# STATE OF MICHIGAN

# COURT OF APPEALS

TOWNSHIP OF BROOKS,

Plaintiff/Appellee/Cross-Appellant,

v

JAMES R. HADLEY, JOHN J. JULIANUS TRUST, ROBERT JULIANUS, MARY STEIN RESTATED TRUST, MARY M. STEIN, LESTER E. HALLBERG, CLAUDIA HALLBERG, and ROY W. FORBES,

Defendants/Appellants/Cross-Appellees,

and

DAVID L. SHARP, ROGER L. STROVEN, ROGER L. DEJONG, LUANNE DEJONG, JACK JEFFERS, GEORGE S. HOFACKER, KAY M. HOFACKER, MARIANNE GELUSO, SHARON FLEENOR, JULIE WILSON, IRENE M. GODLEWSKI TRUST, DANIEL ROTHENTHALER, RICHARD LEONARD, HARRIET LEONARD, THEODORE SENFT, AMALIA SENFT, TED ROBINSON, SUSAN ROBINSON, MARILYN ROBINSON, REX V. ROBINSON, MARILYN M. ROBINSON, THOMAS J. GOULD, KATHLEEN M. GOULD, FRIEDA D. SCHNEIDER TRUST, THOMAS J. SCHNEIDER, JAMES RYAN, HELEN G. COOPER, THOMAS F. COOPER, WILLIAM HAISMA, DONA L. BLACK, ROBERT CROSCHERE, CHARLOTTE CROSCHERE, THOMAS A. POSTMA, AMY M. POSTMA, JOAN WALLACE, and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants.

UNPUBLISHED
September 2, 2014

No. 299409
Newaygo Circuit Court
LC No. 07-019180-CE

EVERETT TOWNSHIP,

Plaintiff/Counter-Defendant/Appellee/Cross-Appellant,

v

No. 299420
Newaygo Circuit Court
LC No. 07-019178-CE

STEVEN SKOWRONSKI, SCOTT BURN, Personal Representative for the ESTATE OF MICHAEL MILLER, FRED S. WISNIEWSKI, EDWIN UNGREY, RICHARD J. SIMONS, SANDRA L. SIMONS, WALTER W. CARHART, COLLEEN B. CARHART, CAROL WEATHERHEAD, ROBERT & HOLLY PIETILA TRUST, LAURA ANN PACIFICI, DOROTHY L. LAKE, ROBERT F. LAKE, RANDALL D. LOWING, NANCY A. LOWING, JEFFREY A. BALL, and GWEN L. BALL,

Defendants,

and

DANIEL HANKS, SR., DONNA JACHIM, LINDA BARLE, JOHN HANKS, JR., and CAROL HANKS,

Defendants/Appellants/Cross-Appellees,

and

KENNETH THEDE and CHERYL THEDE,

Defendants/Appellees,

and

RAY W. ROTHENTHALER,

Defendant/Counter-Plaintiff.

Before: HOEKSTRA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this consolidated appeal, defendants are all owners of real property within the boundaries of plaintiffs, which are townships in Newaygo County. The facts in both cases are functionally identical, and the township ordinances at issue are identical in relevant part. The trial court heard both cases simultaneously. Defendants appeal by right orders granting plaintiffs' requests for declaratory and injunctive relief requiring defendants to connect to a public sewer system. Plaintiffs cross appeal the trial court's denial of awards of penalty costs, service fees, and attorney fees and costs. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff townships, along with non-parties Garfield Township, the Newaygo County Board of Public Works, and the Chain of Lakes Utility Authority (COLA), constructed a joint sanitary sewer system. Pursuant to MCL 333.12753, each of the townships adopted an accompanying, identical, ordinance requiring, inter alia, connection to the sewer system by property owners who met certain criteria. Plaintiffs required defendants, among others, to connect to this system. To pay for the cost of construction and connection, a special assessment district was created. Defendants and other property owners were notified of their inclusion in the district, given a chance to object at a public hearing, and ultimately sent notices to connect. In 2005, a number of the instant defendants filed suit against all three townships on various grounds, seeking to avoid being required to connect to the sewer system. The trial court in that action ultimately found in the townships' favor.

In 2007, plaintiffs filed their respective complaints in the instant actions, seeking declaratory and injunctive relief to compel defendants to connect immediately to the sewer system, as well as recovery of expenses and attorney fees. Plaintiffs contended that defendants' failures to connect constituted nuisances per se. Defendants asserted a number of affirmative defenses, most of which the trial court dismissed. Nonetheless, the trial court permitted defendants to take discovery regarding their claims that it would be "inequitable" to require them to connect to the sewer system and that the COLA system was technically defective due to substandard components, broken connections, and faulty installation that voided various manufacturers' warranties.[1] The trial court also initially denied summary disposition to plaintiffs on defendants' claim that the forms they were required by COLA to sign as part of their applications to connect were unconstitutional contracts of adhesion. The trial court finally ruled that it would permit discovery to allow the named defendants to show, as individuals, that it would be inequitable to hook up their individual home.

Following extensive discovery, plaintiffs' again moved for summary disposition. The trial court granted plaintiffs' motions in large part. The trial court first concluded, however, that on the basis of the evidence submitted, defendants' objections to connecting to the sewer system were neither arbitrary nor capricious and that they had presented a colorable claim that the sewer system suffered from systematic defects. However, while the trial court found that defendants' expert was partly credible as to whether these issues would cause problems, it also found that plaintiffs had presented credible evidence that the installation methods used were within the

[1] Among other things, defendants particularly contended that the "grinder cans," which are devices that grind waste from structures into a fine slurry and pump it into the sewer system, had been installed inadequately.

discretion of the installers. The trial court found that, notwithstanding defendants' reasonable lack of confidence in the system, the DEQ was addressing the issues. Therefore, the trial court granted plaintiffs' injunctive relief of requiring any defendants who had not already done so to connect to the sewage system, comply with the townships' ordinances regarding application and hook-up, and pay the district assessment fee.

The trial court, however, exempted some of the defendants who had not yet connected from having to pay "penalty costs, [or] prior unpaid service fees, etc." on the basis of its finding that defendants had not acted capriciously. The trial court also ordered that three defendants receive additional equitable relief in the form of specific remediation to the problems with their respective grinder can installations. The trial court did not specifically address the plaintiffs' nuisance per se claim. The trial court subsequently clarified that plaintiffs' request for attorney and other fees and costs was denied and that neither the ordinance nor the connection forms constituted an adhesion contract. The trial court also noted that it had denied plaintiff's motion for summary disposition based on res judicata. The trial court subsequently issued a separate final order in each case, identical except for the specific relief ordered concerning the three homeowners who were to have their installations fixed. These appeals and cross-appeals followed.

Defendants first argue that the trial court erred when it found that the documents defendants were required to sign were adhesion contracts, and thus are against public policy as well as violative as an unconstitutional restraint on the homeowners' freedom of contract. We agree. We decline to consider defendants' arguments regarding limited government or the prohibition against laws interfering with preexisting contractual agreements. No such analysis is necessary. There can be no real dispute that the states have general sovereignty and, subject to constitutional limitations, have general and broad legislative powers. *Gibbons v Ogden*, 22 US 1, 195, 203-205 (1824); *Williams v Mayor, etc, of Detroit, et al*, 2 Mich 560, 563-564 (1853). The state through its police power may impose legislation affecting individuals' rights for the benefit of the common good. *People of City of Adrian v Poucher*, 398 Mich 316, 318-320; 247 NW2d 798 (1976).

However, there is a fundamental and critical difference between the undoubted power to compel people and entities to do things or abstain from things, and a power to compel people and entities to *agree* to things. A person might, as a practical matter, have no choice but to enter into an agreement in order to do or abstain from something. Nonetheless, to the extent the forms at issue constitute contracts for defendants to do *what they were already required to do by law*, in exchange for services *mandated by law*, any argued consideration is illusory. "Under the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise." *Yerkovich v AAA*, 461 Mich 732, 740-741; 610 NW2d 542 (2000). To that extent, therefore, the contracts at issue here are illusory.

We therefore hold that, although plaintiffs can compel defendants to connect to the sewer system, plaintiffs cannot compel defendants to sign any contracts that would have the effect of giving up any legal rights or remedies in exchange for that connection. At oral argument, plaintiffs conceded that the contracts are not of any great importance to them. Consequently, rather than attempting to evaluate the nature of the contracts here in any greater detail, we

reverse the trial court to the extent the trial court ruled that defendants must sign the contracts, and instead we hold that plaintiffs cannot require defendants to do so.

Defendants next argue that, in effect, equity should exempt them from any requirement to connect to the COLA sewer system because of the incompetent installation of the system and the fact that their septic systems are perfectly functional as found by the trial court.

However, our Legislature has determined in absolute terms that converting from septic systems to sanitary sewer systems is in the public interest, MCL 333.12752, and it is not the role of the courts to interfere with policy set by the Legislature. As to the former, MCL 333.12753(1) mandates that "[s]tructures in which sanitary sewage originates lying within the limits of a city, village, or township shall be connected to an available public sanitary sewer in the city, village, or township if required by the city, village, or township," and it affords no exceptions for "defective" such sewers. "Equity may not be invoked—in the absence of fraud, accident, or mistake—to avoid the dictates of a statute." *Eastbrook Homes Inc v Treasury Dep't*, 296 Mich App 336, 347; 820 NW2d 242 (2012). In any event, plaintiffs will be responsible for all future repairs, and defendants have remedies at law to compensate them for any damage; i.e., MCL 691.1417 specifically provides for a claim for damages from a sewage disposal system event, with MCL 691.1416 providing applicable definitions. Equity may provide a remedy if any available remedies at law are doubtful or incomplete, *Edsell v Briggs*, 20 Mich 429, 432-433 (1870), but we perceive no such inadequacy here, so equity cannot assist defendants. *Detroit Trust Co v Old Nat'l Bank of Grand Rapids*, 155 Mich 61, 65; 118 NW 729 (1908).

Defendants next argue that the trial court improperly limited discovery in the instant case; specifically, defendants contend that they should have been permitted to explore more fully how the entire sewer system was malfunctioning rather than merely how it failed to function properly for individual homeowners. We disagree. The trial court in fact ordered plaintiffs to provide all of the incident reports, and counsel and the court clarified that defendants could use these reports of other problems to establish whether defendants' arguments were not unordinary, unreasonable or arbitrary. Thus, defendants' claim that the trial court initially foreclosed discovery is based on an erroneous reading of the trial court's order. Moreover, the trial court permitted extensive discovery. In addition to the expert deposition testimony, during a later hearing, the trial court personally went over the incident reports with Wilson Sherman and Bob VanValkenburg, from the Chain of Lakes Sewer Board, and allowed the parties' attorneys to ask Sherman questions. Defendants have not specifically stated what discovery they did not receive or how it would have strengthened their case. Consequently, defendants have not shown that the trial court erred regarding the extent of discovery.

Defendants next argue that the suits should have been dismissed pursuant to their first affirmative defense that they did not receive proper statutory notice, as required by MCL 333.12754. Notice is required before a municipality can bring suit to force property owners to connect to a municipal sewer system. *Bingham Farms v Ferris*, 148 Mich App 212, 219; 384 NW2d 129 (1986). However, as an affirmative defense, the burden of proof was on defendants. *Rasheed v Chrysler Corp*, 445 Mich 109, 131-132; 517 NW2d 19 (1994). Defendants conceded that notices were in fact sent, so they were required to provide evidence showing that they were defective. The trial court here *only* precluded defendants from obtaining copies of all of the notices as a group. The trial court explicitly left open the option for any individual homeowner

to obtain a copy of their notice—which plaintiffs were willing to provide—and make an individual challenge. We do not believe this harmed defendants in any way. Defendants provided no evidence, not even an affidavit, asserting that any of the notices were defective, and even if any notice were improper, only the particular defendant affected would be entitled to relief on that basis. We do not believe the trial court's order was outside the range of principled outcomes. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

On cross-appeal, plaintiffs argue that the trial court erroneously refused to award attorney fees, costs, and civil penalties to plaintiffs from the defendants who did not timely connect to the sewer system.

We review a trial court's award of attorney fees and costs for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008); *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). This Court reviews for clear error the trial court's findings of fact concerning an award of attorney fees. *Reed*, 265 Mich at 164.

Pursuant to Article III, § 306 of the respective ordinances, individual homeowners shall connect to the public sewer system within nine months of the official notice sent by the township to connect. This section also specifically states, "Persons who fail to complete a required connection to the Public Sewer System within such nine (9) month period shall be liable for a civil penalty equal in amount to the User Charges and Debt Service Charges that would have accrued and been payable had the connection been made as required."

The primary focus of an ordinance is its language. *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). Under § 306, there is no allowance for a failure to connect being wrongful or justified, only whether connection was required and did not happen. Nevertheless, the trial court waived this penalty on the grounds that defendants' objections to having to connect were both supported by the evidence and were not arbitrary, frivolous, or capricious. The trial court also found that defendants had a reasonable basis for not having confidence in the system, but noted that plaintiffs were working with DEQ to resolve the problems. We conclude that these grounds, even if true, do not afford a basis for excusing defendant's failure to connect. Indeed, the trial court and the parties recognized early on in the litigation of this case that delay in connecting would result in the imposition of the civil penalty imposed by § 306. Having acknowledged this consequence of litigating this case without first connecting, we conclude that the trial court excusing it in the end when defendants failed to prevail was an abuse of discretion.

Plaintiffs also argue that they are entitled to costs and reasonable attorney fees pursuant to § 1005 and § 1006. The general "American rule" is that "attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998); see also *Haliw v Sterling Hts*, 471 Mich 700, 706-707; 691 NW2d 753 (2005). Both § 1005 and § 1006 provide mandatory language for assessing costs and reasonable attorney fees for noncompliance with plaintiffs sewer ordinance.

Defendants' argue that these sections only apply to post-connection actions. We disagree. While they are located in the article of the ordinance that also deals with post-

connection damage to the sewer system, it is not limited to that article in any way. Although the more specific connection enforcement provision of § 307 does not contain an attorney fee provision, § 1007 of the ordinances provide that remedies are cumulative. Because there is no accusation of fraud, mistake, or accident, equity cannot be used to avoid the mandatory imposition of costs and reasonable attorney fees as provided by § 1005 and § 1006. See *Freeman v Wozniak*, 241 Mich App 633, 637; 617 NW2d 46 (2000).

As a general matter, courts are, in the absence of any other controlling authority, within their general power to decline to award costs due to the involvement of a question of public concern. See *Polania v State Employees' Retirement Sys*, 299 Mich App 322, 335; 830 NW2d 773 (2013); MCR 2.625(A); MCR 7.219(A). We acknowledge that the trial court found that defendants were entitled to some relief because the sewer system was apparently plagued with problems. Nevertheless, § 1005 and § 1006 are unambiguously mandatory cost-shifting provisions, and therefore must be enforced as written. See, e.g., *Kitchen v Ferndale City Council*, 253 Mich App 115, 127; 654 NW2d 918 (2002) (recognizing cost-shifting provisions in the Open Meetings Act as mandatory); *Thomas v New Baltimore*, 254 Mich App 196, 205-206; 657 NW2d 530 (2002) (concluding cost-shifting provisions in the Freedom of Information Act are mandatory). Additionally, this Court has also recognized that the general rules of MCR 2.625 do not necessarily apply to cases in which fees or costs are governed by a more specific provision. See *Lavene v Winnebago Ind*, 266 Mich App 470, 476; 702 NW2d 652 (2005). Whatever the relief defendants obtained, they did not prevail in the relief that they *sought*, which was outright immunity from being "obligated to hook up to the system." Consequently, the trial court abused its discretion in waiving enforcement of these provisions.

In summary, we reverse the trial court to the extent that it held that defendants must enter into contracts, but affirm the trial court to the extent it required defendants to connect to the sewer system. We also reverse the trial court's refusal to impose civil penalties pursuant to § 306, and costs and reasonable attorney fees pursuant to § 1005 and § 1006. We remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs on the appeal, neither party having prevailed in full, but plaintiff, having prevailed on the cross-appeal, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey

# STATE OF MICHIGAN

# COURT OF APPEALS

TOWNSHIP OF BROOKS,

Plaintiff/Appellee/Cross-Appellant,

v

JAMES R. HADLEY, JOHN J. JULIANUS TRUST, ROBERT JULIANUS, MARY STEIN RESTATED TRUST, MARY M. STEIN, LESTER E. HALLBERG, CLAUDIA HALLBERG, and ROY W. FORBES,

Defendants/Appellants/Cross-Appellees,

and

DAVID L. SHARP, ROGER L. STROVEN, ROGER L. DEJONG, LUANNE DEJONG, JACK JEFFERS, GEORGE S. HOFACKER, KAY M. HOFACKER, MARIANNE GELUSO, SHARON FLEENOR, JULIE WILSON, IRENE M. GODLEWSKI TRUST, DANIEL ROTHENTHALER, RICHARD LEONARD, HARRIET LEONARD, THEODORE SENFT, AMALIA SENFT, TED ROBINSON, SUSAN ROBINSON, MARILYN ROBINSON, REX V. ROBINSON, MARILYN M. ROBINSON, THOMAS J. GOULD, KATHLEEN M. GOULD, FRIEDA D. SCHNEIDER TRUST, THOMAS J. SCHNEIDER, JAMES RYAN, HELEN G. COOPER, THOMAS F. COOPER, WILLIAM HAISMA, DONA L. BLACK, ROBERT CROSCHERE, CHARLOTTE CROSCHERE, THOMAS A. POSTMA, AMY M. POSTMA, JOAN WALLACE, and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants.

UNPUBLISHED
September 2, 2014

No. 299409
Newaygo Circuit Court
LC No. 07-019180-CE

EVERETT TOWNSHIP,

Plaintiff/Counter-Defendant/Appellee/Cross-Appellant,

V

No. 299420
Newaygo Circuit Court
LC No. 07-019178-CE

STEVEN SKOWRONSKI, SCOTT BURN, Personal Representative for the ESTATE OF MICHAEL MILLER, FRED S. WISNIEWSKI, EDWIN UNGREY, RICHARD J. SIMONS, SANDRA L. SIMONS, WALTER W. CARHART, COLLEEN B. CARHART, CAROL WEATHERHEAD, ROBERT & HOLLY PIETILA TRUST, LAURA ANN PACIFICI, DOROTHY L. LAKE, ROBERT F. LAKE, RANDALL D. LOWING, NANCY A. LOWING, JEFFREY A. BALL, and GWEN L. BALL,

Defendants,

and

DANIEL HANKS, SR., DONNA JACHIM, LINDA BARLE, JOHN HANKS, JR., and CAROL HANKS,

Defendants/Appellants/Cross-Appellees,

and

KENNETH THEDE and CHERYL THEDE,

Defendants/Appellees,

and

RAY W. ROTHENTHALER,

Defendant/Counter-Plaintiff.

Before: HOEKSTRA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. (*concurring in part and dissenting in part)*

I concur with the majority in all respects other than the majority's reversal of the trial court's refusal to impose certain sanctions on three specific defendants. In particular, civil penalties pursuant to Article III, § 306 of the respective ordinances are imposed nine months after being *required* to connect to the sewer system. The trial court essentially held that three of the defendants, Julianus, Forbes, and Hadley, were not "required" to connect to the sewer system until certain issues with the system were resolved. As the majority notes, equity generally cannot be invoked in avoidance of statutory requirements. *Eastbrook Homes Inc v Treasury Dep't*, 296 Mich App 336, 347; 820 NW2d 242 (2012). Defendants admittedly did not offer arguments based on the exceptions to that rule, namely fraud, accident, or mistake. See *id*. However, rightly or wrongly, plaintiffs have not cross-appealed the trial court's holdings regarding Julianus, Forbes, and Hadley not being required to connect until the issues were resolved. Indeed, the trial court's orders to the effect that they were not required to connect have not been successfully challenged.

Whether those orders should or should not have entered, they did enter. Consequently, properly or improperly, the nine-month period in § 306 did not commence until that resolution. I believe that the majority improperly disregards the actual facts of this case. The trial court may or may not have made a mistake, but it did not exceed its subject-matter jurisdiction, so the orders that the named defendants were not required to hook up are simply part of objective reality. I note further that it is deeply unfair for a party to be punished for relying on the validity of an order of a court. The majority not only undertakes to rewrite established and unchallenged history, but actively undermines the authority of courts in general, which absolutely depend on their orders being considered respectable and trustworthy. I would direct that on remand, the trial court must impose the penalty under § 306 to all defendants but must calculate the amount for Julianus, Forbes, and Hadley based on the date when the system was ready for them to connect thereto.

/s/ Amy Ronayne Krause