

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

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JUDICIAL CENTER

LISA KRAGNES, et. al.,)	
)	Law No. CE 49273
Plaintiff,)	
)	CITY'S REPLY TO PLAINTIFF'S
vs.)	RESISTANCE TO CITY'S
)	MOTION FOR SUMMARY
CITY OF DES MOINES, IOWA,)	JUDGMENT PURSUANT TO
)	IOWA CODE CHAPTER 670
Defendant.)	TORT IMMUNITIES

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BRIEF POINT I

FOR THE FIRST TIME IN THE NEARLY 4-YEAR HISTORY OF THIS CASE, PLAINTIFF ASSERTS THAT HER CLAIM IS FOR UNJUST ENRICHMENT/RESTITUTION. HOWEVER HER PETITION AND HER ACTIONS PLACE THIS CASE SQUARELY IN THE REALM OF TORT, AND BELIE HER 11TH HOUR ASSERTIONS TO THE CONTRARY. PLAINTIFF'S CHARACTERIZATION OF HER CLAIM AS ONE FOR UNJUST ENRICHMENT IS SIMPLY A RUSE TO AVOID THE TORT IMMUNITIES WHICH WILL ELIMINATE HER CASE.

The Plaintiff begins her resistance to the City's motion for summary judgment on immunity grounds by chastising the City for failing to cite "... any case from Iowa or elsewhere establishing that a refund of an illegal municipal fee or tax must sound in tort." (Plaintiff's Brief in Resistance to City's Motion for Summary Judgment, P.3). There are two problems with the Plaintiff's criticism. First, the case is not primarily about a refund. Rather the case is primarily about whether the franchise fees at issue are illegal. The Plaintiff claims that pursuant to state statute, the fees are illegal. (Petition, ¶ 6, 7, 8). Second, the City had no reason to cite opinions placing the Plaintiff's claim in tort, because everything the Plaintiff has said, and everything the Plaintiff has done, for the last four years indicates that her case is a tort case.

A. EQUITY IS THE LAST RESORT, NOT THE FIRST CHOICE

Any analysis of whether a claim sounds in tort or in equity must begin with the recognition of the fact that the law is favored over equity and, "A court of equity should not be the first, but the last resort." SDG Macerich Properties, L.P. v. Stanek, Inc., 648 N.W.2d 581, 588 (Iowa 2002).

B. EQUITY CAN'T BE USED TO CIRCUMVENT STATUTORY TORT IMMUNITIES

A second initial consideration, equally as important, is that a Plaintiff cannot employ "the

unjust enrichment cause of action merely to circumvent to the tort provision of Chapter 613A. *See* Annot., 1 A.L.R.2d 864, 865 (1948).” Dolezal v. City of Cedar Rapids, 326 N.W.2d 355, 360 (Iowa 1982).¹

In Dolezal, the city cited no authority for its claim that the case sounded in tort rather than equity. That’s why the court did not address the issue other than remarking that one cannot attempt to use equity to avoid tort immunity. Id.

Ms. Kragnes is not the first creative plaintiff to attempt to salvage an otherwise untenable cause of action by characterizing the action as equitable, because if it were characterized as a tort, it would fail. In Hill v. U.S., 149 U.S. 593, 599, 13 S.Ct. 1011, 1013 (1893) a plaintiff attempted to characterize a complain as equitable because at the time the federal government was totally immune from all tort claims. The Court shot down the attempt, saying:

The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for tort committed in their name by their officers. Nor can the settled distinction in this respect between contract and tort be evaded by framing the claim as upon an implied contract. Gibbons v. U.S., 8 Wall. 269, 274; Langford v. U.S., 101 U.S. 341, 346; U.S. v. Jones, above cited.

Id. *See also:* Bigby v. U.S., 188 U.S. 400, 409, 47 L.Ed. 519, _____, 23 S.Ct. 468, _____ (1903)

[While a party may waive tort and sue on contract in an instance where the claim has elements of both contract and tort, but an action in contract can’t be created simply by not suing in tort].

Bloomington Inc. v. New York City Transit Authority, 2006 WL 2472733, *2 (N.Y. Supp. 2006)

[Plaintiff could not claim equity in order to avoid tort notice of claim requirement]; Raintree

¹ Dolezal is the case relied upon most heavily by Plaintiff in her resistance. As we have seen above, and as we shall see, that choice is unfortunate for the Plaintiff in many respects. (Plaintiff’s Brief, P.3,4).

Homes, Inc. v. Village of Long Grove, 807 N.E.2d 439, 446-47 (Ill. 2004) [Plaintiff could not engage in artful pleading designed to cloak suit in equity in order to avoid tort statute of limitations];² *And see generally*: Annotation, 1 A.L.R.2d 864, § 4 (1948), cited with approval in Dolezal, 326 N.W.2d at 360.

C. **UNJUST ENRICHMENT IS A CONTRACT BASED THEORY, BUT TAXATION CAN NEVER BE BASED UPON CONTRACT**

A third initial consideration is an understanding of just what unjust enrichment is. And what it is is a legal theory based on “quasi-contract or contracts implied in law, sometimes called constructive contracts.” Dolezal, 326 N.W.2d at 359. The importance of the true meaning of unjust enrichment becomes apparent when we consider that:

Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract.

Shell Oil Co. v. Bair, 417 N.W.2d 425, 431 (Iowa 1987), quoting Welch v. Henry, 305 U.S. 134, 146-47, 59 S.Ct. 121, 125, 83 L.Ed. 87, 93 (1938) (emphasis added). Put another way:

The power of taxation shall never be surrendered or suspended by any grant or contract to which the State shall be a party.

S & M Finance Co., Ft. Dodge v. IA. St. Tax Comm., 162 N.W.2d 505, 513 (Iowa 1968).

One must ask the Plaintiff: “Where is the quasi-contract? Where is the constructive contract? Please, can you show me the contract implied in law?” Of course, because this is not a genuine unjust enrichment case, the Plaintiff is unable to answer the single question that is most fundamental to her suit. Indeed, a review of Plaintiff’s Brief in Resistance to the City’s motion for

² Ms. Kragnes is guilty of this attempt as well. In her petition she seeks a five year statute of limitations. (Petition, Prayer). However, if she were to truthfully and correctly characterize her cause of action as one in tort, she would be limited to a two year statute of limitations. Iowa Code § 670.5.

summary judgment reveals that Plaintiff does not identify the nature of the constructive contract that would, if it existed, support her claim. She does not identify it because it does not exist.

Dolezal nicely illustrates the kind of relationship that must exist between parties before there can be said to be a constructive contract between them. There a tenant farmed land condemned by the City and its airport commission. Early in the planting season, the tenant sought an injunction. While the injunction-petition was pending, and with full knowledge of the City, the farmer planted and tended his crops and brought them to the brink of harvest. Just before the harvest, however, the City forbade the farmer from entering the land he had tilled. The City threatened the former with criminal prosecution if he entered onto the land. The City hired the farmer's former employees to perform the harvest. The City sold the crop and retained all the profit. Dolezal, 326 N.W.2d at 356.

The similarities between Dolezal and this case are nil. Indeed, the two are so far apart factually that a theory of unjust enrichment cannot encompass them both. Dolezal's claim rested:

... not on deprivation of an existing right through municipal action, but on the concept of restitution from a corpus generated by his own labor and investment, as a person with no existing right in the land or its produce.

Dolezal, 326 N.W.2d at 358. Ms. Kragnes' claim, on the other hand, rests solely and completely upon a claimed breach of a statutory duty by the City. She claims an existing right, pursuant to state statute, not to be illegally taxed. (Petition ¶ 6, 7, 8).

Another reason that militates against a finding that Plaintiff's Petition sounds in unjust enrichment is the underlying principle of unjust enrichment – that plaintiff show a benefit conferred upon defendant to the detriment of plaintiff. Iowa Waste Systems, Inc. v. Buchanan, 617 N.W.2d

23, 30 (Iowa Ct. App. 2000).

Ms. Kragnes cannot satisfy that underlying principle.

To be sure, she alleges a benefit conferred upon the City in the form of franchise fees paid. (Petition ¶¶ 6, 7, 8). However, a careful review of her petition shows that the second part of the equation – a detriment to herself – is not alleged.

A review of the Kragnes opinion shows why. And the “why” is because Ms. Kragnes received multiple benefits from the fees she paid. The Court said:

In September 2004, the City began receiving the increased fees. The City deposited the revenue generated by the franchise fees in its general fund. The 2004 increase in the franchise fees allowed the City to enact one of the largest property tax cuts in its history. In January 2005, the city manager reported to the mayor and the council that the increased franchise fees were generating enough revenue to restore the library hours, hire twenty-four additional firefighters, hire twelve additional police officers, provide low-income assistance to persons to have their utility services reconnected, make four economic development grants, make a grant to the Des Moines school system, fund improvement of the City’s roads, and place \$750,000 in the City’s reserves.

Thus, as a matter of the law of this case, the City has conferred considerable benefits upon Ms. Kragnes in return for the fees she paid. As such, her case cannot be one for unjust enrichment.

D. THE MAIN ALLEGATION OF THE PETITION PLACES THIS CASE SQUARELY IN TORT

In determining whether a case is one at law or equity, we first look to:

The essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint. . .

Mosebach v. Blythe, 282 N.W.2d 755, 758 (Ct. App. Iowa 1979). *See also*: Turner v. Low Rent

Housing Agency of the City of Des Moines, 387 N.W.2d 596, 598 (Iowa 1986), [If the “heart of the

issues” are equitable, so is the case]; Phone Connections, Inc. v. Harbst, 494 N.W.2d 445, 448 (IA. Ct. App. 1992) [Action classified according to its “primary purpose” or “controlling issue”].

In Mosebach, suit was brought upon a contract about the sale of an elevator business. Some of the claims were equitable in nature and some were legal. The standard of review upon appeal was disputed because the true nature of the case – legal or equitable – was disputed. Mosebach, 282 N.W.2d at 758. After examining the petition to determine the essential character of the case and the relief sought, the court said:

Furthermore, where the primary right of the plaintiff arises from the nonperformance of a contract, where the remedy is monetary in nature, and where monetary damages are full and certain, remedies are usually provided by actions at law and equity has no jurisdiction.

Id., citing Berry Seed Co. v. Hutchings, 247 Iowa 417, 422, 74 N.W.2d 233, 237 (1956). The court continued:

If, as here, both legal and equitable relief are demanded, the action is ordinarily classified according to what appears to be its primary purpose or its controlling issue. Plaintiffs primarily sought monetary damages for the breach of an express agreement. While plaintiffs did plead equitable issues in the alternative, the basic relief sought was legal in nature. We conclude the action below was tried at law.

Id., (internal citations omitted).

A review of Ms. Kragnes’ Petition reveals that the parallels between Mosebach and this case are compelling. In Mosebach, the remedy was monetary in nature. Id. Here, Ms. Kragnes wants her franchise fees back, a monetary remedy. In Mosebach, the monetary damages were full and certain. Id. Here, the amount paid by Ms. Kragnes in franchise fees already is certain, and the amount to which the City is entitled will be ascertained at trial.

The only difference is Mosebach claimed a contractual violation, Id., while Ms. Kragnes

claims a statutory violation. But, as we shall see in the next brief point, a claim of statutory violation is a tort claim as well.

A comparison between the Dolezal pleadings and the Plaintiff's Petition in this case is also instructive. Mr. Dolezal specifically sued for unjust enrichment. Dolezal, 326 N.W.2d at 356. Ms. Kragnes did no such thing. A reader of her Petition will not find the words "unjust enrichment" or "restitution" anywhere in the document. Likewise, the terms "quasi-contract," "constructive contract," and "contract implied in law" are nowhere to be found in her pleading.

As pointed out, this case has been on file for nearly four years and only in the last few days has the Plaintiff claimed refuge in the harbor of unjust enrichment. In such a situation, where a party makes a long-after-the-fact rationalization it is appropriate to examine the party's actions because the party's "actions speak louder than its words." I.E.S. Utilities, Inc. IA Dep't of Rev. and Fin., 545 N.W.2d 536, 548 (Iowa 1996).

In October of 2006 the City made a motion for partial summary judgment, arguing that even if the City's franchise fee was too high, the Plaintiff was not entitled to a refund. The Plaintiff vigorously resisted the motion, filing a brief, a supplemental brief, an appendix and a supplemental appendix.

Not once did Plaintiff claim her suit was one for unjust enrichment and restitution. (See Court File).

In May of 2007, the City attempted to amend its answer to include, among other things, a counterclaim for **UNJUST ENRICHMENT**.

Most interestingly, Plaintiff resisted the proposed counterclaim, saying it was "**FACIALLY WITHOUT MERIT.**" (See Court File).

And again, Plaintiff in her resistance failed to articulate that her suit was for unjust enrichment and/or restitution. Certainly one would expect a Plaintiff making a claim for unjust enrichment to explain how a counterclaim for the same is “facially without merit.”

Plaintiff never proffered that explanation. And the reason she didn’t is that her suit was and is a tort suit, as we see from her past actions, and from her pleadings.³

Even more interestingly, when the City attempted to amend to include the unjust enrichment counterclaim, the City also amended to include the affirmative defense of Chapter 670 tort immunities – the very immunities asserted in this motion for summary judgment. The Plaintiff never said, then, that her claim did not sound in tort. One would think that if Plaintiff was truly making a non-tort claim that she would say that a tort immunity affirmative defense was facially without merit. At the very least, one would think she would resist the proposed amendment by saying it was inapplicable. But she did not say those things one would expect her to say if she was making a claim in unjust enrichment. (See Court File).

Plaintiff’s words are clear. She is claiming the City violated a statute and taxed her illegally (Petition, ¶ 7,8). Her actions are clearer. Given multiple opportunities to disclose that the nature of her claim was one for unjust enrichment, she made no such disclosure.

Only now, faced with the imminent demise of her suit by way of § 670.4, does she seek the protection in unjust enrichment. As we shall see in the following brief point, unjust enrichment gives her no protection at all. The fundamental center of her suit is an alleged statutory violation by

³ The City wishes to take this opportunity to alert the Court that if this motion for summary judgment fails because the Court finds that Plaintiff’s Petition does not sound in tort, the City will renew its motion for partial summary judgment on the issue of a refund, and the City will renew its motion to amend to include a counterclaim for unjust enrichment.

the City, and such a suit sounds in tort, not unjust enrichment.

E. **PLAINTIFF'S PETITION ALLEGES A VIOLATION OF STATUTORY DUTY AND A VIOLATION OF A STATUTORY DUTY IS A TORT**

Iowa Code § 670.1(4) defines 'tort' as follows:

"Tort" means every civil wrong which results in wrongful death or injury to person or injury to property or injury to personal or property rights and includes but is not restricted to actions based upon negligence; error or omission; nuisance; breach of duty, whether statutory or other duty or denial or impairment of any right under any constitutional provision, statute or rule of law.

If the definition seems broad, it is. Indeed, our Supreme Court has said:

The definition of tort was given its widest range, meaning 'every civil wrong . . . and includes but is not restricted to actions based upon negligence, breach of duty, and nuisance.' Section 613A.1(3).⁴

Symmonds v. Chicago, Milwaukee, St. Paul and Pacific R.R. Co., 242 N.W.2d 262, 264 (Iowa 1976). This means, says the Symmonds court, that a city is liable in tort for either omissions or commissions, where "authority and control over a particular activity has been delegated to it" by statute. Id. at 265.

Thus, it should come as no surprise, given the broad definition of tort and the court's recognition of tort liability for statutory violations, that the black letter law of Iowa holds that claims of a statutory violation fall directly under Chapter 670.

Breach of an actionable duty created by statutes is tortious conduct under Chapter 613A

⁴ Chapter 670 was previously codified as Chapter 513A. See: Iowa Code Annotated, § 670.1, Historical Notes.

Wilson v. Nerstad, 282 N.W.2d 664, 669 (Iowa 1979). *See also*: Adam v. State, 380 N.W.2d 716, 722-25 (Iowa 1986) [statutory duties create tort liability]; Hildebrand v. Cox, 369 N.W.2d 411, 416 (Iowa 1985) [City liable for damages for breach of statutory duty if statute designed to protect plaintiff].

All that remains, then, is to determine if Plaintiff has alleged a statutory violation. A determination made easy because of the clarity of Plaintiff's pleading. In paragraphs 6, 7 and 8 of her Petition she says the following:

6. Said "franchise fees", which are, or are to be, charged and collected by the City through its franchise agreement with MidAmerican Energy constitutes a tax and revenue generating measure which has been or will be illegally imposed and collected from the Plaintiff and other members of the Class through the adoption of said ordinance and imposition of said "franchise fees".

7. Chapter 364.3(4) provides that a City may not levy a tax unless specifically authorized by a state law.

8. The Defendant has illegally exacted from the Plaintiff, and those similarly situated, illegal taxes as a revenue generating measure under the guise of the "franchise fees" and said exaction is illegal and void and should be refunded.

Despite Plaintiff's present protestations to the contrary, there can be no doubt about what she said and what she meant. Her entire case is predicated upon the City's violation of Iowa Code § 364.3(4). A review of her entire petition reveals no other potential source of municipal liability. There is no Count II. There is no Count III.

Plaintiff places all her eggs in a statutory violation basket. Statutory violation is the sole basis for the City's exposure. Statutory violation is the one claim she makes, and it is the only claim she makes.

And it is a tort claim. Wilson, 282 N.W.2d at 669.

In Caudell v. Shelby County, 519 N.W.2d 423, 424 (Iowa 1994), a property owner sued, claiming an improper measurement caused her to pay more property taxes than she owed. Unlike this case, administrative and constitutional issues were raised. Id. But like this case, tort immunity under § 670.4(2) was an issue. Id. at 425. The district court granted summary judgment and the Supreme Court affirmed saying:

Finally, Caudill argues the district court erred in granting summary judgment because she claims a separate cause of action in tort. We determine Iowa Code section 670.4(2) (1993) controls this claim. This section excludes governmental subdivisions from tort liability for “[a]ny claim in connection with the assessment or collection of taxes.”

Id. at 425.

In City of West Branch v. Miller, 546 N.W.2d 598, 599-600 (Iowa 1996) a city sued a county assessor for failure to properly assess and collect taxes as required by statute. The clear import of the case is that, but for the purchase of insurance by the county, the immunity of § 670.4(2) would have applied to shield the alleged breach of statutory duty from liability. Id. at 600-05.

Finally, in Hearst Corp. v. IA. Dep’t of Rev. and Fin., 461 N.W.2d 295, 298-99 (Iowa 1990) a corporate taxpayer sued the state over sales and use taxes the corporation had paid. Again, unlike here, the taxpayer raised constitutional question. Id. at 301-08.

But, the taxpayer also raised claims of statutory violation in the assessment and collection of taxes. The state raised an immunity defines under their § 25A.14(2).⁵ The court said:

We also note that our State Tort Claims Act, section 25A.14(2) (1989), does not apply to authorize any claim arising in respect to the assessment or collection or any tax or fee. Therefore, the decision of the district court is affirmed on this issue.

Id. at 309.

F. A CLAIM OF ALLEGED STATUTORY VIOLATION INVOLVING THE APPLICATION OF A POLICE POWER BY A CITY SOUNDS IN TORT

In the previous two sections of this brief, we examined how an alleged statutory violation by a city both sounds in tort and triggers the statutory immunities of Iowa Code § 670.4. Here, we find that an alleged statutory violation that involves the city's use of its police powers also sounds in tort. Kelley v. Story County Sheriff, 611 N.W.2d 475, 481 (Iowa 2000).

In Kelley, law enforcement officers damaged two doors during the execution of an arrest warrant upon one who was not an owner of the property where the arrest happened. The owner sued, claiming the damage done to the property amounted to an unconstitutional taking. The district court determined the real cause of action was in tort, not eminent domain, and granted immunity under Ch. 670. The Supreme Court agreed. Id. at 479-81, 483-84. The Court said:

Plaintiff's property was damaged as a consequence of the county's exercise of police power, and not as a consequence of the county's exercise of its power under eminent domain.

Id. at 481.

The significance of a claim involving an exercise of police power sounding in tort

⁵ As the Municipal Tort Claims act was recodified from Ch. 613A to Ch. 670, so to was the State Tort Claims Act recodified from Ch. 25 to Ch. 669. The tax immunity 25A.14(2), now § 669.14(2), is virtually the same as that of § 670.4(2).

becomes apparent when we read the Supreme Court decision in this case. Kragnes v. City of Des Moines, 714 N.W.2d 532 (Iowa 2006). There, the court said in no uncertain terms that the assessment and collection of the franchise fees at issue were exercises of the City's police power. Indeed, the Iowa Supreme Court mentions the term "police power" no fewer than six times in its opinion. Kragnes, 714 N.W.2d at 633, 640, 642, 643, 643-44.

G. THE ONLY DUTY ALLEGED IN THIS CASE IS A DUTY IMPOSED BY STATUTE

The starting point of any tort inquiry is the identification of a duty. Jahnke v. City of Des Moines, 191 N.W.2d 780, 783 (Iowa 1971). The only duty allegedly violated in this case is a statutory duty. (Petition, ¶ 6, 7, 8). And as we have seen, alleged statutory violation sound in tort. Wilson, 282 N.W.2d at 669. *See also*: Curtis v. Loether, 415 U.S. 189, 195, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974) [Damage action pursuant to statute sounds in tort].

CONCLUSION

Faced with the demise of her case because of the immunities of Iowa Code § 670.4, Plaintiff now attempts to characterize her suit as one grounded in unjust enrichment. However, her pleadings and her actions dictate that her claim truly sounds in tort. The attempt of Plaintiff to call her case one of unjust enrichment should be seen for what it really is – an attempt to avoid the broad-based immunities of § 670.4.

For the reasons briefed, summary judgment should be granted to the City and the costs of this action assessed against the Plaintiff.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of attorneys of record herein at their respective addresses

disclosed on the pleadings on 5-28-08

By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Federal Express Other:

Signature *Diane Roscoe*