STATE OF MICHIGAN

COURT OF APPEALS

BOULEVARD & TRUMBULL TOWING, INC,

Plaintiff-Appellant,

v

CITY OF DETROIT, CITY OF DETROIT POLICE DEPARTMENT, and DETROIT BOARD OF POLICE COMMISSIONERS,

Defendants-Appellees.

UNPUBLISHED
November 18, 2021

No. 352503
Wayne Circuit Court
LC No. 17-010371-CZ

BOULEVARD & TRUMBULL TOWING, INC,

Plaintiff-Appellee,

v

CITY OF DETROIT, CITY OF DETROIT POLICE DEPARTMENT, and DETROIT BOARD OF POLICE COMMISSIONERS,

Defendants-Appellants.

No. 353099
Wayne Circuit Court
LC No. 17-010371-CZ

Before: RICK, P.J., and RONAYNE KRAUSE and LETICA, JJ.

PER CURIAM.

These consolidated appeals arise out of defendant the Detroit Board of Police Commissioners's (the Board's) termination of a permit held by plaintiff Boulevard & Trumbull Towing, Inc., to conduct vehicle towing services within defendant the City of Detroit (the City) for defendant the City of Detroit Police Department (the Department), following revelations that plaintiff obtained the permit through bribery. The trial court ultimately granted summary disposition in favor of defendants as to all of plaintiff's various claims, and in Docket No. 352503, plaintiff appeals those dismissals. The trial court then denied defendants' motion for case

evaluation sanctions, and in Docket No. 353099, defendants appeal that denial. In Docket No. 352503, we reverse the dismissal of plaintiff's federal due process claim on res judicata grounds. In Docket No. 353099, we vacate the trial court's order denying case evaluation sanctions. In all other respects, we affirm.

I. FACTUAL BACKGROUND

The City of Detroit has been in the established practice of utilizing private towing companies (or "towers") to tow abandoned, damaged, forfeited, stolen, illegally parked, impounded, or other vehicles on behalf of the Detroit Police Department. Very generally, towers could apply for permits, which, if granted following certain background checks and at the Board's discretion, would be valid for five years and were renewable. Permitted towers would then be placed into a pool from which they would be contacted to perform tows on a rotating basis. The City has ordinances governing the permitting process, which, in part, grant powers to the Board to establish standards for towers and provide for termination of permits. Plaintiff had been a long-standing police authorized tower. It was granted its last five-year permit in May 2016.

However, in May 2017, Gasper Fiore, who was in May 2016 the president and 60% owner of plaintiff,[1] was indicted in the United States District Court for the Eastern District of Michigan on bribery charges involving payments to government officials in exchange for governmental towing contracts.[2] Shortly thereafter, Celia Washington, a deputy police chief who was charged with overseeing the City's towing rotations, was also indicted on federal bribery charges. The basis for the indictment was that Washington accepted payments from Fiore in April 2016 in order to award his towing companies, including plaintiff, favorable permits and towing rotations within the City.[3] Almost immediately after Fiore's payments to Washington, the Department, as noted, awarded plaintiff the 2016 towing permit. Fiore and Washington would both ultimately enter guilty pleas to some of their charges pursuant to plea agreements.

On June 15, 2017, after news of the indictments became public, the Board met in a closed session and voted unanimously to rescind plaintiff's towing permit. Although the minutes for the meeting do not specifically disclose the reason for the rescission, the Board seemingly acted pursuant to Detroit Ordinance § 55-15-1(4), which provided, in relevant part:

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[1] Plaintiff contends that, in the aftermath of the bribery revelations, Fiore was demoted to a mere employee and eventually purged from plaintiff altogether. Defendants contend that Fiore was, and possibly still is, actually the de facto owner or controller of multiple tow companies in addition to plaintiff, with a history of cloaking that network of ownership under various shams.

[2] Insofar as we can discern, Fiore was not, strictly speaking, charged with the specific instance of bribery that resulted in the issuance of the 2016 permit from the City to plaintiff, but his sentencing memorandum in that matter noted that the charges were "one part of a broad range of bribery payments to Macomb County public officials."

[3] Thus, Washington apparently *was* charged with the specific instance of bribery that resulted in issuance of the 2016 permit from the City to plaintiff.

> The City may immediately terminate any towing permit with a tow company for fraud or criminal conduct by the tow company or its employees, provided however, that as soon as practicable the permit holder shall be afforded an opportunity for a hearing before the Board of Commissioners or the Board's designee following which hearing the Board shall either affirm or rescind the termination.

The Board did not provide plaintiff with prior notice of the meeting. The Board also did not offer plaintiff a prompt hearing following the termination, although plaintiff apparently did not seek one other than by filing this lawsuit. After the Board terminated plaintiff's permit, multiple other governmental entities also terminated their arrangements with plaintiff.[4]

Months after this lawsuit was initiated, the City's Office of Inspector General (OIG) conducted an investigation into Fiore's criminal behavior. In May 2018, the OIG recommended that the City decline future applications from plaintiff for towing permits. In June 2018, the OIG held a hearing regarding its investigation and recommendation, at which plaintiff appeared and argued in its defense. The OIG ultimately rejected plaintiff's claims that Fiore's payment to Washington had been merely a small loan and that plaintiff did not violate any rule. Ultimately, after noting that plaintiff had not cooperated in providing requested information during the hearing and that plaintiff had not taken steps to guard against criminal conduct in connection with plaintiff's application for the permit, the OIG found that plaintiff had failed to show that it was a responsible contractor that conducts business with honesty and integrity and it upheld its initial recommendation. On November 2, 2018, the OIG issued its final recommendation and also issued a notice of proposed debarment and initiation of debarment proceedings. Plaintiff expends considerable effort arguing that the OIG investigation was flawed, but plaintiff has not actually pursued any action, as far as we know, seeking to overturn the outcome of that investigation.

II. PROCEDURAL BACKGROUND

Plaintiff filed this lawsuit in July 2017. Plaintiff initially alleged violations of procedural and substantive due process under both the Michigan and the United States Constitutions and a violation of the Open Meetings Act (OMA), MCL 15.261 *et seq*. Plaintiff sought reinstatement of its 2016 towing permit, compliance by defendants with the procedural due process requirements of Detroit's ordinances through mandamus and injunctive relief, and damages. Plaintiff later filed an amended complaint adding claims of breach of contract, "breach of 2016 permit," unjust enrichment, and violation of the Federal Wiretap Act, 18 USC § 2515 *et seq*.[5] Plaintiff's breach

[4] Given what we can discern from the federal charges against Fiore and the wide-ranging scope of his apparent pattern of bribery, the other governmental entities may have done so for the same reasons as the City, rather than because they thoughtlessly followed the City's lead.

[5] At some point, City employees came into possession of an affidavit from an FBI agent that contained information derived from a federal wiretap that had been authorized during the federal investigation of Washington. Apparently, the affidavit should have been sealed, but Washington's attorney inadvertently failed to seal it when publicly docketing it, and it fell into the City's hands after it was publicized by the news media. See *B & G Towing, LLC v City of Detroit, MI*, 828 Fed Appx 263, 265 (CA 6, 2020). In a lawsuit filed by one of the other parties to the wiretapped call,

of contract and unjust enrichment claims were pleaded in the alternative and mostly premised on defendants allegedly failing to compensate plaintiff for some towing and storage services and retaining some overpaid administrative fees.

Defendants sought removal of the matter to the federal district court, but the federal district court denied supplemental jurisdiction over the state-law claims. See *Boulevard & Trumbull Towing, Inc v Detroit*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 9, 2018 (Case No. 17-12446), pp 4-5. The federal district court remanded the state claims back to the circuit court and retained jurisdiction over the federal due-process claim. *Id*. The federal district court then held that because plaintiff's theory was not that defendants' rules were procedurally inadequate *per se*, but rather that defendants were disregarding those rules, plaintiff was required to show that it lacked a remedy under Michigan law. *Id*. at pp 7-12. The federal district court concluded that plaintiff had failed to show why its pending action in the Wayne County Circuit Court did not offer an adequate state-law remedy. Therefore, it dismissed plaintiff's federal due process claim without prejudice because that claim would not be ripe for federal court action until the state action was complete. *Id*. at pp 12-13.

Defendants first moved for summary disposition in December 2018. Regarding procedural due process, defendants argued that even if plaintiff had a right to a hearing regarding the termination of its permit, it was not entitled to a pre-termination hearing, because the City's towing rules explicitly provided that the City could summarily terminate permits at any time on the basis of fraud or criminal conduct. Plaintiff chose to commence suit instead of seek a post-termination hearing, and in any event, any such hearing would have been difficult to conduct while Fiore's criminal charges were pending. Furthermore, the OIG investigation provided plaintiff with a hearing at which it was allowed to call witnesses and present evidence. Defendants further argued that even if plaintiff had been immediately afforded a full hearing, the outcome would have been the same, so plaintiff cannot recover any damages. Defendants argued that plaintiff's substantive due process claim was simply not applicable to a government contract, and the OMA claim failed because the Board's closed session was to meet with counsel and discuss privileged information before making a decision in a public session. Defendants conceded that plaintiff had a valid claim to a few thousand dollars arising out of the City's 2013 bankruptcy but argued that plaintiff had otherwise not factually supported its breach of contract or unjust enrichment claims. Defendants

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Fiore's ex-wife, and one of the other Fiore-related towing companies, the Sixth Circuit Court of Appeals held that Fiore and the company had no cause of action for any reliance by the City on the contents of the affidavit, because the wiretap itself had been legal, City had nothing to do with the initial inadvertent disclosure, and there was no rule against making use of information already disclosed to the public. *Id*. at 266-269. To the limited extent plaintiff's brief on appeal could be construed as continuing to pursue this claim, we consider it conclusively resolved in defendants' favor by the Sixth Circuit, and we mostly need not discuss it further. We do, however, note that the Wiretap Act claim was the only count in plaintiff's amended complaint that might even arguably have pertained to the OIG investigation.

contended that mandamus was improper because plaintiff had no clear legal right to, and defendant had no clear legal duty to perform, any ministerial act.

The trial court agreed that plaintiff was not entitled to a pre-termination hearing, but it held that plaintiff had been entitled to a post-termination hearing. The trial court rejected defendants' argument that the hearing as part of the OIG investigation was sufficient: it was untimely because it was not held until almost seven months after Fiore's guilty plea, and it was not meaningful because it pertained to the propriety of issuing future permits to plaintiff rather than to the termination of the 2016 permit. The trial court held that defendants had violated plaintiff's procedural due process rights by failing to afford it a timely and meaningful post-termination hearing, and therefore it was not required to consider whether the OIG investigation was otherwise improper.[6] However, the trial court held that plaintiff was "not entitled to a writ of mandamus because it has failed to show that it has no other adequate legal remedy," such as an injunctive order in light of the procedural due process violation requiring defendants to hold a hearing. The trial court found the remainder of plaintiff's claims to be factually or legally unsupported. It therefore granted summary disposition in favor of plaintiff as to procedural due process under the Michigan Constitution, and it granted summary disposition in favor of defendants as to all other claims.

Approximately five months later, after considerable further motion practice, defendants filed a second motion for summary disposition. Defendants reminded the trial court that the only issue remaining in the case was the extent to which plaintiff was entitled to damages arising out of the failure to provide procedural due process in the form of a prompt hearing following termination of the 2016 permit. However, defendants argued that municipalities and governmental employees were absolutely immune regarding damages claims for alleged violations of the Michigan Constitution. Defendants pointed out that the alternative remedies of mandamus or injunctive relief were available, and the touchstone was whether such remedies or theories were legally cognizable rather than whether they were actually viable in a given case. In any event, in light of the overwhelming evidence of Fiore's bribery, there was no plausible basis for plaintiff to contend that any amount of procedural due process would have resulted in a different outcome. The trial court agreed that defendants were immune to damages and dismissed plaintiff's remaining claim on that limited basis.

Defendants then moved for case evaluation sanctions, arguing that a case evaluation panel had awarded $100,000 to plaintiff, which defendants had accepted but plaintiff rejected. Defendants noted that sanctions were mandatory, because instead of prevailing on its claims for several million dollars, plaintiff's claims were ultimately dismissed in their entirety. The trial court expressed dismay at the motion, pointing out that defendants had in fact deprived plaintiff

[6] As alluded to in footnote 5, it appears that plaintiff's Wiretap Act claim was largely premised on OIG's use of the wiretap affidavit, which would therefore not have anything to do with the termination of the 2016 permit. Nowhere did plaintiff properly request any relief even implicitly pertaining to the outcome of the OIG investigation. The trial court therefore properly observed that the claims before it pertained only to the termination of the 2016 permit, not to the OIG's recommendations regarding future towing permits.

of its due process rights, and the lawsuit proceedings were "long and protracted" but "didn't have to be if the City would have done what the City was supposed to do to begin with." The trial court ruled from the bench that "given the history of this case," it would exercise its discretion to deny the motion for case evaluation sanctions. These appeals followed.

III. STANDARDS OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The trial court did not specify the subrule upon which it based some of its grants of summary disposition, but because it appeared to consider evidence beyond the pleadings, we treat it as having been granted pursuant to MCR 2.116(C)(10), which tests the factual sufficiency of a claim. *Innovation Ventures v Liquid Manufacturing*, 499 Mich 491, 506-507; 885 NW2d 861 (2016). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden*, 461 Mich at 120. Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*. at 119.

This Court also reviews a "a trial court's decision regarding a writ of mandamus for abuse of discretion." *In re MCI Telecom Complaint*, 460 Mich 396, 443-444; 596 NW2d 164 (1999). "[W]hether the doctrine of res judicata bars a subsequent lawsuit constitutes a question of law that this Court likewise reviews de novo on appeal." *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 686; 762 NW2d 529 (2008). The proper interpretation of a contract is reviewed de novo as a question of law. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). In general, we review de novo a trial court's decision whether to grant case evaluation sanctions, but a trial court's decision whether to decline to award costs pursuant to the "interest of justice" exception under MCR 2.403(O)(11) is reviewed for an abuse of discretion. *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005).

IV. MANDAMUS AND INJUNCTIVE RELIEF

Plaintiff argues that the trial court erred by dismissing its mandamus claim and its request for injunctive relief on the grounds that it had an adequate remedy in its due process claim. Plaintiff argues that it did not, in fact, have an adequate remedy, because the trial court dismissed its due process claim. We disagree.

"The primary purpose of the writ of mandamus is to enforce duties created by law, where the law has established no specific remedy and where, in justice and good government, there should be one." *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 667; 425 NW2d 80 (1988) (citations omitted). The plaintiff must demonstrate "(1) a clear legal right to the act sought to be compelled; (2) a clear legal duty by the defendant to perform the act; (3) that the act is ministerial, leaving nothing to the judgment or discretion of the defendant[.]" *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 584; 922 NW2d 404

(2018) (quotation omitted). "Furthermore, an individual seeking mandamus must not have another adequate remedy available." *White-Bey v Dep't of Corrections*, 239 Mich App 221, 225; 608 NW2d 833 (1999). " 'The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it. It only lies when there is practically no other remedy.' " *Clark v Peninsular Bldg & Loan Ass'n*, 268 Mich 584, 585; 256 NW 556 (1934), quoting *Ex parte Rowland*, 104 US 604, 617; 26 L Ed 861 (1881). Conversely, mandamus may be proper where the kind of harm suffered by a party simply cannot be made whole by any other kind of relief. See *Garner v Michigan State Univ*, 185 Mich App 750, 763-764; 462 NW2d 832 (1990).

An "adequate legal remedy" is available to a party if there is a process that the party can pursue that *could* provide relief, even if there is doubt whether that process actually *will* provide relief. For example, a right to seek judicial review, even though an application or petition that might not be granted, satisfies the requirement of an "available legal remedy." *Keaton v Village of Beverly Hills*, 202 Mich App 681, 683-684; 509 NW2d 544 (1993); *Khan v Warden, Jackson Prison*, 128 Mich App 224, 226-227; 340 NW2d 77 (1983). Allegedly wrongfully-discharged probationary employees have an "adequate legal remedy" if they can proceed against their employer under a collective bargaining agreement, despite their union refusing to process their grievances. *Cyrus v Calhoun Co Sheriff*, 85 Mich App 397, 399; 271 NW2d 249 (1978). Indeed, a party has an "adequate legal remedy" if another count in the party's complaint would have resulted in the same desired relief, even if that other count was properly dismissed. *Southfield Ed Ass'n v Bd of Ed of Southfield Public Schs*, 320 Mich App 353, 357-359, 370, 378-379; 909 NW2d 1 (2017). In other words, an "adequate legal remedy" sufficient to preclude mandamus exists where there is a legally-available theory or process that, if successful, could make a party whole—irrespective of whether a claim brought under that theory or process will actually succeed for a particular party. Consequently, there is no merit to plaintiff's argument that it has no "adequate legal remedy" other than mandamus just because its other claims were dismissed.[7]

In addition, plaintiff would independently not be entitled to mandamus or injunctive relief because nothing would be achieved as a result. The trial court correctly determined that under the City's ordinances, plaintiff was not entitled to a hearing before termination of the 2016 permit, because termination was based on fraud or criminal conduct. Therefore, the best-case scenario for plaintiff would be ordering defendants to hold a post-termination hearing regarding the 2016 permit. Notably, a post-termination hearing inherently means that the permit has already been terminated—the purpose of the hearing is to determine whether to affirm or rescind the termination. Therefore, the permit could not be reinstated pending that hearing, even temporarily.[8] Holding such a hearing would be pointless.

Plaintiff presents a great deal of argument to the general effect that the termination of the 2016 permit was somehow flawed. However, plaintiff's arguments skirt around the fact that

[7] See also, 52 Am Jur 2d, Mandamus, § 39, pp 367-368 ("A plaintiff does not allege a justifiable excuse [for failing to pursue another remedy other than mandamus] when he or she alleges the other remedy was not pursued because it was fruitless").

[8] The permit would also have already expired by its own terms, in any event.

plaintiff's then-principal obtained the 2016 permit through bribery, essentially entitling defendants to terminate that permit. Plaintiff continues to argue that it did not actually do anything wrong and that Fiore is no longer associated with plaintiff, which presumably it would want to articulate at a post-termination hearing. We do not necessarily disagree with the trial court that the OIG investigation failed to afford plaintiff procedural due process because it was untimely and conducted for a purpose other than determining whether the termination of the 2016 permit should be rescinded or affirmed. However, the OIG investigation delved into the same facts that resulted in the termination of the 2016 permit, and plaintiff had a full opportunity to make its argument, replete with the presentation of evidence and witnesses. Plaintiff's argument and interpretation of the facts were rejected. Notwithstanding plaintiff's displeasure with the investigation, which may or may not have any validity, plaintiff has not pursued any claim to overturn it. Were a post-termination hearing to be held now, the outcome of that hearing would unambiguously be a foregone conclusion: there is no conceivable doubt that the termination would be affirmed.

A question is moot, and therefore generally not entertained by the courts, when it becomes impossible for the court to craft a remedy that will "have any practical legal effect upon a then existing controversy." See *People v Richmond*, 486 Mich 29, 34-35; 782 NW2d 187 (2010) (quotation omitted). Irrespective of the availability of another remedy, mandamus is not properly invoked to compel a pointless performance. See *Johnson v Mich Parole Bd*, 361 Mich 500, 500-501; 105 NW2d 416 (1960); *Gamble v Liquor Control Comm*, 323 Mich 576, 580; 36 NW2d 297 (1949); *Quandt v Schwass*, 286 Mich 433, 438-439; 282 NW 206 (1938). As discussed, compelling the hearing would be useless and serve no purpose. For the same reason, injunctive relief, which likewise could only compel defendants to hold a pointless hearing that would not affect the outcome, would also be inappropriate. The trial court properly dismissed plaintiff's claim for mandamus and properly denied injunctive relief under any theory.

V. DUE PROCESS

Plaintiff argues that the trial court improperly granted summary disposition as to its federal due process claim on the basis of governmental immunity. Technically, we disagree, because it is clear that the trial court actually dismissed plaintiff's federal due process claim on the basis of res judicata. Nevertheless, we conclude that the trial court erred in dismissing the federal due process claim on that basis. Plaintiff's action in federal court was dismissed without prejudice because it was unripe for review while this proceeding remains pending. Thus, there was no adjudication on the merits of plaintiff's federal due process claim. See *Annabel v CJ Link Lumber Co*, 417 Mich 950, 950; 331 NW2d 900 (1983); *Yeo v State Farm Fire and Cas Ins Co*, 242 Mich App 483, 484; 618 NW2d 916 (2000). We decline to consider the parties' other arguments pertaining to the federal due process claim, because they should be addressed to the trial court in the first instance. We reverse the trial court's dismissal of plaintiff's federal due process claim on res judicata grounds, and we remand for further proceedings.

Plaintiff also argues that the trial court improperly dismissed its state due process claim on governmental immunity grounds. We disagree. As plaintiff admits, our Supreme Court has held that no damages remedy exists for claims against a municipality based on a violation of the Michigan Constitution. *Jones v Powell*, 462 Mich 329, 335-337; 612 NW2d 423 (2000). In *Jones*, our Supreme Court recognized the availability of "a narrow remedy against the state on the basis of the unavailability of any other remedy," which was "inapplicable in actions against a

municipality or an individual defendant." *Id*. at 337. It is clear from our Supreme Court's discussion that it was concerned with whether other remedies could be obtained against municipal or individual defendants in the abstract, not whether a specific defendant had a meritorious claim for one of those remedies.[9] There are other remedies available against municipalities for violations of the Michigan Constitution. See, e.g., *Sharp v City of Lansing*, 464 Mich 792, 800; 629 NW2d 873 (2001) (holding that injunctive and declaratory relief are available to restrain violations of the constitution). Therefore, no basis exists for crafting an additional remedy, and if there were, such a remedy should come from our Supreme Court or from the Legislature.

Plaintiff argues that we should instead follow *Marlin v City of Detroit*, 117 Mich App 108, 114; 441 NW2d 45 (1989), in which this Court declined to find the City of Detroit entitled to governmental immunity for a claim based on a violation of the Michigan Constitution. We disagree. We note that *Marlin* is not wholly wrong, because, as noted, there are remedies other than damages that may be pursued against municipalities. However, we disagree with plaintiff that *Jones* is distinguishable or anything less than comprehensive. Therefore, to the extent *Marlin* can be construed as holding that a claim for damages is available against a municipality for a violation of the Michigan Constitution, it has been overruled by *Jones*. See *Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 352-354; 785 NW2d 45 (2010). The trial court properly dismissed plaintiff's due process claims brought under the Michigan Constitution.

VI. UNJUST ENRICHMENT AND BREACH OF CONTRACT

Plaintiff contends that it has established questions of fact that preclude summary disposition of its unjust enrichment and breach of contract claims. We disagree.

"A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *AFT Mich v Michigan*, 303 Mich App 651, 660; 846 NW2d 583 (2014) (quotation marks and citation omitted). Unjust enrichment "is the equitable counterpart of a legal claim for breach of contract." *Id*. at 677. "Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another." *Id*. (quotation omitted). The elements of a claim for unjust enrichment are "(1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to plaintiff because of the retention of the benefit by the defendant." *Id*. at 677-678 (quotation omitted). "If this is established, the law will imply a contract in order to prevent unjust enrichment." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). "However, a contract will be implied only if there is no express contract covering the same subject matter." *Id*.

Plaintiff's argument is difficult to follow, but apparently it deduces the existence of a contract or unjust enrichment because at some point in 2015, the City asked some of its towers to store some towed vehicles. Plaintiff also contends that the City was unjustly enriched because at some point, it decided to stop collecting a particular administrative fee it had required towers to

[9] As discussed above, we are also unpersuaded that at an individual level, a remedy is "unavailable" for purposes of this analysis solely because it happens to be meritless in a particular case.

pay, and the City did not pay those fees back to the towers. Plaintiff asserts that the City paid for the storage of at least some of the vehicles, but it cites no evidence in support of that claim. *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Otherwise, plaintiff relies entirely on an affidavit from a City police officer that effectively disproves plaintiff's arguments. In relevant, part, the affidavit recites:

> 5. In 2013, the City implemented an administrative fee of $75 per tow, which was paid by each tower to the City.
>
> 6. In 2017, the City decided to stop collecting the administrative fee when a vehicle is not redeemed by its owner and does not sell at auction.
>
> 7. The City did not change its interpretation of the applicable ordinance. The city [sic] decided to implement a new procedure moving forward.
>
> 8. No tower was entitled to, or received, reimbursement of the administrative fees paid prior to the new decision regarding the fee.
>
> 9. In 2015, a [Detroit Police Department] officer asked several towing companies on the City's rotation to maintain possession of some forfeiture vehicles.
>
> 10. I have been advised that when the request was made, there was no suggestion or promise that the towers would be paid for retaining the vehicles.
>
> 11. The City Council did not approve any contract to pay the towers for storing the forfeiture vehicles, and the [Detroit Police Department] officer who made the request was not a designated decision maker for City contracts.

Thus, the trial court was clearly correct in concluding that plaintiff has not provided a scintilla of evidence that there was ever a contractual agreement, express or implied, to pay for vehicle storage. Plaintiff's breach of contract claim was correctly dismissed.

One of plaintiff's unjust enrichment claims is equally plainly meritless. Plaintiff provides no evidence that it ever paid the $75 per tow administrative fees after the City decided to stop collecting those fees. Plaintiff likewise provides no evidence that, say, all towers other than plaintiff were reimbursed for those fees. Plaintiff simply does not provide any argument that we can comprehend explaining how the City was unjustly enriched, nor does plaintiff provide any evidence from which unjust enrichment is apparent.

The vehicle storage is a slightly closer question, because the City clearly did receive a benefit from plaintiff by having plaintiff store vehicles on its property. However, that is not, by itself, sufficient to establish unjust enrichment. See *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195-196; 729 NW2d 898 (2006); see also *NL Ventures VI Farmington v Livonia*, 314 Mich App 222, 241; 886 NW2d 772 (2016). The evidence, such as it is, reveals that plaintiff would have had no expectation of compensation for storing the vehicles. As the trial court observed, plaintiff has provided no evidence that it ever asked defendants to pay for storage of the vehicles. The trial court also reasonably concluded that plaintiff stored the vehicles "to further the relationship with" the Detroit Police Department—in other words, plaintiff might have been

compensated intangibly in the form of goodwill. Plaintiff provides no evidence from which it could be inferred that its storage of the vehicles was anything other than a gratuitous benefit. Plaintiff's unjust enrichment claims were correctly dismissed.

We finally observe that plaintiff does not appear to have pursued its OMA or substantive (as opposed to procedural) due process claims on appeal. Those claims are therefore abandoned. *David v Sternberg*, 272 Mich App 377, 383; 726 NW2d 89 (2006).

VII. CASE EVALUATION SANCTIONS

Defendants appeal the trial court's denial of case evaluation sanctions. Because we are reversing the trial court's dismissal of plaintiff's federal due process claim and remanding for further proceedings, this matter is no longer final, and we must also vacate the trial court's order denying case evaluation sanctions. However, we offer some discussion to provide the parties and the trial court guidance on remand.

Generally, a party that rejects a case evaluation award is subject to sanctions if the action proceeds to verdict and the party fails improve its position. *Elia v Hazen*, 242 Mich App 374, 378-379; 619 NW2d 1 (2000). As defendants point out, plaintiff received a case evaluation award of $100,000 in its favor. Defendants accepted that award, and plaintiff rejected that award. Overlooking, for the moment, our reversal of summary disposition as to plaintiff's federal due process claim, because plaintiff did not prevail in any respect, defendants would ordinarily be entitled to case evaluation sanctions. However, pursuant to MCR 2.404(O)(11), the "interest of justice" exception, a trial court may, after considering all the facts and circumstances of a particular case, deny actual costs or award something less than actual costs, if it finds that "unusual circumstances" exist. *Haliw v City of Sterling Heights*, 257 Mich App 689, 709; 669 NW2d 563 (2003), rev'd on other grounds 471 Mich 700 (2005). This Court has recognized a nonexhaustive list of examples that constitute unusual circumstances that may justify denying costs in the interest of justice, including when the prevailing party has engaged in misconduct or gamesmanship, when the nature of the law is unsettled and substantial damages are at issue, when a party is indigent and an issue merits a decision by a trier of fact, or when the effect on third persons may be significant. *Id.* at 707-708.

The trial court's denial of case evaluation sanctions is not a model of clarity, but it appears to have been based on its perception that plaintiffs had been wronged by defendants' denial of procedural due process. The trial court also offered a vague reference to "the history of this case." To the extent the trial court denied case evaluation sanctions on the basis of defendants' conduct regarding the facts underlying the litigation, that would not be a proper "unusual circumstance" that would justify invocation of the "interest of justice" exception. *Haliw*, 257 Mich App at 706-707. Conversely, gamesmanship perpetrated by the prevailing party during the litigation is a proper basis for invoking the "interest of justice" exception. *Id*. at 707-708. To the extent the trial court denied case evaluation sanctions on the grounds that defendants could and should have sought summary disposition on governmental immunity grounds as to plaintiff's due process damages claim at the outset, or at least at the same time their first motion for summary disposition, the trial court probably would not have erred. Nevertheless, we need not resolve that issue, nor do we need to consider the parties' other arguments regarding case evaluation sanctions, because our remand as to the federal due process claim would have required vacation of any case evaluation

sanctions in any event. On remand, if defendants ultimately again prevail in full, the trial court must provide a more detailed and comprehensive articulation of its reasoning for granting or denying case evaluation sanctions.

VIII. CONCLUSION

In Docket No. 352503, we reverse the trial court's dismissal of plaintiff's federal due process claim on res judicata grounds, and we remand that claim only for further proceedings. We do not otherwise express any views as to the substantive or procedural merits of that claim, because such arguments should be addressed to the trial court in the first instance. We affirm the trial court's dismissal of plaintiff's remaining claims in their entirety. In Docket No. 353099, our reversal of the trial court's dismissal of plaintiff's federal due process claim requires us to vacate the trial court's order denying case evaluation sanctions. Depending on the trial court's resolution of plaintiff's federal due process claim, it may conduct whatever further proceedings regarding case evaluation sanctions, if any, as it deems proper. We do not retain jurisdiction. We direct that the parties shall bear their own costs in both docket numbers. MCR 7.219(A).

/s/ Michelle M. Rick
/s/ Amy Ronayne Krause
/s/ Anica Letica