STATE OF MICHIGAN

COURT OF APPEALS

DANIEL BRUNET, Individually and as Representative of a Class of Similarly Situated Persons and Entities,

Plaintiff-Appellant,

v

CITY OF ROCHESTER HILLS,

Defendant-Appellee.

UNPUBLISHED
December 2, 2021

No. 354110
Oakland Circuit Court
LC No. 18-164764-CZ

Before: MURRAY, C.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

Plaintiff Daniel Brunet, individually and as class representative, appeals as of right the trial court's opinion and order granting defendant City of Rochester Hills's motion for summary disposition and denying his motion for partial summary disposition. This case concerns charges imposed by defendant for municipal water and sewer services. Defendant asserts that these charges are unlawfully excessive, unreasonable, and in violation of MCL 141.91 and a now-amended municipal ordinance. We affirm.

I. FACTS AND PROCEEDINGS

Defendant operates a municipal water supply system, of which plaintiff is a customer.[1] The water system has two central purposes: (a) supply treated or "potable" water to municipal water customers, and (b) provide excess capacity for public fire protection. In March 2018, plaintiff filed a 10-count complaint against defendant, generally alleging that the water charges imposed by defendant on its customers since 2012 have been unlawful for the following two principal reasons. First, defendant accumulated surplus funds to allegedly pay for future capital

[1] To be precise, this case involves the water and sewer system, water and sewer customers, and water and sewer charges. For ease of discussion, we simply refer to the "water system," "water customers," and "water charges," respectively.

improvements to its water system, and these surplus funds are unnecessary to provide service to the *present* water customers. According to plaintiff, defendant may only charge its water customers for the present costs of supplying water. Second, defendant charges its water customers for the fire protection component of its water system. However, because fire protection operates for the benefit of the general public, not only the water customers themselves, the general public should be charged for the fire protection.[2] Plaintiff also noted that defendant had an ordinance providing that the fire protection component would be paid by defendant itself from its general fund. Plaintiff requested that the trial court certify the instant action as a class action with plaintiff himself as the class representative of all persons or entities who paid the water charges at any time in the preceding six years. He further requested that defendant disgorge the excess funds that it had received to the putative class in equity and that the trial court declare that the water charges are unlawfully excessive to the extent outlined in the complaint.

In March 2019, the trial court certified the class, which it defined as "all persons and entities who/which have paid the City for water and/or sewage disposal service at any time since March 30, 2012 or who/which pay the City for water and/or sewage disposal service during the pendency of this action."

In December 2019, plaintiff moved for partial summary disposition, arguing that the water charges were unreasonable as a matter of law until November 2018 because defendant had the following ordinance in effect concerning the cost of fire protection services:

> (b) Fire Service Fee. As a fire service fee for providing a water system with extra capacity available for fighting fires and protecting property in the city, the city shall be charged based on a base-extra capacity approach attributing to fire protection the difference between total system capacity and capacity required by other customer classes. The fire service fee shall be required and adjusted annually to reflect actual versus budgeted revenue requirement for the water fund for the previous year.
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> (c) Quarterly billing. Charges against the City shall be payable in quarterly installments from the current city's fire fund or from the proceeds of taxes which the city, within constitutional limitations, is authorized and required to levy in an amount sufficient for this purpose. [Rochester Hills Ordinance, § 102-124.]

Plaintiff argued that although Rochester Hills Ordinance, § 102-124 essentially required that the fire protection component be paid for by defendant itself, defendant violated the ordinance during the class period until November 2018 by charging its water customers for this service.[3]

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[2] Plaintiff refers to the future capital improvement component of the water charges as the "Reserve Charge" and the fire protection component as the "Fire Service Charge." To be clear, however, defendant does not separately itemize or charge its water customers for these components. These terms are created by plaintiff for the purposes of this litigation.

[3] Rochester Hills Ordinance, § 102-124 was amended in November 2018 to remove such language.

Thus, plaintiff argued, he and the class were entitled to a refund for monies paid for the fire protection component.

Defendant moved for summary disposition of the entire complaint.[4] Defendant acknowledged that the fund for its water system had accumulated a substantial surplus of about $46 million in recent years. However, defendant asserted, the majority of the water system will need to be replaced in the upcoming five to 10 years, and it will likely use substantially all of its surplus funds to do so. Defendant explained that it always has intended to use the surplus funds for these upcoming capital improvement projects and that paying for the projects with cash is more fiscally responsible than doing so with bonds. Defendant argued that it was authorized by MCL 141.121 to charge its customers for these future capital improvement projects and that its water charges were reasonable in all respects. Defendant also argued that a municipal regulation passed in 1999 authorized charging its water customers for the fire protection component, so its water charges were not unlawful to that extent.

The parties presented competing evidence concerning the reasonableness of the water charges, with plaintiff's experts opining that the water charges were unreasonably excessive, and defendant's experts opining that the charges were reasonable. The trial court discussed this evidence in a 37-page opinion and ultimately granted summary disposition in favor of defendant. In relevant part, the trial court reasoned that the water charges did not violate MCL 141.91 because they were "user fees," not "taxes," under *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998); that the water charges were reasonable because plaintiff "has submitted no evidence of anything illegal or improper" and otherwise failed to overcome the presumption of reasonableness; and that plaintiff was not entitled to equitable relief with respect to the fire protection component of the water charges because his "sole evidence" in that regard was "an ordinance that was mistakenly left on the books and was arguably already overridden by lawful resolution."[5] Plaintiff now appeals.

II. MCL 141.91

Plaintiff first argues that the water charges are an unlawful tax in violation of MCL 141.91. We disagree.

We review de novo whether a municipal charge is a "tax." See *Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412, 413-414; 671 NW2d 572 (2003). We also review de novo questions of statutory interpretation. *PNC Nat'l Bank Ass'n v Dep't of Treas*, 285 Mich App 504, 505; 778 NW2d 282 (2009). Finally, "[t]his Court reviews de novo a trial court's ruling on a

[4] The trial court dismissed two counts of the complaint months earlier, so defendant's motion concerned the remaining eight counts.

[5] The trial court also ruled in favor of defendant on other issues that plaintiff does not challenge on appeal.

motion for summary disposition." *Hartfiel v City of Eastpointe*, 333 Mich App 438, 444; 960 NW2d 174 (2020).

It is initially noted that plaintiff brought alternative claims for assumpsit and unjust enrichment.[6] "At common law, assumpsit was a proper vehicle for recovering unlawful fees, charges, or exactions—including unlawful utility charges—that the plaintiff had paid to a municipality under compulsion of local law." *Youmans v Charter Twp of Bloomfield*, ___ Mich App ___, ___; ___NW2d ___ (2021) (Docket No. 348614); slip op at 27 (cleaned up). "With the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved." *Id*. (cleaned up). "Hence, an assumpsit claim is modernly treated as a claim arising under quasi-contractual principles, which represent a subset of the law of unjust enrichment." *Id*. (quotation marks and citations omitted). "Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another." *Wright v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019). Consequently, if plaintiff is correct that the water charges violated MCL 141.91 (or any other law), he and the class would arguably be entitled to equitable relief to recover the charges unlawfully paid.

MCL 141.91 provides as follows:

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

MCL 141.121 provides, in relevant part, as follows:

> (1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates shall be sufficient to provide for all the following:
>
> (a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement as may be necessary to preserve the public improvement in good repair and working order.
>
> * * *
>
> (d) Other expenditures and funds for the public improvement as the ordinance may require.

[6] Plaintiff also sought declaratory relief in his "Prayer for Relief."

(2) The rates shall be fixed and revised by the governing body of the borrower so as to produce the amount described in subsection (1). . . .[7]

MCL 141.121 places "the amount of the charge within the sound discretion of the city officials, especially when considered in relation to the objectives of the program in maintaining the system and paying off the bonds in the manner required by statute." *Yurek v City of Sterling Heights*, 37 Mich App 386, 390; 194 NW2d 474 (1971) (cleaned up).

In *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998), our Supreme Court considered whether a "storm water service charge" was either a valid user fee or a tax that violated the Headlee Amendment, Const 1963, art 9, § 31, which generally prohibits the imposition of new municipal "taxes" that are not ratified by the voters. The charge was imposed on "each parcel of real property located in the city using a formula that attempts to roughly estimate each parcel's storm water runoff," and it was intended to fund the separation of combined sanitary and storm sewers within the city that had not already been separated. *Id*. at 155. In its analysis, the Court first observed that "a 'fee' is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A 'tax,' on the other hand, is designed to raise revenue." *Id*. at 161 (cleaned up). The Court then identified the following three factors to distinguish between a user fee and a tax: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose," (2) "user fees must be proportionate to the necessary costs of the service," and (3) user fees contain an element of "voluntariness." *Id*. at 161-162. The Court ultimately ruled that application of the three-factor test compelled the conclusion that the charge at issue was a tax for the purposes of the Headlee Amendment. *Id*. at 169.

In this case, plaintiff acknowledges in his brief on appeal that he is not maintaining a Headlee claim, but he argues that *Bolt* is persuasive authority for the proposition that the water charges at issue are unlawful "taxes" under MCL 141.91. In other words, because MCL 141.91 generally prohibits municipal taxes that are not otherwise authorized by law, and because application of the *Bolt* test indicates that the water charges here are "taxes," it necessarily follows that the water charges violate MCL 141.91. However, plaintiff simply fails to address defendant's argument that the water charges are authorized because they are fully consistent with MCL 141.121(1)(a) and (d). "An appellant's failure to properly address the merits of an argument

[7] MCL 141.121 is part of the Revenue Bond Act of 1933, MCL 141.101 *et seq*. Although MCL 141.121 seems to contemplate only those situations in which bonds are issued, MCL 141.104 provides that "[t]he powers in this act granted may be exercised notwithstanding that no bonds are issued hereunder." Thus, the parties do not dispute that MCL 141.121 may apply in this case, notwithstanding that defendant apparently does not intend to exclusively issue bonds to fund the future capital improvements. See *Seltzer v Sterling Twp*, 371 Mich 214, 219; 123 NW2d 722 (1963) ("It was clearly the intention of the legislature to give townships the power and authority under the Revenue Bond Act of 1933 to purchase, acquire, construct, improve, enlarge, extend or repair a water supply system and a sewage disposal system, and to own, operate and maintain the same, notwithstanding no bonds are issued in connection therewith.").

constitutes the abandonment of an issue." *In re Application of Detroit Edison Co for 2012 Cost Recovery Plan*, 311 Mich App 204, 214; 874 NW2d 398 (2015). Thus, this issue is abandoned.[8]

Regardless, plaintiff's argument is meritless. In essence, plaintiff argues that because a municipality generally may not charge current ratepayers for future capital improvements—as recognized by older cases such as *Wolgamood v Village of Constantine*, 302 Mich 384; 4 NW2d 697 (1942), and newer cases such as *Bolt*—it follows that the water charges here are not permissible "rates" or "fees" but are instead "taxes" because defendant acknowledges that the cash reserve will be used for future capital improvements. In our view, plaintiff overstates the principle derived from such cases.

In *Wolgamood*, our Supreme Court explained as follows:

> A municipally owned utility is built and operated, not for a corporate profit, but for the purpose of providing utility services at a reasonable cost to the citizens of the municipality, who are generally identical with the customers. For a municipally owned light plant to charge rates which will, in addition to the necessary expenses of construction and operation, build up a reserve for depreciation equaling the replacement cost of the plant, is to require the citizens and customers not only to pay for construction of their own utility but also to provide the capital for the construction of a new plant to serve future users. [*Wolgamood*, 302 Mich at 404-405.]

In other words, a municipality may not charge current ratepayers for the costs of constructing the original municipal utility (typically though bonds that must be paid over time) *and* the future costs of replacing that same utility. Doing so "is to ask the consumers to pay off the capital investment twice, once as a debt service and again in the establishment of a depreciation reserve." *Id*. at 405 (quotation marks and citation omitted). Of course, there is nothing in *Wolgamood*, or any other case of which we are aware, to suggest that a municipality may not charge current ratepayers *once* for the cost of the municipal utility. Thus, there is no question that current ratepayers may be charged for the cost of servicing bonds that were issued years ago to pay for the costs of constructing the original municipal utility. It follows that if the municipality originally constructed its utility through cash and intends to replace the utility in a similar manner, then current ratepayers may properly be charged for accumulating that cash reserve. That is, there is no conceptual difference between requiring ratepayers to service bonds and requiring ratepayers to contribute to a cash reserve that will be used for future capital improvements to the utility.

Accumulating such a cash reserve by charging ratepayers based on depreciation is an appropriate way to do so. In *City of Detroit v City of Highland Park*, 326 Mich 78; 39 NW2d 325 (1949), Highland Park argued that the water and sewage rates charged by Detroit were unreasonable because, among other reasons, Detroit included depreciation in its rates, and "to charge depreciation sufficient to amortize the cost over the service life of the system is to charge

[8] Recently, our Supreme Court noted in different circumstances that merely because a particular "charge" is a "tax" for the purposes of the Headlee Amendment does not necessarily render it unlawful. See *Gottesman v City of Harper Woods*, ___Mich___ (2021) (Docket No. 160806).

this generation for improvements to be used by the next generation." *Id*. at 95. Our Supreme Court rejected that argument, explaining that Detroit advanced "huge sums . . . as an investment in a utility on which Detroit may earn a reasonable return." *Id*. Although Detroit issued bonds as well, "the bonds so issued were only for a small part of the total cost." *Id*. "[O]n a utility basis where the city is not recovering its capital as part of the expense, depreciation charges sufficient to rebuild and restore the system over its service are proper items of expense in determining the rate to be charged." *Id*. at 98. "It is incumbent on the city of Detroit, the owner, to keep up, repair or rebuild the system to the extent that it becomes necessary through depreciation in order to protect its large investment, the advance of almost $12,000,000 in cash besides the issuance of the bonds." *Id*. Simply put, our Supreme Court approved of depreciation charges "sufficient to rebuild and restore the system" because Detroit was entitled to "protect its large investment."

Bolt presented the same concern as *Wolgamood*. In *Bolt*, the Court reasoned that the charge at issue was a "tax" because, in relevant part, "[a]t the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter. . . . The revenue to be derived from the charge is clearly in excess of the direct and indirect costs of actually using the storm water system over the next thirty years and, being thus disproportionate to the costs of the services provided and the benefits rendered, constitutes a tax." *Bolt*, 459 Mich at 163. Thus, in *Bolt*, the ratepayers were expected to pay for the benefits of the improved system that they would enjoy *and* pay for the benefits of the improved system that future ratepayers, who would not pay the charge at issue, would enjoy. This constituted a similar "double charge" as in *Wolgamood*.

Accordingly, it is not enough for plaintiff to simply show that the water charges at issue are funding a reserve to pay for future capital improvements. Our Supreme Court approved of such a practice in *Highland Park*. Rather, at a minimum, plaintiff must also show that current ratepayers are being "double charged" for the water system, contrary to cases such as *Wolgamood* and *Bolt*. We consider that issue below.

III. REASONABLENESS

Plaintiff argues that the water charges are unreasonable. We disagree. We review de novo whether a municipal charge is reasonable. See *Mapleview Estates, Inc*, 258 Mich App at 413-414.

It is a longstanding principle that municipal utility rates are presumed to be reasonable. See *Highland Park*, 326 Mich at 100-101 ("The rate lawfully established by the plaintiff is assumed to be reasonable in absence of a showing to the contrary or a showing of fraud or bad faith or that it is capricious, arbitrary or unreasonable, and the burden of proof is on the defendant to show that the rate is unreasonable."). In *Meridian Twp v City of East Lansing*, 342 Mich 734; 71 NW2d 234 (1955), Meridian Township challenged the water rates set by East Lansing, arguing that East Lansing violated a provision of the contract between the parties stating that "such rates shall always be reasonable in relation to the costs incurred by the City for the supply of water." *Id*. at 748. Our Supreme Court explained that the question before it was whether the water rates were "reasonable" as defined by the contract:

> We are asked by the appellant to find that the rate charged is not reasonable as above prescribed. It will be noted that the clause under examination does not

> equate rates to costs. Identity is not required. Obviously there is elbow-room for adjustment. The requirement merely is that they shall be 'reasonable' in relation to costs. *The word 'reasonable' with respect to rates charged by utilities is a word of the most universal employment. It may be provided by ordinance, statute, or constitution, that rates shall be 'reasonable,' or 'fair and reasonable.'* Moreover, should the question of rate arise on a contract implied in law, the judicial requirement is that the rate to be paid shall be 'reasonable.' It may also be employed (as in the case at bar) in a contract. The determination of its meaning, in any case, is not subject to mathematical computation with scientific exactitude but depends upon a comprehensive examination of all factors involved, having in mind the objective sought to be attained in its use. Here it is related to the costs incurred by the city in the supply of water. [*Id*. at 749 (internal citations omitted; emphasis added).]

Ultimately, our Supreme Court ruled in favor of East Lansing, stating that Meridian Township failed "to show that the rates charged were, in fact, unreasonable with relation to costs." *Id*. at 753.

In *City of Plymouth v City of Detroit*, 423 Mich 106; 377 NW2d 689 (1985), Detroit increased water rates it imposed on suburban Detroit municipalities by 39 percent. *Id*. at 109. Plymouth sued Detroit, alleging that the increase was unreasonable. *Id*. Detroit argued that the increase was necessarily reasonable under the version of MCL 123.141 in effect at the time, which essentially provided that "the city may charge its outlying customers not more than twice what it charges its own users." *Id*. at 123. According to Detroit, because it did not charge the suburban municipalities more than twice what it charged its own customers, and because MCL 123.141 "represents the only applicable standard of reasonableness," it logically followed that the 39-percent increase was reasonable. *Id*. Plymouth responded that a contractual provision between the parties stated that "rates shall always be reasonable in relation to the costs incurred by the Board for the supply of water." *Id*. at 111. Thus, Plymouth argued, "the statute only provides for a statutory floor and ceiling of reasonableness and that the specific provisions of the contracts between the parties govern their relationship." *Id*. at 124. In resolving the dispute, our Supreme Court agreed with our conclusion that "the statute does not render reasonable as a matter of law rates within its maximum and minimum provisions in the face of a contractual provision which states that rates shall be reasonable in relation to costs. Regardless of how the statute reads, [Detroit] has limited its discretion in setting rates by agreeing to the contractual provision." *Id*. at 124-125 (quotation marks and citation omitted). Ultimately, however, the Supreme Court ruled in favor of Detroit, concluding that Plymouth failed to sustain its burden of showing that the water rates were unreasonable in violation of the contract:

> The plaintiff had ample opportunity to substantiate its claim on the theory with which it had chosen to prove that the rates in question were violative of the contract between the parties. The trial court concluded that the rates charged had not been shown to be unreasonable. We find no error in the trial court's conclusion. . . . [*Id*. at 137.]

In *City of Novi v City of Detroit*, 433 Mich 414; 446 NW2d 118 (1989), Novi challenged the water rates set by Detroit, arguing that they violated the newly enacted MCL 123.141(2), see 1981 PA 89, which provided, in relevant part, as follows:

> The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making. . . .

The trial court ruled in favor of Detroit, but we reversed, explaining that MCL 123.141(2) established the standard that water rates must "reflect the actual cost of providing the service," and as a result, the concept of reasonableness was no longer relevant. *Id*. at 427-428 (quotation marks and citation omitted). Our Supreme Court reversed this Court, stating as follows:

> We acknowledge that the Legislature intended that municipal water rates more accurately reflect the actual cost of service when it eliminated the artificial limits imposed by the previous version of MCL 123.141. However, the Legislature's use of the phrase "based on the actual cost of service as determined under the utility basis of rate-making" cannot be construed to mean "exactly equal to the actual cost of service," in light of the difficulties inherent in the rate-making process and the statutory and practical limitations on the scope of judicial review. The concept of reasonableness, as recognized by the courts of this state and other states in utility rate-making contexts, must remain operable, in order to provide a meaningful and manageable standard of review.
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> * * *
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> For these reasons, we hold that 1981 PA 89 did not render inoperable the concept of reasonableness in the process of judicial review of municipal utility water rates. The burden of proof remains on the plaintiff to show that a given rate or rate-making method does not reasonably reflect the actual cost of service as determined under the utility basis of rate-making pursuant to MCL 123.141(2). [*Id*. at 430-433 (cleaned up).]

Our Supreme Court ultimately concluded that "the plaintiff City of Novi did not meet its burden of proving that the City of Detroit Water and Sewerage Department's rate-making method, or the resulting rates charged, did not comply with the utility basis of rate-making." *Id*. at 438.

More recently, in *Trahey v City of Inkster*, 311 Mich App 582; 876 NW2d 582 (2015), this Court summarized the following pertinent principles concerning the presumption of reasonableness:

> The determination of reasonableness is generally considered by courts to be a question of fact. Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable. This presumption exists because courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making. However, the presumption of reasonableness may be overcome by a proper showing of evidence. The burden of proof is on the

> plaintiff to show that any given rate or ratemaking practice is unreasonable. [*Id*. at 594 (cleaned up).]

Here, plaintiff argues that the water charges imposed by defendant are unreasonable for the following reasons: (1) "the City has charged far more than necessary to operate its water and sewer systems," i.e., that "the City has been operating its Water and Sewer Fund for a profit because its revenues have consistently exceeded its expenses"; (2) his experts opined that the water charges were unreasonable because, among other things, "[b]y including depreciation in setting its rates, the City's rates double count certain capital expenses"; and (3) defendant did not accumulate the surplus *with the intent* of funding future capital improvements.

Plaintiff, however, does not identify the standard or authority for "reasonableness." In other words, plaintiff does not identify a statute, contractual provision, or ordinance establishing the underlying basis for "reasonableness." In *Meridian Twp*, for example, the basis for "reasonableness" was a contractual provision stating that water rates must be "reasonable in relation to the costs incurred by the City for the supply of water." *Meridian Twp*, 342 Mich at 748. In *City of Plymouth*, the basis for "reasonableness" was a contractual provision stating that water rates "shall always be reasonable in relation to the costs incurred by the Board for the supply of water." *City of Plymouth*, 423 Mich at 111. In *City of Novi*, the basis for "reasonableness" was a statute stating that "[t]he price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making." *City of Novi*, 433 Mich at 419.[9] And in *Trahey*, the basis for "reasonableness" was a municipal ordinance stating that water rates must be "just and reasonable." *Trahey*, 311 Mich App at 594.

Plaintiff apparently is attempting to maintain a freestanding claim of "reasonableness" that is not grounded in any specific law nor in any type of cogent reasoning. A bald assertion of some type of unknown reasonableness standard is not consistent with the caselaw discussed above, in which "reasonableness" was linked to a statute, contractual provision, ordinance, or other source of authority. Of course, plaintiff is nominally correct that municipal utility rates must be "reasonable," but he overlooks the fact that the standard for "reasonableness" is often uniquely determined by reference to the specific law, cost basis, or contract at issue. In one case, a "reasonable" water rate had to simply reflect the costs of supplying water, whereas in another case, a "reasonable" water rate had to reflect the costs of supplying water as determined under the utility basis of rate-making. Yet, in other cases, as in *Trahey*, the concept of "reasonableness" was that referred to by ordinance. Thus, in light of plaintiff's failure to identify a basis for "reasonableness" here, we could consider this issue abandoned. See *In re Application of Detroit Edison Co for 2012 Cost Recovery Plan*, 311 Mich App at 214.

Regardless, most of plaintiff's arguments in regard to his understanding of reasonableness are meritless and we dispose of them quite briefly. First, plaintiff argues that the mere fact that defendant accumulated a reserve of about $50 million shows that the water charges were

[9] Although the statute did not expressly include the word "reasonable," our Supreme Court explained that the concept must nonetheless be imposed within the statute. See *id*. at 433.

unreasonable.[10] However, as explained previously, our Supreme Court in *Highland Park* approved of such accumulated reserves to pay cash for future capital improvements. Second, plaintiff argues that his experts' opinion created a genuine issue of material fact as to whether the water charges were unreasonable, given that they opined that defendant "collected more than $24 million in excess of the amounts it was entitled to collect." However, one of those experts acknowledged during his deposition that he was unaware of the particular depreciating nature of defendant's water system, the critical justification offered by defendant in support of its reserve.[11] Such a lack of knowledge fundamentally undermines the opinion of plaintiff's experts. A plaintiff cannot proceed to trial simply because his or her expert was unaware of the pertinent facts. Compare *Pete v Iron Co*, 192 Mich App 687, 689; 481 NW2d 731 (1991) (concluding that summary disposition was properly granted to the defendant in a slip-and-fall case because, in relevant part, "[p]laintiff's expert testified during deposition that he did not know what caused plaintiff's fall, but opined that she may have 'misstepped' "). In other words, where defendant argues that it accumulated its reserve to pay for substantial capital improvements in the upcoming five to 10 years and that its water charges are therefore reasonable, plaintiff's experts cannot ignore that fact but nonetheless conclude that the water charges are unreasonable. Third, plaintiff argues that there is a question of fact as to whether defendant had a specific plan to use its reserve to fund future capital improvements before the instant action was filed. However, notwithstanding the testimony of defendant's officers that defendant did have a specific plan for its reserve, and notwithstanding that plaintiff does not dispute that the reserve will actually be used to fund future capital

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[10] Plaintiff relies on *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204; 934 NW2d 713 (2019), for the proposition that a municipal utility charge that consistently returns a profit is evidence (perhaps conclusive) that the charge is unreasonable. In that case, our Supreme Court favorably cited the dissenting opinion of Judge Jansen, who explained that consistent annual profits generated by the city's building fees was evidence that the fees were unauthorized by statute. See *id*. at 220. According to plaintiff, the same reasoning should apply here. Plaintiff's argument misses the mark because the statute at issue in that case provided that the building fees "shall be intended to bear a reasonable relation to the cost, including overhead." MCL 125.1522(1)-(2). Thus, as Judge Jansen observed, consistent annual profits indicated that the building fees were not, in fact, intended to bear a reasonable relation to the cost of operating the regulatory scheme. Here, in contrast, plaintiff does not ground his argument of "unreasonableness" in a similarly worded statute.

We also note that municipal utilities are not necessarily precluded from generating a reasonable profit. See *Chocolay Charter Twp v City of Marquette*, 138 Mich App 79, 84; 358 NW2d 636 (1984) ("A municipality is not required to furnish utility services at cost, but may charge a rate which will yield a profit."); McQuillin: The Law of Municipal Corporations, § 35:60 ("While in theory, water from a municipally owned plant should come to the consumer without profit to the municipality, this does not exclude the idea of profit in operation. A city is entitled to a reasonable profit and it may even use that profit for other valid municipal purposes.").

[11] Although the expert only testified in the first person, the most reasonable inference is that neither expert was aware of the particular depreciating nature of defendant's water system. Tellingly, there is nothing in the experts' 27-page written opinion to suggest otherwise.

improvements, plaintiff provides no authority for the proposition that defendant was obligated to have a specific plan for its reserve before the instant action was filed. See *Bohn v City of Taylor*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2019 (Docket No. 339306) ("Instead, plaintiffs contend that the City must have a specific plan for capital improvements equivalent to the amount in the reserve fund and that without such a plan, the fund's existence is evidence that the rates are excessive. Plaintiffs do not provide any authority (legal or otherwise) to support this contention.").[12]

Plaintiff's best argument for reversal is that defendant "double counted" both debt service and depreciation for six particular assets, such that water customers were charged for both the original construction of those assets (funded through bonds) and anticipated future construction (funded through depreciation as a proxy for anticipated costs). However, the trial court did not address this argument. In his lower court brief discussing this position, plaintiff summarily directed the trial court to the three particular exhibits:

> [FN 14]: *See* Exhibit 23 hereto (City's Objections and Responses to Plaintiff's Fourth Interrogatories and Fourth Requests for Production of Documents).

[12] "Although unpublished opinions of this Court are not binding precedent, MCR 7.215(C)(1), they may, however, be considered instructive or persuasive." *Adam v Bell*, 311 Mich App 528, 533 n 1; 879 NW2d 879 (2015) (quotation marks and citation omitted).

In any event, the law is contrary to plaintiff's argument that charges by a municipal utility are unreasonable if the municipality does not have a specific plan for use of its reserve before a lawsuit is filed. "A city has no duty to justify or explain its actions in setting rates until the party contesting their validity shows their invalidity by competent evidence." McQuillin: The Law of Municipal Corporations, § 35:57. In other words, a party contesting the validity of municipal charges (i.e., rates) must *first* produce evidence that the charges are unreasonable, and *then* the municipality must justify its actions in setting those charges. As applied here, defendant does not have to justify its actions in setting the water charges at issue—its alleged lack of a preexisting specific plan for use of the reserve—unless plaintiff first shows that the charges are unreasonable. Plaintiff cannot simply demand a justification for the water charges and subsequently argue that the purported insufficiency of the justification establishes that the water charges are unreasonable.

Moreover, plaintiff's argument is illogical for the simple reason that "[m]unicipal utility rates may include a profit margin," and "[t]he profit may be transferred to the general fund and used for purposes other than supplying the utility service." *Id*. Thus, so long as the charges are reasonable, the municipality may use accumulating reserves from those charges (i.e., profit) for any municipal purpose whatsoever. See *id*. It therefore cannot be the case that defendant is obligated to have a specific plan providing that accumulated reserves from its water charges must be used for one particular municipal purpose, or future capital improvements, rather than for some other lawfully allowed purpose.

[FN 15]: See Exhibit 24 hereto (excerpts from City's annual financial statements showing principal debt expense for the assets listed below). See also Budget documents (Exhibit 20 hereto).

With this glaring lack of analysis and citation to the record, the trial court cannot be reasonably faulted for its failure to consider plaintiff's "double counting" argument. Plaintiff submitted dozens of pages of detailed accounting statements and responses to interrogatories, but he did not inform the trial court how it should consider these documents or where the pertinent facts relating to plaintiff's argument could be found. While true that MCR 2.116(G)(5) provides that "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)," this subrule does not mean that a party may submit hundreds of pages of documents to the trial court and expect that court to parse through the documents to find the relevant facts establishing a genuine issue of material fact. Rather, this Court has explained that a trial court is "not obligated under MCR 2.116(G)(5) to scour the record to determine whether there exists a genuine issue of fact to preclude summary disposition." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 381; 775 NW2d 618 (2009) (quotation marks and citation omitted). "It is absurdly difficult for a judge to perform a search, unassisted by counsel, through the entire record, to look for such evidence." *Id*. at 379 (citation omitted).

Similarly, MCR 7.212(C)(7), which concerns briefs filed in this Court, provides, in relevant part, that "[f]acts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." Thus, the mere citation to a multipage exhibit is insufficient. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004) ("In support of this claim, plaintiffs provide general citations from Dr. Derderian's deposition, testimony from the profusionist in one patient's case, and one patient's medical records. Such general citations are insufficient."). Accordingly, because plaintiff failed to cite supporting documentary evidence for his assertion that defendant engaged in improper "double counting," both in the trial court and in this Court, he is not entitled to relief on this basis.

IV. VIOLATION OF ORDINANCE

Finally, plaintiff argues that the water charges were unreasonable as a matter of law before November 2018 to the extent that defendant included a component for fire protection, contrary to former Rochester Hills Ordinance, § 102-124.

Initially, we note that plaintiff appears to be arguing only that the violation of former Rochester Hills Ordinance, § 102-124 resulted in the water charges being unreasonable. See *Trahey*, 311 Mich App 595 ("Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable."). While plaintiff cites multiple cases for the basic proposition that a municipality is bound by its own ordinances, see, e.g., *Taber v City of Benton Harbor*, 280 Mich 522, 526; 274 NW 324 (1937), he does not challenge the basis for the trial court's dismissal of the counts of the

complaint seeking relief for a violation of former Rochester Hills Ordinance, § 102-124 alone.[13] To the extent that plaintiff intended to challenge that dismissal, his argument is waived. See *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue."). Thus, we need only address the argument that the alleged violation of the November 2009 version of Ordinance § 102-124 resulted in the water charges being unreasonable.

"This Court must presume the amount of the [municipal utility] fee to be reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence." *Jackson Co v City of Jackson*, 302 Mich App 90, 109; 836 NW2d 903 (2013) (cleaned up). Here, the fire protection component of the water charges was substantively a component for "excess capacity" of the water system, i.e., water capacity that was beyond that necessary to service the ordinary needs of the water customers. In *Novi*, our Supreme Court explained that "excess capacity is includable in the rate base where it is reasonably necessary to fulfill contractual obligations." *Novi*, 433 Mich at 435. Moreover, the Court suggested that when "facilities that are arguably excess capacity are constantly in use," the excess capacity is properly includable for that additional reason as well. See *id*. ("In the instant case, because the DWSD system is integrated, the facilities that are arguably excess capacity are constantly in use.").

Assuming that plaintiff is correct that the language of former Rochester Hills Ordinance, § 102-124 resulted in the water charges including an illegal component for excess capacity and thereby rebutting the presumption of reasonableness, the trial court correctly held that plaintiff is not entitled to equitable relief. In *Youmans*, another case involving a claim for equitable relief for allegedly inflated water charges, this Court explained that "[w]hether the Township would receive an unjust 'benefit' from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were 'excessive,' not on whether some aspect of the Township's ratemaking methodology was improper." *Youmans*, ___Mich App at ___; slip op at 30. Thus, this Court rejected the plaintiff's argument that "in the face of illegal or improper expenses included in the disputed rates, she is not required to demonstrate that the rates actually *overcharged* for the related water and sewer services." *Id*. (emphasis in original).

The same is true here. It would not be inequitable to allow defendant to retain the money for excess capacity because that excess capacity, i.e., the "fire service fee," provided exclusive benefits to water customers. The fire service fee under former Rochester Hills Ordinance, § 102-124 was determined by "a base-extra capacity approach attributing to fire protection the difference between total system capacity and capacity required by other customer classes." Simply, this means that the fire service fee was the difference between the capacity *required* by water customers and the overall water system capacity. This excess-capacity difference supported the fire protection services, which admittedly benefitted the general public, but also the water customers themselves. Defendant's public utilities engineering manager explained the benefits of the excess capacity in an affidavit as follows:

[13] The trial court ruled that Rochester Hills's ordinances are only enforceable by certain government officials and entities. Plaintiff does not argue otherwise on appeal.

> 4. One benefit of the water system's capacity is that it ensures that the City will have sufficient water flow to fight fires. The system's capacity also provides numerous benefits to ratepayers who purchase and use City water, including meeting customers' minimum needs for average daily water flow.
>
> 5. The system's capacity also allows the City to provide service under emergency conditions, maintain service during an event that causes failure, and quickly recover from these events.
>
> 6. In addition, extra water system capacity allows system users to access sufficient water flow to irrigate their lawns. Many of the City's water ratepayers take advantage of this benefit and use sprinkler systems to irrigate their lawns in summer months.

Thus, the excess-capacity costs that plaintiff attributes entirely to the costs of fire protection services actually provide unique benefits to water customers alone. Similarly, for example, our Supreme Court in *Novi* explained that the "base-extra capacity method" in that case required separating "base costs," which were "[t]hose costs associated with furnishing water at average annual rates of use," with other costs, such as "[t]hose additional costs associated with meeting water demands on the day or days of maximum use" and "[t]hose additional costs associated with meeting demands during the peak hour of use." *Novi*, 433 Mich at 421-422. In *Novi*, as in this case, charging water customers for excess capacity provided exclusive benefits to those customers.

It is impossible to disentwine the "fire protection" aspect of excess capacity with the "potable water" aspect of excess capacity. As noted, excess capacity is necessary to provide potable water during times of heightened demand or emergencies.[14] Moreover, even when excess capacity is used to provide fire protection, i.e., the water supply is used to fight a fire, that excess capacity still benefits water customers because those customers are (typically) able to maintain ordinary water use. If the water system had no excess capacity, then fighting a fire would result in water customers not having access to the ordinary water supply. Essentially, "fire protection" is but one example of heightened demand or emergency. If water customers may properly be charged for excess capacity to protect against heightened demand during a hot summer day—as plaintiff does not seem to dispute—it follows that they may also be charged for excess capacity to protect against fighting a large fire.

At a minimum, even if plaintiff is correct that the "fire protection" aspect of excess capacity exclusively benefits the general public and does not provide any unique benefits to water customers themselves, which would perhaps raise *Bolt*-type concerns, it is apparent that "fire protection" is so intertwined with the concept of excess capacity itself that the two cannot be

[14] Compare *In re Reliability of Electric Utilities for 2017-2021*, 505 Mich 97, 103 n 1; 949 NW2d 73 (2020) ("Regulators overseeing capacity calculate peak demand using the hottest days of the year and add a 'reserve margin'—that is, some *extra* capacity—to ensure that suppliers meet even unexpectedly high spikes of demand.") (emphasis in original).

disentangled by this Court, at least where plaintiff has simplistically equated "fire protection" with excess capacity. Under these circumstances, equity does not entitle plaintiff and the class to relief.

V. CONCLUSION

The trial court correctly granted summary disposition in favor of defendant because plaintiff did not show that the water charges violated MCL 141.91 or were "unreasonable," or that he was entitled to equitable relief for the alleged violation of former Rochester Hills Ordinance, § 102-124. Therefore, we affirm.

/s/ Christopher M. Murray
/s/ Michael J. Riordan