STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF MAYFIELD,

Plaintiff-Appellant,

and

JERRY E. TATE, BEVERLY A. TATE, RUSSELL E. DARBEE, LINDA M. DARBEE, and PATRICIA LAND,

Plaintiffs,

v

CITY OF LAPEER,

Defendant-Appellee.

UNPUBLISHED
March 7, 2000

No. 212714
Lapeer Circuit Court
LC No. 96-02267 CK

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

O'CONNELL, J. (dissenting).

I respectfully dissent. I would conclude that the township has standing to bring the instant action because it provided a franchise to defendant allowing defendant to sell sewer and water services to residents of the township. As the majority correctly notes, a franchise tendered to a defendant to provide public utility services constitutes a contract between the body offering the franchise and the defendant providing the services. *Constantine v Michigan Gas & Electric Co*, 296 Mich 719, 728; 296 NW 847 (1941), quoting *Lansing v Michigan Power Co*, 183 Mich 400, 410-411; 150 NW 250 (1914). The majority concludes that this does not confer standing on the township because the township has not alleged a breach of the franchise agreement. However, the township does claim that the rates charged by defendant are unreasonably excessive. This claim arises out of the franchise agreement and concerns the terms of that agreement. The township is in privity of contract with defendant and brought an action to challenge defendant's conduct under that contract. I would conclude that this a sufficient interest in the outcome of the litigation to confer standing on the township.

While the individual plaintiffs are not parties to this appeal, I would also conclude that a genuine question of material fact exists regarding whether the rates were unreasonable. I discuss this issue because I believe that the township has standing to argue that the rates were unreasonable, and the trial court found no issue of material fact regarding the reasonableness of the rates. Defendant charges the township residents one-and-a-half times the normal fee for utility services and also charges an additional fee in lieu of city taxes. The individual plaintiffs presented an affidavit from an expert witness, who stated that the fee in lieu of taxes was not customary and may not be reasonable, especially in light of the fact that the township residents did not receive the same services as did the city residents for their payment of taxes. Both the trial court and the majority conclude that this expert's affidavit was too equivocal to create a genuine issue of material fact, because he stated that the fee in lieu of taxes might nonetheless be reasonable. However, the expert merely indicated that, if defendant used general city tax revenue to fund its sewer and water services, then the fee in lieu of taxes *might* be reasonable in amounts proportionate to the amount of general city tax revenue used to fund the services. Defendant did not then present evidence that the fee in lieu of taxes was proportionate to the amount of general city tax revenue used to fund it sewer and water services. Therefore, no evidence suggests that the fee was structured in such a way that the expert would consider it reasonable. In the absence of this evidence, I would conclude that the expert's affidavit is sufficient to raise a genuine question of material fact regarding whether the fee was unreasonable.

In reviewing the trial court's decision to grant a motion for summary disposition under MCR 2.116(C)(10), we must view the documentary evidence in a light favoring the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). This Court is liberal in finding a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998). In light of this standard, I would conclude that a genuine issue of material fact exists that would prevent entering judgment as a matter of law on the issue of the reasonableness of the rates. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

Accordingly, I would reverse and remand for further proceedings.

/s/ Peter D. O'Connell