case No. 326589, 2016 WL 4375657, *4 (Mich Ct App, Aug. 16, 2016) 5
Dawley v Hall, 501 Mich 166; 905 NW2d 863 (2018)..... 9,12
Employees Mut Ins Co v Morris, 460 Mich 180, 198; 596 NW2d 142 (1999) 6
Estate of Hewett v County of Brunswick, 199 NC App 564 (2009)..... 11
Garner v City of Inkster, Case No 17-cv-13960, 2018 WL 3870056 (ED Mich, Aug. 15, 2018) . 5
Georgia Dep't of Cmty Health v Data Inquiry, LLC, 313 Ga App 683, 687–88, 722 SE2d 403, 407 (2012)..... 9
Greenbelt Ventures LLC v Washington Metropolitan Area Transit Authority, 2010 WL 3469957, *7 (D Md, Sept 1, 2010) 11
In Re Bradley Estate, 494 Mich 367; 835 NW2d 545 (2013) 2,3,5,12
Johnson v Menominee, 173 Mich App 690, 693–694; 434 NW2d 211 (1988)..... 6
Kammer Asphalt Paving Co v East China Twp Schools, 443 Mich 176, 185; 504 NW2d 635 (1993)..... 6
Kincaid v City of Flint, No. 337972, 2018 WL 3129700 (Mich Ct App June 26, 2018) 1
Lipson v Univ of Louisville, 2018 WL 3595829, *6 (Ky Ct App, July 27, 2018) 11
Maskery v Bd of Regents of Univ of Michigan, 468 Mich 609, 614; 664 NW2d 165 (2003)..... 4
Morris Pumps v Centerline Piping, Inc, 273 Mich App 187, 193-94; 729 NW2d 898, 903 (2006) 6
Myers v City of Portage, 304 Mich App 637, 643; 848 NW2d 200 (2014) 7
Nawrocki v Macomb County Road Com'n, 463 Mich 143, 156; 615 NW2d 702 (2000) 3
Odom v Wayne County, 482 Mich 459, 478-479; 760 NW2d 217 (2008) 4
Parker v West Bloomfield Twp, 60 Mich App 583, 600; 231 NW2d 424 (1975)..... 6
Pohutski v City of Allen Park, 465 Mich 675, 690; 641 NW2d 619 (2002)..... 4
Richardson Hosp Authority v Duru, 387 SW3d 109 (Tx. App. 2012) 11
Robinson v Colorado State Lottery Div, 179 P3d 998, 1007 (2008) 10
Ross v Consumers Power Co (On Rehearing), 420 Mich 567; 363 NW2d 641 (1984)..... 3,5
Rowland v Washtenaw Cty. Rd. Comm'n, 477 Mich 197, 212, 731 NW2d 41, 51 (2007)..... 12
Schwarz Properties LLC v Town of Franklinville, 204 NC App 344 (2010) 12
Shears v Bingaman, No. 329776, 2017 WL 3642644, at *1 (Mich Ct App Aug 24, 2017)..... 1,8
Studier v Mich Pub Sch Employees' Retirement Bd, 472 Mich 642, 661; 698 NW2d 350 (2005) 6,10,12
Walsh v Taylor, 263 Mich App 618, 624-25; 689 NW2d 506, 512 (2004)..... 3
Webb v Wakefield Twp, 239 Mich 521, 527-529; 215 NW 43 (1927)..... 7

Statutes

MCL 691.1401..... 1, 2, 3
MCL 691.1407(1) 4

STATEMENT OF INTEREST

Incorporated in 1855, the City of Flint ("City") is the largest city in Genesee County, Michigan, and is home to approximately 100,000 residents. The City is currently involved in two lawsuits in which plaintiffs have brought unjust enrichment claims, based on allegations that the City failed to satisfy procedures set by local ordinances, governing the pricing of water and sewer services. In *Shears v Bingaman*, No. 329776, 2017 WL 3642644, at *1 (Mich Ct App Aug 24, 2017), the Court of Appeals held that where an ordinance or statute does not create a contractual relationship, a plaintiff cannot create one under the guise of unjust enrichment. In *Kincaid v City of Flint*, No. 337972, 2018 WL 3129700 (Mich Ct App June 26, 2018), the City argued that plaintiffs could not show an express or implied contract and that their activity of adjusting the water rates was not exempt from governmental immunity as a purported ultra vires activity. The Court of Appeals did not address the issue and granted summary judgment to the City on other grounds. Plaintiffs in *Shears* and *Kincaid* both filed Applications for Leave to Appeal, which are currently pending before this Court. Moreover, the City is currently involved in over 60 other cases arising out of the Flint water crisis, that assert unjust enrichment claims, one of which has been appealed by right to the Court of Appeals, *Collins v City of Flint*, COA docket no. 345203.

This case is relevant to the pending applications in *Shears* and in *Kincaid* because it involves the precise issue of whether an unjust enrichment claim, as an implied contract at law, is an exception to governmental immunity not contained within the Governmental Tort Liability Act, MCL 691.1401 *et seq* ("GTLA"). Here, the Court of Appeals incorrectly held that the legal fiction of an implied-in-law contract allowed Plaintiffs to successfully avoid governmental immunity. This holding ignored the well-established and broad protections of governmental

immunity, as this Court set forth in the case of *In Re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013). *Bradley* teaches that to determine whether governmental immunity applies, a court must look beyond the labeling of a claim to determine its true nature by examining the type of liability to which the claim gives rise.

Left uncorrected, the Court of Appeals decision opens every level of government in Michigan to virtually unchecked liability by allowing potential plaintiffs to avoid the GTLA by minimally pleading an unjust enrichment claim. Such a result cuts against both binding and persuasive authority and must be reversed by this Court. Accordingly, the issues before the Court are of the utmost concern not only to the City, but also to Michigan jurisprudence as a whole.

STATEMENT OF THE BASIS OF JURISDICTION

Amicus curiae City of Flint agrees with the parties' statements as to the basis for jurisdiction.

STATEMENT OF QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN CREATING A NEW EXCEPTION TO THE GOVERNMENTAL TORT LIABILITY ACT, MCL 691.1401 ET SEQ., BY HOLDING THAT AN UNJUST ENRICHMENT CLAIM IS NOT BARRED BY GOVERNMENTAL IMMUNITY BECAUSE IT IS BASED ON THE EQUITABLE DOCTRINE OF AN IMPLIED CONTRACT AT LAW?

Defendant-Appellant and *Amici* say "yes."

Plaintiff-Appellee says "no."

The Genesee County Circuit Court says "no."

The Michigan Court of Appeals says "no."

This Court should say "yes."

STATEMENT OF FACTS

Amicus curiae City of Flint adopts as its own the Statement of Facts offered by Appellant in its Supplemental Brief.

I. STANDARD OF REVIEW

Amicus curiae City of Flint adopts as its own the Standard of Review set forth in Appellant's Application for Leave.

II. ARGUMENT

A. The Court of Appeals Mis-Applied *In Re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013)

Governmental immunity in Michigan is codified by the GTLA, MCL 691.1401 *et seq.*. *Ross v Consumer Powers Co*, 420 Mich 567, 672, n 24; 363 NW2d 641 (1984). Courts have consistently upheld immunity under the GTLA by looking beyond the description of a plaintiff's claim, because "the potential of immunity is at the core of virtually any case" involving a governmental party, and plaintiffs are expected to state their claims to avoid immunity. *Walsh v Taylor*, 263 Mich App 618, 624-25; 689 NW2d 506, 512 (2004). As correctly explained by the panel in *Walsh*:

> … a plaintiff's mere allegations are not enough to avoid the broad sweep of immunity. … Instead, we believe that whenever a plaintiff alleges facts in avoidance of immunity, or when a defendant claims that immunity applies, ***the trial court should be obligated to evaluate the specific conduct alleged to determine whether a valid exception exists***. [*Id.* (emphasis added).]

Using this approach, the judiciary can enforce the broad sweep of immunity intended by the legislature. *Nawrocki v Macomb County Road Com'n*, 463 Mich 143, 156; 615 NW2d 702 (2000). The principle of governmental immunity serves to protect governmental parties not only against liability, but also against the disruption, expenditure of resources and distraction of discovery and trial. *Ross*, 420 Mich 596; *Odom v Wayne County*, 482 Mich 459, 478-479; 760

NW2d 217 (2008). As recognized by this Court, "[a]lthough governmental agencies have many duties reading the services they provide to the public, a breach of those duties is compensable under the [GTLA] only if it falls within one of the statutorily created exceptions." *Pohutski v City of Allen Park*, 465 Mich 675, 690; 641 NW2d 619 (2002). Despite this clear guidance, the Court of Appeals created a new exception to the GTLA that goes far beyond the statutory text and thus impermissibly substituted its own policy judgments for those of the Legislature.

This Court recently reinforced the requirement that courts must look past the label placed on claims for purposes of construing the GTLA in broadest terms:

> … MCL 691.1407(1) refers not merely to a "tort," nor to a "tort claim" nor to a "tort action," but to "tort liability." … We therefore hold that "tort liability" as used in MCL 691.1407(1) means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages.
>
> … The Legislature's express decision to use the word "liability" in describing the governmental immunity available under MCL 691.1407(1), rather than "action" or "claim," indicates that our focus must be on the nature of the liability rather than the type of action pleaded. … ***Further, because the nature of the liability will often be reflected in the remedy available…[and] because a tort, by definition, encompasses an award of compensatory damages, the nature of the damages is precisely relevant in determining whether the type of liability imposed is tort liability. Accordingly, regardless of how a claim is labeled, courts must consider the entire claim, including the available damages, to determine the nature of the liability imposed.*** [*In Re Bradley Estate*, 494 Mich 367, 386-388; 835 NW2d 545 (2013) (emphasis added; footnotes omitted).]

See also, *Maskery v Bd of Regents of Univ of Michigan*, 468 Mich 609, 614; 664 NW2d 165 (2003) (exceptions to governmental immunity should be narrowly construed). To justify its conclusion that "a claim based on the equitable doctrine of unjust enrichment ultimately involves contract liability, not tort liability" the Court of Appeals misconstrued *Bradley*, 494 Mich at 386,

stating "our Supreme Court has specifically held an action for breach of implied contract is not barred by the GTLA." A close reading of *Bradley*, reveals no such specific holding. Rather, *Bradley* only states that *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), "merely recognized that the GTLA does not bar a properly pleaded contract claim." *Id*. at 387. *Bradley* instead cautions *against* a limited construction of the GTLA, stating "our holding clarifies that *Ross's* pronouncement, that 'non-tort cause[s] of act' are not barred by the GTLA, should not be interpreted as limiting the GTLA's application only to traditional tort claims." *Id*.

Despite this clear guidance, the Court of Appeals did just that by applying *Bradley*, and by implication *Ross*, too broadly, finding that any claim pursued under the theory of an implied contract, such as unjust enrichment, does not give rise to tort liability and is not barred by the GTLA. This error must be corrected by this Court to ensure that the legislative policy decisions reflected in the GTLA are given their full effect and are applied equally throughout the state. See, e.g., *Pohutski* 465 Mich at 681 (recognizing that the GTLA was drafted to make uniform the potential liability for all levels of government); *Garner v City of Inkster*, Case No 17-cv-13960, 2018 WL 3870056 (ED Mich, Aug. 15, 2018) (dismissing pursuant to the GTLA "Plaintiffs' state tort law claims against the City [including], Count XIV (Assumpsit/Unjust Enrichment)…")(Exhibit __); *Costella v City of Taylor*, Case No. 326589, 2016 WL 4375657, *4 (Mich Ct App, Aug. 16, 2016) (dismissing plaintiff's unjust enrichment claim pursuant to the GTLA).

B. <u>The Court Of Appeals Decision Ignores The Strong Presumption That Public Bodies Cannot Enter Into Implied Contracts At Law</u>

Unjust enrichment is based in equity, not contract, and implicates the "equitable right of restitution when a person has been unjustly enriched at the expense of another." *Michigan Ed*

Employees Mut Ins Co v Morris, 460 Mich 180, 198; 596 NW2d 142 (1999). Under this theory, a person who has been unjustly enriched at the expense of another is required to make restitution to the other. *Kammer Asphalt Paving Co v East China Twp Schools*, 443 Mich 176, 185; 504 NW2d 635 (1993); *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193-94; 729 NW2d 898, 903 (2006). "[A]n implied-in-law contract ***is a legal fiction*** 'to enable justice be accomplished' even if there was no meeting of the minds and no contract was intended." *AFT Mich v Michigan*, 303 Mich App 651, 660; 846 NW2d 583 (2014) (citation omitted; emphasis added). It is also well settled that a contract implied in law "is not a contract at all," but rather an obligation imposed by the law "where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation." *In re Lewis Estate*, 168 Mich App 70, 74; 423 NW2d 600 (1988).

Here, in reaching its erroneous decision that an implied contract was reached, the Court of Appeals ignored Michigan's strong presumption that public bodies cannot enter into binding contracts unless the controlling governing body authorizes, by conduct or resolution, the contract at issue. See, e.g., *Johnson v Menominee*, 173 Mich App 690, 693–694; 434 NW2d 211 (1988)(individual city council members do not have authority to bind municipality); *Parker v West Bloomfield Twp*, 60 Mich App 583, 600; 231 NW2d 424 (1975) (one who deals with a city is bound to know whether those officials have been delegated the appropriate authority to enter into a contract). In addition, no contract can be implied as a legal "fiction" or otherwise based on a violation of a statute or ordinance, because Michigan law holds a "strong presumption that statutes do not create contractual rights." *Studier v Michigan Pub School Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). Finally, a legislative body enacting a statute or ordinance "merely declares a policy to be pursued until the legislature shall ordain otherwise."

Id. This premise is supported by the fact that the Legislature's main function is to enact laws to manage government affairs, not to enter into contracts. *Studier*, supra at 661, 698 NW2d 350.

The *Studier* Court further held that:

> In order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract. [*Id.* at 662.]

See also, *Myers v City of Portage*, 304 Mich App 637, 643; 848 NW2d 200 (2014) (finding that no cause of action can be inferred against a governmental defendant).

In cases involving public bodies, often the "relationship" at issue does not sound in contract, but is instead created by statute. There is no negotiation between the parties, no meeting of the minds, no inducement to enter into an agreement, no specifications of price. See e.g., *Borg-Warner Acceptance Corp v Dept of State*, 433 Mich 16, 17-18; 444 NW2d 786 (1989). (holding that there was no express or implied contract to support damages for losses resulting from faulty fee-based records search which Secretary of State is required to perform by statute; no indicia of contract relationship – mutual assent, open bargaining, inducement to enter into transaction). Indeed, Michigan law only recognizes implied contracts involving municipalities in limited circumstances, such as where the municipality received the benefit of services or labor, but a defect or irregularity in the exercise of lawful authority prevented the formation of a valid contract. See e.g., *Webb v Wakefield Twp*, 239 Mich 521, 527-529; 215 NW 43 (1927); *Baker v Kalamazoo*, 269 Mich 14, 20; 256 NW 606 (1934).[1] The Court of Appeals failed to make any comparable findings in this case or even recognize that these prerequisites must exist to justify

[1] The GTLA provides that "Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed."

allowing a claim based on an implied contract at law or unjust enrichment to avoid the GTLA. This Court must, therefore, at a minimum, reverse the Court of Appeals and remand so that the requisite and appropriate factual findings and legal analysis may be completed.

The Michigan Supreme court in *Bradley*, at 388-389, again offers on-point guidance here:

> In summary, several principles emerge from our explication of the phrase "tort liability" that will guide courts charged with the task of determining whether a cause of action imposes tort liability for purposes of the GTLA. Courts considering whether a claim involves tort liability should first focus on the nature of the duty that gives rise to the claim. If the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable. *However, if the wrong is not premised on a breach of a contractual duty, but rather is premised on some other civil wrong, i.e., some other breach of a legal duty, then the GTLA might apply to bar the claim.* In that instance, the court must further consider the nature of the liability the claim seeks to impose. If the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable. (Emphasis added).

Applying the guidance required under *Bradley*, another panel of the Court of Appeals, just two days after the decision in this case, correctly held that the plaintiff's claims for unjust enrichment sounded in tort and thus were 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). Importantly, the panel specifically rejected plaintiffs' attempt to overcome the presumption that statues do not create contractual rights by arguing that various ordinances provisions created a claim for unjust enrichment, which is an implied contractual relationship between plaintiffs and the City. The reasoning of the panel in *Shears* is well-grounded and should be adopted by this Court when reversing the Court of Appeals in this case.

C. Equitable Claims Are By Definition Non-Contractual and Are Thus Barred by the GLTA

When faced with the same issue presented to this Court, the Georgia Court of Appeals utilized straightforward reasoning that this Court should adopt and apply in this case. The Georgia Court of Appeals explained that:

> Unjust enrichment is an equitable principle that may be applied when there is no valid written contract between the parties, but the plaintiff has conferred a benefit to the defendant that would result in that party's unjust enrichment unless it compensates the plaintiff . . . Although Georgia's Constitution provides for a waiver of the State's sovereign immunity in an action asserting the breach of a written contract . . . it does not include a waiver of sovereign immunity for equitable claims against the State. Further, the General Assembly has enacted no statute waiving sovereign immunity for equity claims against the State. It follows that, because both unjust enrichment and quantum meruit are equitable claims, such claims against the State are barred by sovereign immunity.

Georgia Dep't of Cmty Health v Data Inquiry, LLC, 313 Ga App 683, 687–88, 722 SE2d 403, 407 (2012) (internal citations omitted). This reasoning applies with equal force to Michigan's GTLA.

The GTLA applies to claims that seek to apply tort liability. MCL 691.1407. Tort liability is defined as "noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *In Re Bradley Estate*, 494 Mich at 385. As with Georgia law, the Michigan Legislature has not expressly provided for a waiver of governmental immunity for equitable claims, but has specified other exceptions to governmental immunity. MCL 691.1401 *et seq*. By recognizing an additional exception to governmental immunity, not set forth in the statute, the Court of Appeals' August 22, 2018 decision ignores the controlling doctrine of statutory construction of *expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of other similar things not mentioned). *Dawley v Hall*, 501 Mich 166; 905

NW2d 863 (2018) (citing *Bradley v Saranac Community Schs Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997)).

Instead, since unjust enrichment is an equitable claim that necessarily involves the absence of contractual obligations, unjust enrichment must, by definition, be a "noncontractual civil wrong" subject to the GTLA. This reasoning is particularly true where an unjust enrichment claim is based on a Michigan statute or ordinance, because there is a "strong presumption that statutes do not create contractual rights." *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). Had the Michigan Legislature intended that the GTLA permit equitable claims, such as unjust enrichment, that are based on the legal fiction of a contact, it could have enumerated such an exception. Since the Legislature did not do so, it would be improper for the judiciary to do so. The Court of Appeals thus erred by holding that unjust enrichment claims are categorically exempt from the protections of the GTLA.

D. The Court of Appeals Ignored Persuasive Decisions of Other Jurisdictions Addressing the Same Question

Other jurisdictions that have considered whether a municipality is protected by governmental immunity when defending an unjust enrichment claim have correctly held that unjust enrichment claims are barred by governmental immunity. Those courts' rationales largely align with *Bradley, Ross*, and *Shears*. Like in *Bradley*, the Colorado Supreme Court, observed that it must apply a case by case analysis assessing the nature of the injury and the relief requested. *Robinson v Colorado State Lottery Div*, 179 P3d 998, 1007 (2008). The court noted that "unjust enrichment is a form of quasi contract implied in law that does not depend in any way upon a promise or privity between the parties" and that "a claim that lies in tort or could lie in tort is barred by governmental immunity." *Id.* at *1007*. The *Robinson* court explained that the

plaintiff's unjust enrichment claim required showing that the Lottery unjustly retained money spent by the plaintiff on tickets when prizes were no longer available, which relied on allegations of tortious conduct. *Id*. at 1007-1008. Further, the relief requested was money that she spent on the lottery tickets – effectively the equivalent to the damages she could seek in tort. Thus, the Colorado Supreme Court concluded that because the plaintiff's claim lied in tort or could lie in tort, it was barred by governmental immunity. *Id*. at 1007.

Other courts have also roundly recognized that where there is no express contractual relationship, there is no waiver of governmental immunity. See, e.g., *Richardson Hosp Authority v Duru*, 387 SW3d 109 (Tx. App. 2012) (Dismissing unjust enrichment claim pursuant to governmental immunity, noting "[t]he legislature has not created a waiver of governmental immunity for equitable claims that seeks money damages. . . regardless of the nature of the equitable claim . . . [if] money damages are the remedy sought, then the claim is barred by governmental immunity."); *Lipson v Univ of Louisville*, 2018 WL 3595829, *6 (Ky Ct App, July 27, 2018) (Plaintiff cannot recover for unjust enrichment "because there is no waiver of immunity for anything other than a written contract.").

The main analytic theme running through cases in other jurisdictions is that under the doctrine of governmental immunity, a government is immune from suit if it was acting pursuant to its governmental function as opposed to proprietary function. See, e.g., *Estate of Hewett v County of Brunswick*, 199 NC App 564 (2009); *Greenbelt Ventures LLC v Washington Metropolitan Area Transit Authority*, 2010 WL 3469957, *7 (D Md, Sept 1, 2010). Thus, courts must determine whether the acts complained of were made pursuant to a governmental or proprietary function. North Carolina courts, for example, have aptly explained the difference between governmental and proprietary activities: "If the undertaking of the municipality is one in

which only a governmental agency could engage, it is governmental in nature. It is proprietary and private in nature when any corporation individual or group of individuals could do the same thing." *Estate of Hewett*, 199 NC App 564. The Court in *Estate of Hewett* dismissed the plaintiff's unjust enrichment claim, holding that governmental immunity applied because the alleged unlawful acts were made by the County while it was engaged in the governmental function of the implementation of a junk removal program for purposes of public safety. *Id*. at 571. Similarly, in *Greenbelt Ventures LLC*, the court dismissed plaintiff's unjust enrichment claim relating to the construction of a transit system, holding, in relevant part, that waiver of governmental immunity occurs only for contracts, and torts occurring in the performance of a non-governmental function.

Schwarz Properties LLC v Town of Franklinville, 204 NC App 344 (2010) is particularly instructive. In *Schwarz*, the local government passed an ordinance that required property owners to pay for replacement of municipally-provided trash carts and cans which are lost, stolen, or damaged. Plaintiff brought suit, alleging unjust enrichment. *Id*. at 349. The court ruled that plaintiff was essentially seeking damages for the local government's alleged breach of its duty to collect garbage, a governmental function. Thus, plaintiff's claim was barred by governmental immunity. *Id*. at 350. The court also pointed out that it reached the same conclusion in a previous case in which a plaintiff sought damages on a theory of unjust enrichment after a town enacted an ordinance requiring property owners to connect to the town's water and sewer system. *Id*. (citing *Blevins v Denny*, 114 NC App 766 (1994)).

As detailed above, and as instructed by *Bradley*, Michigan courts have traditionally applied the same rationale for determining the applicability of governmental immunity as these other jurisdictions. The Court of Appeals' August 22, 2017 opinion is an outlier, inasmuch as it

ignores precedent and usurps the legislature's authority to establish the parameters of governmental immunity. See *Rowland v Washtenaw Cty Rd Comm'n*, 477 Mich 197, 212, 731 NW2d 41, 51 (2007) (noting that nothing requires that the Legislature provide an exception to governmental immunity).

The Court of Appeals' panel erred here because it did not thoroughly analyze the true nature of the plaintiffs' unjust enrichment claim and the relief requested, nor did it even mention, let alone analyze, whether the alleged unlawful acts were made by the government acting in its governmental or proprietary function. This Court now has the opportunity to clarify the proper framework by which to evaluate whether an equitable claim, such as unjust enrichment, is barred by governmental immunity. Under this Court's precedents, this analysis inevitably leads to the conclusion that governmental entities in Michigan are immune to claims of unjust enrichment, because such claims seek recompense not for the breach of a bargained-for and mutually agreed-upon obligation, but instead seeks compensation for an alleged wrong arising out of equity. The Court of Appeals error usurps the policymaking authority of the legislature and must be reversed.

III. CONCLUSION AND RELIEF REQUESTED

For the above-stated reasons, *amicus curiae* City of Flint respectfully requests that the Court peremptorily reverse the August 22, 2017 opinion of the Court of Appeals or in the alternative, grant Defendant-Appellant's Application for Leave to Appeal, reverse the Court of Appeals' August 22, 2017 decision, and hold that unjust enrichment is not an exception to the GTLA.

Respectfully submitted,

CLARK HILL PLC

By: /s/ Christopher M. Trebilcock
Christopher M. Trebilcock (P62101)
ctrebilcock@clarkhill.com
Robert N. Dare (P79207)
rdare@clarkhill.com
Attorneys for Amicus Curiae City of Flint
500 Woodward Avenue, Suite 3500
Detroit, MI 48226
(313) 965-8300

Dated: September 5, 2018

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 5th day of September, 2018, I electronically filed the foregoing papers with the Clerk of the court using the TrueFiling system which will send notification of such filing to all properly registered counsel of record.

/s/Christopher M. Trebilcock
Christopher M. Trebilcock (P62101)
500 Woodward Avenue,
Suite 3500
Detroit, MI 48226
(313) 965-8300