

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LISA KRAGNES, et al.</p> <p align="center">Plaintiffs,</p> <p>vs.</p> <p>CITY OF DES MOINES, IOWA,</p> <p align="center">Defendant.</p>	<p align="center">Case No. CE 49273</p> <p align="center">BRIEF IN SUPPORT OF PLAINTIFF'S RESISTANCE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO IOWA CODE SECTIONS 670.4(2) AND 670.4(3)</p>
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COMES NOW the Plaintiff, Lisa Kragnes, on behalf of herself and all others similarly situated, and respectfully submits this Brief to the Court in support of Plaintiffs' Resistance to Defendant's Motion for Summary Judgment Pursuant to Iowa Code Sections 670.4(2) and 670.4(3).

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FACTS

The Plaintiff's petition in this matter does not cast this case as a "tort" under the law. (Defendant's Appendix pp. 13-16). A Polk County District Court has already considered arguments of tort immunity in a similar case and rejected those arguments. *See Mary E. Lindstrom v. City of Des Moines, Iowa*, Case No. CL 103299. (Plaintiff's Appendix pp. ----).

ARGUMENT

BRIEF POINT I

THIS CASE DOES NOT SOUND IN TORT AND IS NOT GOVERNED BY IOWA CODE CHAPTER 670.

The City of Des Moines attempts to reframe Plaintiff's claim to bring them under scrutiny of statutory partial immunities established in Chapter 670 of the Code. In doing so the City fails to cite any case from Iowa or elsewhere establishing that a refund of an illegal municipal fee or tax must sound in tort. Plaintiffs' claims, much to the contrary, are based on theories of restitution and unjust enrichment. *See Dolezal v. City of Cedar Rapids*, 326 N.W.2d 355, 359 (Iowa 1982). Restitution and unjust enrichment are modern designations for the older doctrine of quasi contract or contracts implied at law. Restatement (third) of Restitution and Unjust Enrichment Section 19.

The Plaintiff's cause of action is premised on the theory of unjust enrichment, or that one shall not be permitted to unjustly enrich oneself at the expense of another or to receive property or benefits without making compensation for them. *West Branch State Bank v. Gates*, 477 N.W.2d 848, 852 (Iowa 1999). Such a claim is the modern designation for the doctrine for quasi-contracts or contracts implied in law. *Iowa Waste Systems, Inc. v. Buchanan County*, 617 N.W.2d 23, 29 (Iowa 2000). Such claims have long been allowed against municipalities and are

not subject to the provisions of what is now Chapter 670 of the Code of Iowa. *Dolezal v. City of Cedar Rapids*, 326 N.W.2d 355, 358-59 (Iowa 1982).

Iowa Code Chapter 670 has been analyzed by the Iowa Supreme Court in *Dolezal v. City of Cedar Rapids*, 326 N.W.2d 355 (1982). In that case the Supreme Court held that restitution and unjust enrichment claims are outside the scope of the municipal tort claims act, Iowa Code Chapter 670.

Iowa Code Section 670.2 provides:

“Except as otherwise provided in this chapter, every municipality is subject to liability for its **torts** and those of its officers and employees, acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function.” Emphasis added.

In Brief Point I, the City relies on Iowa Code Section 670.4(2), which exempts from the **tort** liability created by 670.2 claims pertaining to tax assessments and tax collections. See Iowa Code 670.3. The immunities created under section 670.3 solely pertain to tort cases.

Defendant’s reliance on *Caudill v. Shelby County*, 519 N.W.2d 423 (Iowa Court of Appeals 1994) is misplaced. There, the county assessor had mis-measured plaintiff’s building to erroneously double the square feet of office space for the purpose of determining property tax assessments, thereby resulting in an erroneous property tax computation. The tax payer sued for a refund and when presented with the county’s defense that she failed to exhaust her administrative remedies by failing to file a protest or claim with the Board of Review as required by Section 441.37 Code of Iowa, she responded by filing an amended petition adding a separate tort claim for negligent misrepresentation. The district court granted summary judgment for the county on grounds that the plaintiff failed to exhaust her administrative remedies. *Id* The original claim brought by *Caudill* for the refund was dismissed for failure to exhaust her administrative remedies and the separate tort claim for negligent misrepresentation was

dismissed on immunity grounds. The Court of Appeals did not apply the immunity defense to that taxpayer's original refund claim. Nothing in *Caudill* requires this Court to re-label Plaintiff's refund claim as sounding in tort and the Plaintiff did not allege a negligent misrepresentation claim like the plaintiff in *Caudill*.

BRIEF POINT II

DISCRETIONARY FUNCTION UNITY UNDER IOWA CODE SECTION 670.4(3) CANNOT BE APPLIED TO THIS CASE.

In brief point II of Defendant's brief they argue that Iowa Code Section 670.4(3) confers discretionary function immunity to the City the City's consideration of their preference to impose revenue generating franchise fees as opposed to operating within the tax structure authorized by the legislature as well as Public Safety staffing and Library hours in establishing the franchise fee at issue in this case. In doing so, again the City's premise is that the claims of the Plaintiff sound in tort. As discussed previously Plaintiff's claims do not sound in tort. Consequently, the inapplicability of Chapter 670 prohibits the application of 670.4(3) to this case. As such, the Defendant's motion for summary judgment must fail.

Despite the foregoing, the Defendant spends a significant amount of time attempting to convince the Court that the imposition of the franchise fee amounts to a discretionary function giving rise to immunity under Iowa Code 670.4(3). In doing so the Defendant argues at page 5 of its brief that the decision, "...was made at the highest level of City government, after debate about such policy issues as property tax increases, state funding shortfalls, public safety staffing and curtailed library hours, each decision is entitled to the discretionary function immunity afforded by Section 670.4(3)." (Defendant's Brief p. 5). The City contends the alleged considerations of these policies make the decision relative to the franchise fee "discretionary", thereby triggering applicability of discretionary function immunity under 670.4(3). In doing so,

Defendant ignores yet again the prohibitions on the City's discretion in this area. If the Court were to ignore the fact that the case is one for unjust enrichment and restitution thereby prohibiting applicability of Chapter 670 in the first, then the Court should consider whether discretionary function immunity applies to decisions to violate state law.

The law of the State of Iowa does not allow a municipality to collect a franchise fee in excess of reasonably related costs. As the Supreme Court concludes in *Kragnes v. City of Des Moines*, 714 N.W.2d 632:

“Under these principals, a city has the authority to assess a franchise fee expressed a percentage of the gross receipts derived from a utility's sale of its services to the public so long as the charges are reasonably related to the reasonable cost of inspecting, licensing, supervising or other regulating the activity of those being franchised.” *Id* at 642-643.

As the Supreme Court notes and the law provides, a city is restricted from levying a tax not specifically authorized by State law. Section 364.3(4) (2005) Code of Iowa cited by *Kragnes* at 639. The ability to tax is also restricted by the Constitution which requires specific authorization through legislative enactment. Iowa Constitution Article III, Section 38A cited in *Kragnes* at 639.

Consequently, cities lack discretion to collect fees in excess of what the State law allows. Iowa follows federal precedent in applying the equivalent discretionary function immunity in the Federal Torts Claim Act. *Graber v. City of Ankeny*, 656 N.W.2d 157 (Iowa 2003) at 160-161 (citing *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988)). In *Cline v. Union County, Iowa*, 182 F.Supp.2d 791 (SD Iowa 2001), the Court observed, “the discretionary function exception in Iowa Code Section 670.3(3) applies only to conduct that involves the permissible exercise of policy judgment.” *Id* at 800. (Quoting *Berkovitz*, 486 U.S. 539). In that case, the *Cline* Court

denied the county's motion for summary judgment based on discretionary function immunity for false arrest stating:

Arrest issues generally involve the permissible exercise of policy judgment and fall within the discretionary function exception. Here, however, *Cline* alleges that defendant's arrest and prosecuted him illegally without probable cause. To conduct an illegal arrest or prosecution does not represent a choice based on plausible policy considerations. *Id* at 800.

The need of probable cause to arrest and prosecute is not in the discretion of an arresting or prosecuting entity. Similarly, the imposition of a fee exceeding the reasonable costs of inspecting, licensing, supervising or otherwise regulating an activity as discussed in the *Kragnes* decision and its predecessors is not within the permissible discretion of the municipal corporation.


Furthermore, the City attempts to argue that the policy determinations it has claimed to have considered in levying the illegal exaction in the case are valid considerations in exercising discretion and thereby give rise to the immunity they claim under 670.3(4) Code of Iowa. Their argument, although illustrative of the City's unwillingness to accept the realities associated with the imposition of a legal fee, misses the point entirely. As this Court is aware, "a city has the authority to assess a franchise fee expressed as a percentage of the gross receipts derived from a utility's sale of its services to the public, so long as the charges are reasonably related to the reasonable cost of inspecting, licensing, supervising or other regulating the activity of those being franchised." *Kragnes* at 642-643. The alleged policy considerations relied upon by the City are not valid considerations for the imposition of a franchise fee in excess of the reasonable costs as defined under the clear holdings of the Court in *Kragnes* and its predecessors.

CONCLUSION

The Defendant's attempt at recasting Plaintiff's claims must fail. Plaintiff's claims do not sound in Tort and are not governed by chapter 670 Code of Iowa. The Plaintiff respectfully

requests that the Court deny Defendant's Motion for Summary Judgment and assess costs against the Defendant, and for such other and further relief as the Court deems equitable in the premises.

Respectfully Submitted,

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CERTIFICATE OF SERVICE:

Copies of the foregoing have been mailed
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