STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF MARQUETTE, Plaintiff-Appellant, v CITY OF MARQUETTE, Defendant-Appellee.	UNPUBLISHED December 5, 2006 No. 268535 Marquette Circuit Court LC No. 03-040467-CK

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

O'CONNELL, J. (*dissenting*).

The undisputed facts do not invoke the concepts of anticipatory repudiation or "cover," so I respectfully dissent. Although this case deals with several abstract legal concepts, the wrong approach potentially provides a very real $5.2 million windfall to plaintiff township at the expense of defendant city.

While most cases can be resolved by a straightforward application of the (historical) facts to the law, this case is different; it is factually sensitive. To properly understand this case, the reader must pay "close attention" to the how, what, and why actions that were taken by both the township and the city, and then apply the correct law to all of the historical facts. In my opinion, and contrary to the majority's conclusion, the trial court understood the underlying facts of this case and properly applied the law to those facts. I would affirm the decision of the trial court.

This case rests at the convergence of several contract principles, defying clear application of any single legal theory. It has earmarks of both a sale of goods and a service, and this is merely a preliminary, conceptual, and ultimately ancillary issue.[1] The real problem with this

[1] The jurisdictions are split over whether directly pumping water to an end user is primarily a sale of goods or a service. See *Mattoon v Pittsfield*, 56 Mass App 124, 140-142; 775 NE2d 770 (2002), and cases cited therein. I tend to agree with the cases holding that the service aspects of the transaction predominate. *Id.*; see also *Williams v Detroit Edison Co*, 63 Mich App 559, 564; 234 NW2d 702 (1975). After all, a substantial part of the contract in this case deals with the removal of sewage, and I posit that even the majority would agree that sewage removal does not ordinarily call to mind a sale of goods. Nevertheless, a contrary answer to this isolated legal question would lead me to the same conclusion – the township has failed to demonstrate any

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case, however, is that the township clearly used the original contract and the various enforcement proceedings as a stalking horse for constructing an independent and counter-contractual waterworks at the expense of the city's taxpayers. This is an abuse of countless contract principles and results in the township successfully asserting a totally unjust claim. This is the type of case that offends the common sense of laymen, breeding distrust of the law and disdain for its practitioners. Unfortunately, it takes more than simple application of common sense to follow the tangled thread of law and unravel how such an abhorrent result can be legally cognizable.

As an initial matter, cover is a legally inapplicable concept to the township's waterworks project. Even if this contract is one that deals primarily with goods rather than services, MCL 440.2102, the Uniform Commercial Code (UCC) only allows a buyer to "cover" its purchase of goods by entering a contract for the purchase of replacement goods. MCL 440.2712(1). In this case, the township did not enter into a substitute contract for water from another, existing source. Instead, it entered into contracts to establish a totally new source for the "goods." This is the equivalent of allowing a disgruntled purchaser to reclaim the expenses of building and operating an automobile factory that would provide "cover" for a dealership's failure to deliver a single car. From this perspective, the majority opinion's reasoning regarding the purchase of bottled water turns back on itself, revealing serious problems with strictly applying sales law. "Cover" does not apply in this case for the very reason that it *would* apply in a bottled water case. In the case of simple goods transactions, alternative sources are usually readily available, and "cover" is an efficient way to prevent hardship on all sides. When the alternative to contract performance is procuring and analyzing geological data, buying land, drilling wells, running pipelines, and constructing pumps and storage facilities, the concept of "cover" is neither a reasonable and efficient alternative, nor remotely analogous.[2] MCL 440.2712.

The concept of repudiation is substantially more complicated and factually sensitive, especially when applied to these unusual circumstances. It is hard to imagine another situation in which an entity disavows the very existence of a contract but performs all of its obligations to the letter, only to find itself successfully sued for breach. As is common in cases in which money, politics, and basic needs collide, each side has alternatively overstated its case, and the parties' actions seldom coincide with their asserted fears and injuries. A handful of details fully illustrate the insincerity and invalidity of the township's current claims.

The dispute that spawned this lawsuit was the city's reassertion of an apparently common negotiation tactic – claiming contract ambiguity and general injustice to procure higher rates. The current contract was itself the result of the city attempting to browbeat the township into renegotiating rate terms. After the city tried to raise rates in 1978, the parties entered into extensive contract negotiations that culminated in the disputed 1982 agreement. The contract

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damages related to an anticipatory breach by defendant, so summary disposition was appropriate.

[2] On the other hand, "cover" could apply to the township's decision to accept a temporary supply contract at current contract rates until the legal issue of unilateral renewal could be resolved. However, damages measured under this perspective would, of course, be zero, because the township received the water at identical rates as the contract price. MCL 440.2712.

lacked a fixed rate schedule, but had the temporary rate of 175 percent of the rate imposed on city customers. The contract locked the city into providing the township with water for twenty years and provided each party with a right to renew for another twenty years. The parties later amended the agreement to allow third-party review and adjustment, if necessary, of the going contract rate, starting in 1987. The reviewing expert's decision regarding rate changes would be accepted by each party, or if one of the parties found the decision "clearly and convincingly unreasonable," the matter would be arbitrated.

On April 16, 2002, the city informed the township that it did not intend to renew the contract for another twenty years. The letter relaying this decision did not repudiate the existing contract or express any refusal to perform if plaintiff decided to exercise its renewal option. On May 6, 2002, the township replied with a letter exercising its option to renew the contract for another twenty years. In a meeting on May 23, 2002, city officials expressed their opinion that the option could not be exercised unilaterally and "threatened" the township that, beginning January 1, 2003, it would revert to the 175 percent calculus until a new contract was drafted. According to affidavits from township authorities, city officials also expressed the opinion that the city would not adhere to the contract, even if a court found the contract valid. However, the city officials also reassured the township that the city would not shut off the water supply any time soon.

Within a week, the township had initiated a feasibility study, not a lawsuit, to determine its water-source options, and an engineering firm had agreed to perform the study for no more than $15,000. Less than two weeks later, the township began discussions with a local landowner about acquiring a particular parcel of property for "municipal water well field development." These discussions took place more than a month before the township received the results of the feasibility study and more than two months before the city sent the township its written renunciation of the unilaterally renewed contract. When the feasibility report was issued, it determined that recasting the contract at the city's demanded rates would still prove less expensive, at least for several years, than constructing a waterworks, and the estimated price tag for the waterworks project did not even include land acquisition. Therefore, by the end of July 2002, the township was aware that, fiscally speaking, it was wiser to accede to the city's demands while it sought enforcement of the original contract's terms than to construct its own facilities.

Again, at this point the only indications that the city would not honor the contract were oral representations by city officials. The written repudiation was not sent until two weeks after the township received the results of the feasibility report. The letter repudiating the obligation on the city's behalf did not contain the extreme disavowal allegedly announced at the parties' meeting, but instead explained the city's perspective on the contract language and offered the opinion that no court would hold the city to the contract as the township interpreted it.

By the middle of August, more than four months before performance under the renewed contract was due, the parties mutually agreed to arbitrate their dispute over whether the township could unilaterally renew the contract. If the city had once taken the position that it would not accept any judicial decision that bound it to the contract, it had either totally reversed its original stance or had taken extraordinary measures to disguise its true intentions.

In any event, in a letter sent on November 25, 2002, the city, through its attorney, offered to provide the township with water service, at continuing contractual rates, until the arbitrators returned a decision – even if the decision was not returned until after January 1, 2003. This same letter expressed an understanding of the need to expedite resolution of the renewal issue, an absolute willingness to adhere to the arbitrator's decision on the issue, and the desire to arbitrate other issues, if necessary. The city stayed true to its promise to perform according to the contract. By March, it had provided the township with water for two months in keeping with a contract that it simultaneously insisted did not even exist. Even after the city withdrew from arbitration in March,[3] and after the township quickly sued to enforce the contract, the city renewed its promise to provide water according to the contract until resolution of the controversy. The township collectively accepted the temporary agreement every time it opened a tap, flushed a toilet, or ran a bath.

Although the record is replete with further indications that the township's position is less than genuine and that its claim for damages is nothing more than an attempt to foist a public works project onto the shoulders of somebody else's constituency, these facts are sufficient to dispose of all of the township's present claims.[4]

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[3] The parties did not have a statutory arbitration clause, and neither party argues that the city's retraction of its agreement to arbitrate created or determined any correlative legal issue. See *Wold Architects & Engineers v Strat*, 474 Mich 223; 713 NW2d 750 (2006).

[4] For those who are not yet persuaded, I offer the following, more extensive, recitation of facts. The township's complaint included a motion for a preliminary injunction and requested specific performance of the renewal contract's provisions. Contrary to the township's actions, the complaint included the positive assertion that the township did not intend to sever its water system from the city's, and that it was treating the contract as valid and in force. This ultimately false statement was a necessary element to obtaining the injunctive relief that could sustain the township's water supply during the prolonged construction period. Although plaintiff did not set the preliminary injunction motion for a hearing, the trial court ordered comparable temporary relief on August 14, 2003. The order was not the resolution of an adversarial contest, but the acceptance of a stipulation from the city that it would continue supplying the township with water, despite its contention that its performance was not required by contract. According to the order, the city would give ninety days' notice before it cut off the township's water supply. The township did not take any further action to proceed with its motion for a preliminary injunction or temporary restraining order, even though defendant had not specifically ratified the renewed contract and more than seven months had transpired since the expiration of the original contract. Other documents affirm that the city had already extended its original offer to provide water for the duration of the lawsuit at *contract* rates rather than the rates urged during negotiations.

Even though plaintiff was receiving water at the same rates it would have received them if defendant had renewed the contract, and even though it had scads of legal avenues available if defendant decided to cease supplying it with water, in November 2003, plaintiff purchased new land on which to build its own waterworks facility. Seven months later, and ten days after the

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trial court announced the validity of the contract and enjoined the city from violating the contract as renewed, the township accepted bids and proceeded with the development and construction of its own waterworks. At the point when the trial court required the city to continue complying with the contract's terms, the township had not paid one cent over the contract price for its steady supply of water.

Under the circumstances, the only fiscally sensible justification for building a separate system was because the township wanted an independent supply *regardless* of the viability of its contract with the city. The township knew that the city would let it out of the unfavorable contract at any time, so it took advantage of the city's recalcitrant posturing by trying to shift part of the project's cost onto the city as a consequential damage for its anticipatory repudiation. In short, the township would ultimately benefit, whether it won the lawsuit or not. The township's witnesses testified in their depositions that the township had desired to establish an alternative source of water for years and had regularly conducted feasibility studies in reaction to the city's regularly proposed rate increases. The record is also unsettled about whether the township commissioned the feasibility study before defendant rejected its renewal of the contract and counter-offered that it would continue to provide water service for more money. Finally, when the township's water supply was most tenuous (from August 2002 to December 2003, and from March 17, 2003 to March 27, 2003), the record is silent regarding any additional measures taken by the township to develop the alternative water source. Instead, the township made its greatest strides toward developing its independent source after performance was assured and long-term resolution appeared imminent. The township sued immediately after the alternative dispute resolution measures broke down. It moved for an injunction and requested specific performance. This quick action was an effective mitigation of all damages, because if the city desired to limit its prospective damages, it would wisely conform to the contract.

In the end, it was the city, not the township, that took unusual steps to limit the township's damages. The township did nothing to further the preliminary motions until long after defendant had stipulated to continue supplying water at contract rates. Meanwhile, the township's exploration, land acquisition, and overall project development continued unabated. No rational factfinder could conclude that the township acted reasonably when it continued the massive waterworks project after the court became involved and the city had agreed to comply with the contract until the dispute was resolved.

Nevertheless, while the township urged conformity with the contract on the surface, it was quietly acting as though it, too, wanted out of the contract. The township's manager testified that he anticipated that the new system would only function for the duration of the contract, but accepting this statement would mean that the township would not have water when it needed it most, when the contract finally expired. The manager later admitted that, as of March 2004, the township needed the alternative source of water regardless of the case's outcome, because the city would not renew the contract again. This reveals that the project was not "cover" or mitigation, but anticipation of a future event that has nothing to do with the contract's validity. Given the fact that all of the construction expenses claimed by the township were expected to be necessary at the end of the contract's term, the township's claim that they were the result of the city's breach is completely specious.

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What stands out most prominently and disposes of the majority of the township's claim for damages, is its absolute failure to mitigate its damages. "In both contract and tort actions, the injured party must make every reasonable effort to minimize damages suffered." *Williams v American Title Ins Co*, 83 Mich App 686, 697; 269 NW2d 481 (1978). This principle prevents injured parties from capitalizing on a breach or exploiting a breaching defendant for a windfall. If a repudiating defendant fails to provide a service but demonstrates the plaintiff's failure to mitigate, then the measure of damages is the difference between the original contract price and the amount the plaintiff would have been required to pay if the plaintiff had reasonably obtained performance from another. See *Tradesman Co v Superior Manfg Co*, 147 Mich 702, 705-706; 111 NW 343 (1907); 23 Williston, Contracts (4th ed), § 63:44, p 613.

The township claims that it initiated the waterworks project to mitigate or "cover" for its anticipated lack of water. However, the undisputed facts demonstrate that after November 2002, before the city's performance was due, the city offered to provide the township with water at contract rates. The township had already learned that the cost of entering a contingency contract at the city's demanded rates would still cost less than constructing its own waterworks, so it would have been unreasonable to refuse the city's offer to perform under the contract and, instead, plod forward with the construction of a new waterworks. Under the circumstances, the township only needed an immediate, short-term source of water that could sustain it through litigation. Nevertheless, the township argues that it reasonably mitigated its damages by accepting the city's offer, paying it for the service at contract rates, *and* expending the money to build its own waterworks. This course did not mitigate the damages, but exponentially magnified them. The township further claims in its complaint that it did not accede to the city's demanded rates because they were cost-prohibitive, but fails to dispute that the waterworks construction was projected to cost more than yielding to the city's demands, let alone simply accepting its contract performance until the dispute was resolved. The township's claims about the prohibitive cost of acceding, at least temporarily, to the city only supports the proposition that constructing a pricier new waterworks was totally unreasonable.

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The city did not cut off the water supply, and within six months after the township filed suit, the city was legally precluded from doing so. Moreover, the extensive integration of the two systems strongly suggests that simply "shutting off" the supply was a fairly arduous task that would take several weeks of reconstruction to effectuate. Despite its claims of dire need and distrust of the city, the township waited two years from the point of "repudiation" before it began accepting bids to construct the new facilities, all the while relying for water on the court's authority and the city's word. The township's actions totally belie its claims of desperation, distrust, and uncertainty, and when the dust settled, the township had won the twenty-year extension, had never paid a penny more than the original contract price, and had received a constant supply of water. Nevertheless, it argues that its rational and inconsolable fear of suddenly and irremediably losing its water supply forced it into buying hundreds of acres of property, drilling several wells, and then constructing and installing several millions of dollars worth of extraction, pumping, and storage facilities, none of which has yet added a drop of water to the township's supply. The fact that, contrary to the township manager's projections, the new facilities are expected to provide the township with thirty years of service *beyond* the duration of the current contract is, according to the township, beside the point.

Nevertheless, the township argues that the temporary nature of the city's promise to perform under the contract necessitated its construction of the waterworks. However, this position fails to account for its ability to expedite the dispute's resolution. Although the city disavowed the contract in May, seven months before performance was due, the township waited until the end of August before it demanded arbitration. In contrast to this delay, the township immediately explored alternative water sources. Although the preliminary results indisputably indicated that it would take two years to develop the alternative system, the township continued to pour steady money into the project while it drew out every step of the controversy's litigation. Before arbitration commenced, the city preempted this tactic by providing the township with the ultimate opportunity to mitigate its damages. Each side would conform to the contract for the dispute's duration, reserving its rights while minimizing its costs. The township accepted the offer and then continued to spend money as if the agreement did not exist. This is the antithesis of mitigation.

After it filed suit, any remaining reason to continue construction of the waterworks disappeared. If the township's interpretation of the contract was correct, the law would, and did, provide sufficient safeguards so that the township would receive uninterrupted water service.[5] The trial court was in a position to issue, inexpensively and almost immediately, any necessary emergency injunction. This alternative stands in stark contrast to the township's decision to continue its costly and speculative development of an alternative water supply, the realization of which was still more than two years and $5.2 million away. Therefore, the township's only fathomable avenue of mitigation after March 2003 was to continue to accept the city's performance until the city retracted its repudiation or the trial court found in its favor.[6] Nevertheless, the township continued headlong into the waterworks project even though it had not yet even acquired wellhead property. The choice to continue the project at this stage contraindicates any proximate cause between the alleged breach and asserted damages. More importantly, the unnecessary, unforeseeable, and absolutely avoidable nature of the township's post-suit expenses render those damages totally unrecoverable. MCL 440.2715(2); 23 Williston, Contracts (4th ed), § 63:44, p 613; *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 414; 295 NW2d 50 (1980), citing *Hadley v Baxendale*, 9 Exch 341; 156 Eng Rep 145 (1854).

At the time of suit, the only expenses attributable to the water project were two engineering studies.[7] The first was the feasibility study, and the second was a much more

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[5] If the township's interpretation was incorrect, the city would have forced it to pay higher rates until it could build its own system, but these costs would not have been the result of a *breach* of the contract, but the inability of the township to unilaterally renew it. Moreover, the township would eventually have to incur these costs anyway when the contract ultimately expired, and the rates charged would still be *less* expensive than building the waterworks.

[6] Of course, there was always the possibility that the court would not find in the township's favor. Careful review of the record demonstrates that it was more this contingency, rather than the contingency of the city's recalcitrance, that led the township to develop its alternative water source.

[7] The land purchase initiated in June 2002 fell through, but the township continued to shop for property. It ultimately found a quality set of parcels exceeding 310 acres, and it bought one 271-

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thorough study that took more than fourteen months to complete. However, the second, more extensive study was initiated in December 2002. At this point in the case, the township had discovered the fiscal impracticability of developing the project, the city's performance was not yet due, the city had agreed to submit the issue of contract renewal to arbitration and abide by the decision, and the city had promised to perform for the duration of the dispute. Therefore, this study was a totally unreasonable expense when the township incurred it. The township's authorization of the study at this point clearly indicates that the township was already determined to generate an alternative source for its water whether or not defendant complied with the contract. Under the circumstances, the trial court correctly determined that this study was not legally attributable to the city's disavowal of any future obligations. *Kewin*, *supra*. By December 2002, the only reasonable course available to the township was to accept the city's offered performance, whether voluntarily or according to modified terms, and then expedite litigation.

This approach comports with the idea that a party faced with an anticipatory repudiation generally may either rescind the contract, treat the action as a breach and sue *immediately*, or await performance and then pursue whatever remedies will make the party whole. 23 Williston, Contracts (4th ed), § 63:33, p 561. The township did not rescind, but loudly decried the city's unjust withdrawal from the contract. Nor did it immediately sue for damages, which would have totally preempted the township's consternation over whether it would suddenly and irremediably lose its water supply. Finally, it did not await the city's performance, but began creating a replacement source of water and merely accepted the city's performance when the opportunity arose. Under the circumstances, the township did not select any of the reasonable options available to it, and its failure to do so belies its claimed fears and exaggerates its damages.

The township alleges that the urgent state of affairs drove it to expend excessive resources on researching the expensive alternative source of water, but the situation's urgency only highlights the unreasonableness of the township's actions. The new waterworks could not produce a single drop of water until years after the original contract expired on January 1, 2003, yet the township calmly allowed that date to pass without succumbing to any of the city's contractual demands or making any alternative arrangements for a reliable water supply. Negotiations and other resolution efforts slowly unfolded until, faced with the immeasurable liability and expense associated with quickly cutting off the water supply and the embarrassing prospect of entirely caving in to the township, the city promised to continue providing water at the contract rate. It is at this point that the township's mitigation argument fatally falters. By November 2002, the city had promised to provide water in accordance with the contract, and by March 2003, ten months after the alleged repudiation, the township had repeatedly and absolutely relied on the city's promise to continue supplying water. For years it continued to receive water under these conditions: at the same rates and in the same quantities as the renewed contract required.

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acre parcel in late November 2003. The purchase came roughly eight months after the township filed this suit and more than three months after the trial court ordered the city to maintain the township's water supply.

The township argues that all the expenses for the new waterworks were necessary because it never knew if and when the city would suddenly discontinue its performance. According to the township, it was required to pursue alternative sources to obtain water quickly if the city ever unexpectedly cut off water service. The problem with this argument is that litigation to enforce the existing contract was a surer, cheaper, and *faster* alternative than constructing a completely new water source. If the township did not trust the city to maintain the water supply, then it would be unreasonable to rely on the city for the minimum of two years it would take to construct an alternative source. Moreover, litigation was the alternative that the township chose. The township immediately sought arbitration of the dispute, relying on the city's good faith during the proceedings and accepting the city's performance as it came due. The township showed no signs of panic either in its decision not to receive water from a second existing source or in its careful and patient installation of a new water system. Therefore, according to the township's argument, its officials risked the health and safety of its citizenry by relying on an unreliable water source without the prospect of acquiring a backup source for two years.

When arbitration failed, the township did not alter its construction schedule, but sued for specific performance – despite its assertions that it did not trust the city to perform. The township moved for an injunction to maintain the status quo, which could have achieved immediate relief, and yet it waited several months to pursue the remedy. In the meantime, it completely relied on the city's assertion that it would continue to perform according to the contract. Again, if the township's characterization of the city's unreliability is correct, the township's officials were either incurably gullible or inexcusably reckless. In any event, the township did not need to trust the city to supply water voluntarily, at this point it could use the trial court to enforce the contract and prevent hardship. It never needed to do so, because the city faithfully performed under the contract.

Similarly, although the township bought land and drilled some wells, it did not enter a single construction contract on the water project until two years after initiating suit – after the trial court had announced that it would grant summary disposition on the relevant issues and would specifically enjoin the city from refusing to perform under the renewed contract. This delay in pursuing either contract enforcement or water production completely belies the township's assertions of distrust and undermines its alleged reliance on the city's initial repudiation. After the trial court issued its holding, the township's actions totally invalidate all its asserted damages. Ten days after the trial court announced its favorable ruling on the record, the township board accepted its first construction bid and entered a $1.6 million contract to *begin* building the township's water facilities.[8] No fact in the record speaks more to the township's true intentions. After obtaining absolute enforcement of the contract's terms, it continued, with

[8] Although the majority opinion appears to hold that some of the $5.2 million construction costs fall exclusively on the township's shoulders, it does not say which damages are recoverable. The majority opinion should at least acknowledge that plaintiff's pursuit and enforcement of the city's *full performance* amounts to an elected remedy at the time it was granted, and that the township may not recover the expenses that the township incurred to generate a supplemental water supply *after* the requested remedy was awarded.

vigor, to incur costs that could provide only future, post-contractual benefit to the township and persisted in heaping those costs as damages upon the performing, yet somehow breaching, city.

The township also relies on the city's cavalier pronouncement in preliminary negotiations that it would not comply with the contract even if the contract was found to be enforceable. Setting aside the fact that the city totally retreated from this position, the facts undermine the township's assertion of reliance on the city officials' exaggerations, and the law does not recognize any special remedy for unreasonable puffery during negotiations. If the township truly believed that the city would never conform to the contract, it would not have wasted its time and money trying to procure compliance. For example, the one issue slated for arbitration was the contract's unilateral renewal. With the original contract slated to expire and with the city allegedly asserting that it would not honor the contract under any circumstances, the township neglectfully wasted several months working out the details of what it allegedly anticipated would be a pointless attempt at arbitration. Again, this argument assumes that the township's officials knew that the only way to maintain a necessary water supply would be to enter a temporary replacement contract with the city or some other municipality, but instead they recklessly risked the health and safety of the township's citizenry without any hope of acquiring an advantage.

The law does not differentiate between a party who claims that no contract exists and one that brazenly asserts that, even if a contract exists, no amount of authority or penalty could achieve enforcement. 23 Williston, Contracts (4th ed), § 63:48, pp 640-641. In either case, a party may treat the contract as breached and sue immediately, or await performance of the future obligation and count the failure to perform as a breach. In this case, the township sued for enforcement, but also requested injunctive relief and specific performance. Although courts generally do not require an election of remedies at the outset, it is manifestly unjust to obtain specific performance and simultaneously allow the non-breaching party to recover damages as if the contract was totally breached. See 23 Williston, Contracts (4th ed), § 63:57, pp 671-673. The authorities do not allow double recovery under the guise of repudiation. *Id*. Instead, the city's decision to conform to the contract, and the township's acceptance of the performance and continued assertion of the contract's validity, ordinarily precludes any recovery by the township. *Id*.

In other words, because the city continued to perform, its "repudiation" was always purely anticipatory – the city only denied its obligation to provide water in the future. Once the township accepted the continuing performance and obtained its requested enforcement of the future obligations, with no damage directly attributable to the repudiation, the township's remedies were limited to enforcement and, at most, consequential damages. It may not claim additional damages because it thought that its claims would be ineffectual and the court would be incompetent. Such claims are properly dismissed as unrelated to the breach, and in this case, as unadulterated, albeit successful, overreaching. See *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Therefore, the only arguable item that arguably survives is the first feasibility study. Here, the other elements of anticipatory repudiation and causation enter into play. Ordinarily, if a party repudiates under a good-faith interpretation of a contract, and then retracts the repudiation and performs under the contract, the performance precludes any award of damages unless the other party has materially altered its position. See 23 Williston, Contracts (4th ed), § 63:57, pp 670. This case presents a particularly strange set of circumstances in which the city's

retraction of its repudiation was actually conditioned on the outcome of the dispute, making its performance, rather than its repudiation, conditional. Nevertheless, the same principle applies.

The township's recovery of the cost of the feasibility study was not a material change in position and was not related to any anticipatory breach. Township authorities admitted that they routinely conducted feasibility studies whenever the city or other utility provider threatened to alter its rates. In fact, the very definition of a feasibility study is that it weighs the purchaser's options. Therefore, it cannot itself represent a change in position. Because the feasibility study was not a product of the city's repudiation, and because the township later accepted the city's performance, anticipatory repudiation does not apply to award the township the damages for conducting the study. Furthermore, even the feasibility study was initiated after the township learned that the city would continue to supply the township with water beyond the contract's original expiration date. Township officials admitted that, in the meeting at the end of May 2002, city officials reassured them that they would not shut off the water in the near future. Because continued performance was not due until December, and continued contract performance was promised in November, this reassurance of continued performance negates any and all of the township's claim for damages. Although repudiation generally includes the disavowal of future contract obligations, when a party disclaims a contract solely on the basis of an erroneous interpretation and then promises to perform the contract's terms until its interpretation can be verified, repudiation of the contract is necessarily conditional and not absolute. See 23 Williston, Contracts (4th ed), § 63:45, p 618. The party who takes such a position acts responsibly, and I would hold that such a party is only liable for the costs of litigation, and then only if those costs are ordinarily available. This approach encourages parties to reconcile to their original contracts during dispute resolution rather than cutting all ties for fear that they may be held doubly liable for exorbitant expenses on top of the losses sustained by conforming to the controversial contract.

The trial court correctly recognized that plaintiff's waterworks project did not arise from any breach, but was the product of plaintiff's ongoing efforts to obtain independent water service. "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc*, *supra*. Here, the only proximate result of defendant's refusal to renew the contract would be the implementation of a temporary, contingent, replacement contract, followed by litigation for the difference in price. Correctly calculated damages should not create a windfall for the injured party, and in this case, the majority opinion's acceptance of the township's claims allows the township to construct a municipal waterworks at the city's expense and reap the benefit of the city's continuous performance. The city took great pains to minimize the damage to the township and now finds itself charged with the expense of providing the township with water indefinitely, through its own facilities and the facilities it bought for the township. Because the township accepted the city's continued performance while it sought judicial resolution of the dispute, it may not now assert that full performance and absolute resolution failed to fully compensate it.

The majority couches its holding in terms of factual issues, but the approach it takes does not delineate the point at which plaintiff's position legally fails. Therefore, if the trial court finds the facts as the township argues them, the court has no further guidance on where the limits of plaintiff's damages lie. Under the circumstances, the majority opinion is not assailing the trial

court's approach to the facts, but its application of the law to the undisputed facts. Because the trial court has already correctly resolved this case, I would affirm.

/s/ Peter D. O'Connell