STATE OF MICHIGAN

COURT OF APPEALS

MIKE JANOWICZ, WENDY JANOWICZ, BEV BALLARD, MILDRED BOLZMAN, JOHN CLAWSON, KAREN CLAWSON, DALTON COE, LOUISE COE, CARLTON CURREY, VERNITA CURREY, VICTOR DRESSLER, BEVERLY DRESSLER, ARTHUR EBERLEIN, DOROTHY EBERLEIN, ROD GAINFORTH, KATHY GAINFORTH, NEIL GAETH, CRYSTAL GAETH, NORMAN HENSEL, THOMAS HOLLAND, JANICE HOLLAND, HENRY JACOBY, LYDIA JACOBY, CARMEN KAUFFOLD, WILLIAM KAUFFOLD, MAZINE KAUFFOLD, DOROTHY KENNY, JOHN KROLL, NORMAN LENZ, KATHERINE LENZ, LEROY LOEFFLER, SHARON LOEFFLER, EDNA LUTZ, ROBERY LUTZ, CHERIE LUTZ, GARY MARXHAUSEN, DAVID MILLER, KYLE MITZ, SHIRLEY RAYMO, RUTH REITHEL, DONALD RETZLER, LILLIAN RETZLER, HIRAM RICHTER, JOAN RICHTER, KENNETH RINK, JANET RINK, ELSIE ROCKSTROH, KENNETH ROEMER, LUANN ROEMER, WALTER ROEMER, RUTH ROEMER, WILMAN SATTLERMEIR, ERNEST SBRESNY, ARLENE SBRESNY, PAUL STRIETER, DIANE STRIETER, ELMO TRIEBER, DORIS TRIEBER, WILLIAM WEIDNER, MARILY WEIDNER, ARNOLD WEIPPERT, JEFFREY WILLIAMSON, JODY WILLIAMSON, VERN WINTER, and MAXINE WINTER,

Plaintiffs-Appellants,

v

VILLAGE OF SEBEWAING,

Defendant-Appellant.

UNPUBLISHED
March 22, 2007

No. 273511
Huron Circuit Court
LC No. 05-002920-CE

Before: Jansen, P.J, and Neff and Hoekstra, JJ.

PER CURIAM.

In this action challenging the constitutional validity of the rate and surcharge charged to plaintiffs by defendant for sanitary sewer service, plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant. We affirm.

I. Facts and Procedural History

Plaintiffs are residents of the Hickory Court subdivision, a residential neighborhood located just outside defendant Village of Sebewaing (the Village) in Sebewaing Township. At the time of the subdivision's development in the early 1970s, the Village agreed by resolution of its board of trustees to permit connection of the subdivision's sanitary sewer system to the recently constructed village system and to thereafter maintain and operate the subdivision's system as its own.

When the Hickory Court system first came online with the Village in 1974, all non-resident users of the Village system, including those located in Hickory Court, were charged a flat fee of $14 per month for sanitary sewer service. In contrast, village residents were charged a monthly fee calculated as $7 plus three mills on the taxable value of the property receiving the service.[1] In 1996, the Village altered its non-resident sewer rates to equate with a monthly fee calculated as $7 plus three mills on the state equalized value of the property receiving service. This fee structure remained in place without challenge by plaintiffs until June 2004, when the Village attached an additional surcharge of $29 per month for those users residing in Hickory Court.

In October 2005, plaintiffs filed the instant suit alleging that the $29 surcharge is "arbitrary, capricious and unreasonable" because it does not reflect any increased costs associated with providing Hickory Court residents with sanitary sewer service, and because the Village had agreed, by way of its resolution accepting the system, to operate and maintain the Hickory Court system as its own without imposing "special charges" against Hickory Court residents for maintenance or other costs. In February 2006, plaintiffs amended their complaint to additionally allege that the practice of calculating non-resident user sewer rates on three mills of the state equalized value was "contrary" to MCL 211.24b.[2] Plaintiffs requested that the trial court declare the $29 monthly surcharge "invalid" and order that plaintiffs "be refunded all

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[1] Although plaintiffs appear to assert in their brief on appeal that Hickory Court users were initially charged the same rate as village residents, there is no record support for this assertion.

[2] As part of the General Property Tax Act, MCL 211.1 *et seq*., MCL 211.24b(2) implements the state constitutional requirement that taxes levied against property be "spread . . . on the tax roll on the *taxable value* of each item of property." (Emphasis Added). See Const 1963, art 9, § 3; see also *WPW Acquisition Co v City of Troy*, 250 Mich App 287, 290 n 3; 646 NW2d 487 (2002).

amounts paid by them beyond an amount which the Court deems to be fair and reasonable," and to also "order a refund of the excess paid between 1996 and 2004 by residents of Hickory Court by reason of 3 mills being levied on State Equalized as opposed to taxable value."

In August 2006, the Village sought summary disposition of plaintiffs' suit under MCR 2.116(C)(10). In doing so, the Village presented evidence which it argued showed that the rate differential and surcharge charged to Hickory Court residents were reasonably related to the cost of maintaining a portion of the system that benefited only Hickory Court users. Defendant further argued that nothing in the resolution accepting the system prevented it from requiring that plaintiffs bear such costs, and that the rate differential and surcharge were, therefore, valid.

Indicating that the issue was one of equal protection, plaintiffs opposed the Village's motion and sought summary disposition in their favor. In doing so, plaintiffs argued that the intent of the resolution agreeing to accept and then maintain and operate the Hickory Court system as its own was that the Hickory Court system would become an equal part of the Village system and would not be "singled out for separate or differential treatment." Citing the minutes of meetings held by the Village sanitary sewer commission and council in April and May of 1996, plaintiff further argued that it was clear that the 1996 rate change was intended by the Village to make the rates charged to both residents and non-residents the same.[3] However, plaintiff argued, "[f]or some reason, the person at the Village responsible for imposing sewer charges correctly based the millage levy to Village residents on taxable value but levied the same amount on Hickory Court residents on state equalized value." Thus, plaintiffs argued, because it was clearly the intent of the Village that all users be charged equally, they are entitled to refund of the approximately $12,770 difference paid by Hickory Court users between 1999 and 2004.[4]

Plaintiffs also argued that at least a portion of the $29 surcharge was improper. Specifically, plaintiffs asserted that as part of the surcharge they were being charged one-half of the cost of keeping village sewer employees "on call" for the purpose of dealing with potential system emergencies. However, plaintiff argued, "[t]o charge 50% of the possible on-call emergency costs to Hickory Court residents is inequitable, when an emergency could occur anywhere throughout the system for which a response is required." Noting that there are more than 1000 users of the village sanitary sewer system within the Village and only 37 users within Hickory Court, plaintiff asserted that such costs would be more equitably dispersed if charged on a per user basis. Asserting that the Village could not retroactively charge system users for upgrades to the system, plaintiffs further argued that the portion of the surcharge cited by the Village engineer as necessary to establish a reserve fund to "reimburse the Village sewer fund" for upgrades to the Hickory Court portion of the system was also improper.

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[3] A copy of the minutes of these meetings was not provided by plaintiffs, either below or on appeal.

[4] Although the rate differential challenged by plaintiffs began in 1996, plaintiffs conceded below that they were barred by the statute of limitations from asserting any claim for differences paid between 1996 and 1998.

Finally, plaintiffs argued that the rate differential charged under the Village's current meter-based system, in place since June 2005, was also invalid. Plaintiffs alleged in their brief concerning summary disposition that, under the meter-based system, residents are charged $3.35 per 1000 gallons of use and a $10 ready to serve charge, whereas Hickory Court users are charged (in addition to $29 surcharge) $3.50 per 1000 gallons of use and a $12.50 per month ready to serve charge. Although conceding that a municipality may impose a rate differential reflecting indirect costs for operating and maintaining a municipally-owned system that are borne only by residents, plaintiffs asserted that to satisfy equal protection the differential must be reasonable and cannot subsidize resident use of system. Here, plaintiffs argued, defendant had presented no evidence that would support a finding that the differential charged under the Village's current, meter-based rate system did not, in effect, subsidize village resident use of the system. The trial court, however, noting that plaintiffs had presented no evidence to dispute the costs to operate and maintain the Hickory Court system cited by the Village, granted summary disposition in favor of defendants. This appeal followed.

II. Analysis

Plaintiffs contend that the trial court erred in granting the Village's motion for summary disposition. We disagree.

We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Pinckney Community Schools v Continental Cas Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). This Court, like the trial court, must look at the record as a whole and, giving the nonmoving party the benefit of the doubt, determine if the record creates open issues on which reasonable minds could differ. *Id*.; *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). The moving party has the initial burden of supporting its position by pointing to affidavits, depositions, admissions, or other documentary evidence in the record. *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the nonmoving party to show that a genuine issue of material fact exists. *Id*. "Where the burden of proof at trial on a dispositive issue rests on the nonmoving party, that party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the opposing party fails to present documentary evidence showing that there is a genuine issue of material fact, summary disposition is appropriate. *Id*. at 362-363.

A. Equal Protection

Plaintiffs assert that they were denied equal protection of the law by being charged sewer service rates different from those charged village residents between 1999 and 2004. Because plaintiffs have failed to meet their burden of establishing a material question of fact regarding violation of the equal protection guarantee, we disagree and affirm the trial court's grant of summary disposition in favor of the Village.

The equal protection guarantee is a measure of constitutional tolerance in a governmental classification scheme. *Doe v Dep't of Social Services*, 439 Mich 650, 661; 487 NW2d 166 (1992). It requires that disparate treatment be rationally related to a legitimate governmental interest, and not arbitrary or capricious. See *Manistee Bank & Trust Co v McGowan*, 394 Mich

655, 671; 232 NW2d 636 (1975) (equal protection, like due process, "is a guaranty that controls the reasonableness of governmental action") (citations and internal quotation marks omitted), overruled in part on other grounds by *Harvey v Michigan*, 469 Mich 1, 14; 664 NW2d 767 (2003); see also *WA Foote Memorial Hosp v City of Jackson*, 262 Mich App 333, 343; 686 NW2d 9 (2004) (the essence of the equal protection guarantee is that the government not treat persons differently on the basis of characteristics that do not warrant disparate treatment). Thus, while the Village may charge different rates to different users of its sanitary sewer system, *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 21; 575 NW2d 56 (1997), the rate differential must be reasonable and must bear a rational relationship to a lawful and reasonable object of the Village, *Village Green of Lansing v Bd of Water & Light*, 145 Mich App 379, 390; 377 NW2d 401 (1985). We note, however, that the rate schedule set by the Village carries a strong presumption of validity and the burden is on plaintiffs to show that it violates equal protection. See *Iroquois Properties v East Lansing*, 160 Mich App 544, 554; 408 NW2d 495 (1987).

Plaintiffs claim that the differing rates charged to them between 1999 and 2004 were arbitrary and unreasonable. On review de novo of the evidence submitted by the parties on motion for summary disposition, we disagree.

In support of its motion for summary disposition, the Village presented a number of affidavits and other documentary evidence, including the affidavit of Sebewaing Department of Public Works (DPW) Superintendent Duane Dressler. In his affidavit, Dressler explained that the village sanitary sewer system requires the use of three separate lift, or pump, stations to transfer sewage collected by the system to the village sanitary sewer lagoon for processing. According to Dressler, one such station serves only Sebewaing High School and transmits sewage directly from the school to the lagoons. The remaining two stations are the main lift station, which serves all system users by pumping all of the sewage collected by the system to the village lagoon, and one that pumps sewage from the Hickory Court subdivision into the Village system, where it is then transferred to the lagoon by the main lift station. According to Dressler, "over the years, concerns arose that the cost of operating and maintaining the Hickory Court lift station, which serves only the residents of Hickory Court and "is one of the most expensive components of the Village sanitary sewer system," exceeded the sums that were being paid by Hickory Court residents.

Beginning in 1997, system users began experiencing basement flooding and other problems associated with the village sanitary sewer system. As a result, the state Department of Environmental Quality (DEQ) required that the Village institute a maintenance program that included fitting both the main and Hickory Court lift stations with telephone dialer alarm systems. The DEQ also required daily inspections of these lift stations by village DPW employees, as well as institution of an "on call" program for those times that employees were not regularly on duty. According to Dressler, implementation of these requirements and system

upgrades necessitated by the aging Hickory Court lift station resulted in the Village spending a total of $61,747 to operate and maintain the Hickory Court lift station between 1999 and 2004.[5]

In February 2004, the Village retained professional engineer Daniel Wolfe to conduct a "sewer rate study." Wolfe's study, completed in June 2004, found that Hickory Court customers should be charged an additional amount of $29 per month per customer "as a surcharge for the operation of the [Hickory Court] lift station."

Wolfe, in an affidavit also presented by the Village in support of summary disposition in its favor, stated that it was his "opinion, as an engineer engaged in municipal sewer facilities, that when an individual customer or group of customers has a specific cost to serve them that is not typical of the other customers, a surcharge is commonly applied to the customer group . . . ." Wolfe averred that the $29 surcharge at issue here, although high, was the result of costs associated with operation of the Hickory Court lift station, was fair and reasonable, and, in his professional judgment did not "provide any subsidy to the cost of providing sanitary sewer for the residents of the Village." Rather, Wolfe averred, "[i]t is a charge solely associated with the recovery of costs of the Village [for] operating and maintaining the Hickory Court lift station." As support for this assertion, Wolfe cited an appendix to his June 2004 sewer rate study, wherein he set forth the following costs and calculations associated with yearly operation and maintenance of the Hickory Court lift station:

Hickory Ct Lift Station Expenses

	Hours	Rate	Total Cost
On call weekend 52wks @ 4hrs	208	33.61	$6,991
On call Holiday 10 @ 1hr/day	10	33.61	$336
Regular daily monitoring 1.5 hrs/week	78	22.41	$1,748
Total Labor	296		$9,075
Equipment rental of Pickup	78	7.22	$563
Electricity (assuming 20% increase			$358
Dialer phone service			$427
Maintenance & repairs			$500
Insurance			$258
Reserve for dialer (assume 5 yrs)			$282
Reserve for pumps (estimate $25,000 over 20yrs)			$1,250
			$12,714

Hickory Court monthly surcharge flat rate per 37 customers $29

In addition to the affidavits of Dressler and Wolfe, the Village also presented the affidavit of Deputy Village Clerk Lorraine Dutcher, who indicated that, as deputy clerk for the Village

[5] As support for these costs, Dressler attached to his affidavit a detailed list of the expenditures associated with the Hickory Court portion of the system during that period.

since 1976, she was in charge of billing the Village's sanitary sewer customers. Dutcher, like Dressler, indicated that because of the high costs associated with operating the Hickory Court lift station, it was more expensive to serve Hickory Court residents than it was to serve any other system user. Dutcher further averred that because of these increased costs the Village instituted a rate differential between the sewer charges for Hickory Court residents and the Village residents. Regarding the basis for calculating this rate differential, Dutcher explained that "[t]he state equalized value [was] . . . used to derive a number that reflected the differential cost between operating the Hickory Court lift station, as opposed to those users who derive no benefit, and thus should incur no cost for the Hickory Court lift station."[6]

Plaintiff offered nothing in response to the evidence presented by the Village and do not, on appeal, dispute that equitable dispersion of costs associated with operating and maintaining the system are a reasonable and lawful object of the Village. *Village Green of Lansing*, *supra*. Rather, plaintiffs argue that the Village resolution accepting the system and agreeing to operate and maintain it as its own clearly did not contemplate that the Village would impose a higher rate for use of the system by residents of Hickory Court. Plaintiffs additionally argue that given their capital contribution to the village sanitary sewer system, i.e., "donation" of the Hickory Court system, the rate differential cannot be justified. With regard to this latter argument, we note that there is no record evidence of the costs associated with constructing the subdivision system, and thus no basis from which to conclude that the rate differentials, in light of such cost, is unreasonable. We further note that the evidence presented below demonstrates that subdivision system components benefit only those residing in Hickory Court and are closed to connection by any users outside the subdivision. Under such circumstances, it is difficult to envision any benefit, financial or otherwise, derived by the Village from accepting the system.

There is similarly no basis from which to conclude that the differing rates are unreasonable because the differential is inconsistent with the Village resolution accepting the Hickory Court system as its own. The resolution at issue, made by the village board of trustees in July 1974, provides:

> NOW, THEREFORE, BE IT RESOLVED, that the Village of Sebewaing does hereby accept the Hickory Grove Subdivision, Sanitary Sewer System, and agrees to maintain and operation said System as part of the Village of Sebewaing Sanitary Sewer System as agreed upon by the Village of Sebewaing resolution of the 24th day of May 1973.[7]

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[6] Plaintiffs do not argue, as they did below, that this charge was contrary to MCL 211.24b. Regardless, we note that insofar as this section merely implements the state constitutional requirement that taxes levied against property be "spread . . . on the tax roll on the taxable value of each item of property," it is inapplicable to the Village, which has no authority to levy a tax against property held by plaintiffs.

[7] The May 1973 resolution of the Village board of trustees provided:

> NOW, THEREFORE, BE IT RESOLVED, that the Village of Sebewaing agrees to accept when constructed in accordance with plans presented, the Sanitary sewer

(continued…)

As argued by the Village, nothing in the language of this resolution prevents it from requiring that plaintiffs bear costs reasonably related to the operation and maintenance of those portions of the village system that benefit only Hickory Court users.

As noted above, in order to avoid summary disposition of their claim that the rate differential charged between 1999 and 2004 were violative of equal protection in favor of defendants, plaintiffs were required to put forth evidence establishing a genuine issue of material fact regarding the arbitrary and unreasonable nature. *Neubacher*, *supra*; *Quinto*, *supra*. Given their failure to do so in the face of evidence that the disparate treatment was rationally based on differences in the costs associated with providing plaintiffs with sanitary sewer service, *WA Foote Memorial Hosp*, *supra*, summary disposition of this claim in favor of the Village was proper.

B. Retroactive Charge

Plaintiff also argues that those portions of the $29 surcharge asserted by Wolfe as necessary to "reimburse the Village sewer fund" for the costs associated with replacement of the Hickory Court lift station pumps and installation of a pump dialer cannot be sustained because they constitute an improper retroactive charge. As support for this assertion, plaintiffs cite *Valentine v Michigan Bell Telephone Co*, 388 Mich 19; 199 NW2d 182 (1972), and *Detroit Edison v Public Service Comm*, 416 Mich 510; 331 NW2d 159 (1982), for the proposition that retroactive ratemaking is contrary to equity and generally accepted practices of utility ratemaking. In both of these cases, however, our Supreme Court merely recognized that the power of the state Public Service Commission (PSC) over public utility rates cannot be retroactively employed. See, e.g., *Valentine*, *supra* at 24-25, citing *Michigan Bell Telephone Co v Michigan Public Service Comm*, 315 Mich 533, 546-547; 24 NW2d 200 (1946), in which the Court held that the PSC's statutory authority to fix public utility rates does not permit the commission to retroactively adjust charges or rates previously fixed by the commission. We do not deal here with the statutory authority of the PSC, and thus find plaintiffs reliance on these authorities unpersuasive.

Asserting that this Court has previously disapproved of "[a]pplying sewer charges retroactively," plaintiffs also cite *Metro Homes, Inc v City of Warren*, 19 Mich App 664; 173 NW2d 230 (1969) and *BPA II v Harrison Twp*, 73 Mich App 731; 252 NW2d 546 (1977). Again, we find plaintiffs' reliance on these cases to be misplaced. Indeed, both *Metro Homes, Inc* and *BPA II* dealt with the propriety of retroactively charging increased sewer "tap-in" fees to individuals who had connected or had justifiably relied on a connection fee schedule already in place, and neither stands for the proposition that a municipality cannot implement a surcharge for

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(…continued)

> system for Hickory Grove Subdivision and agrees to maintain said system upon its acceptance, it being provided that during the course of construction of said system, adequate inspection which meets the approval of the Village is provided at the subdivision owner's expense; it further being provided that as a consideration for acceptance of the system, upon completion, the Village agrees that no one outside Hickory Grove Subdivision shall be entitled to connect to said system.

maintenance of a municipal utility to pay for upgrades to the utility system. In any event, we note that in both cases this Court employed due process as the basis for its conclusion that the charges at issue could not be constitutionally sustained. As discussed above, due process, like equal protection, "is a guaranty that controls the reasonableness of governmental action." *Manistee Bank & Trust Co, supra* at 671. As also discussed above, plaintiffs have presented nothing to show that the establishment of the reserve funds at issue is constitutionally unreasonable. Summary disposition of plaintiff's challenge to the validity of the surcharge amounts establishing these funds was, therefore, proper.

C. Current Rates

Noting that the trial court did not expressly address their argument regarding the validity of the rate differential present in the Village's current, meter-based system, plaintiffs urge remand in order to permit the trial court to address that matter. However, although in arguing for summary disposition plaintiffs referenced a perceived inequity in the current rate system, plaintiffs did not plead a claim predicated on the current rates in their complaint and amended complaint, nor did plaintiffs attempt to file a second amended complaint to add such a claim. The trial court was thus not obligated to consider the validity of these rates. See, e.g., *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Moreover, even had plaintiffs validly raised the issue of the Village's current rates, this Court will not reverse when the trial court reached the right result for the wrong reason. See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). The record in this matter does not support the finding of a genuine issue of material fact precluding summary disposition. Again, plaintiffs have failed to present any evidence to support that the differing rates currently employed by the Village for use of its sanitary sewer system are not reasonably related to the costs associated with operation and maintenance of the Hickory Court station. Thus, because plaintiffs did not plead and submit evidence to this effect, MCR 2.116(G)(4), the trial court did not err in granting summary disposition in favor of the Village. We therefore decline plaintiffs' request that this matter be remanded.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra