

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Snee Farm Lakes Homeowner's Association, Inc., Individually and on Behalf of those Similarly Situated,

Plaintiff,

v.

The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks,

Defendant.

IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2018-CP-10-2764

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**RECEIVED**

**Dec 02 2021**

**SC Court of Appeals**

Plaintiff Snee Farm Lakes Homeowner's Association, Inc., Individually and on Behalf of those Similarly Situated ("Plaintiff" or "Snee Farm") initiated this litigation on June 1, 2018 complaining of the manner in which Defendant the Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks ("Defendant" or "MPW") charged certain of its commercial customers. MPW assesses commercial customers a portion of their monthly bill based on the number of Residential Equivalency Units ("REUs"), representing a reservation of water capacity, assigned to the commercial customer's account. Specifically, Plaintiff complained that it was charged excess Basic Facility Charges ("BFC") because it had unused Residential Equivalency Units (REUs) assigned to its account. In essence, Plaintiff's claim is based on a theory that MPW violated state statutes by basing its rates on assigned REUs that at times reflect a greater reservation of water capacity than the actual water usage by a particular commercial customer.

Plaintiff filed an Amended Summons and Complaint on September 1, 2020 alleging five different causes of action against MPW: 1) Declaratory Judgment, 2) Breach of Contract, 3) Conversion, 4) Unjust Enrichment/Money Had and Received, and 5) Constructive Trust. Plaintiff

seeks a refund on behalf of the entire class from MPW for what Plaintiff claims are excess BFC payments from January 1, 2014 through December 31, 2019. On March 9, 2021, MPW filed a Motion for Summary Judgment asking the Court to dismiss Plaintiff's claims.

Plaintiff's action was certified as a class action on June 14, 2019, with the following class definition:

All current and former MPW commercial customers who paid excessive BFC in excess of \$100, defined as a customer's average daily usage from January 1, 2014 (or any later date of service inception) to December 31, 2019 being less than that customer's assigned REU.

The Court heard arguments in support and opposition to MPW's Motion for Summary Judgment on April 16, 2021 ("Hearing"). Prior to the Hearing, Snee Farm submitted a Memorandum in Opposition and MPW submitted a Reply Memorandum in addition to MPW's Motion for Summary Judgment. After considering MPW's Motion for Summary Judgment, the pleadings, memoranda and exhibits submitted by both parties as well as the oral arguments and facts presented during the Hearing, this Court grants Summary Judgment in favor of MPW and dismisses Plaintiff's case in total with prejudice for the reasons set forth below.

### **SUMMARY OF FACTS**

While there are some disputed facts, which this Court considered in the light most favorable to Plaintiff, the most significant facts presented to this Court are undisputed. The undisputed facts are as follows:

1. MPW is a municipal water and sewer authority established pursuant to ordinance of the Town of Mount Pleasant, South Carolina and state law. (*See* Plaintiff's Response, p. 1).
2. Titles 5 and 6 of the Code of Laws of South Carolina of Joint Acts and Resolutions of the General Assembly of the State of South Carolina provides the authority and responsibility

for MPW to conduct its fiscal affairs, fix rates, collect fees for services, and dispose of these revenues for purposes germane to MPW 's functions.

3. MPW's rates are set by its elected commissioners. (*See* Plaintiff's Response, p. 2).
4. MPW's monthly invoice to customers is made up of two different types of charges: the volumetric charge based on the volume of water used by a commercial customer during the billing cycle and the BFC, a consistent rate charged each month regardless of water usage. (*See* Defendant's Reply, Exhibit G, Snee Farm Water Bill).
5. MPW bases its BFC on the total number of Residential Equivalency Units ("REUs") assigned to the commercial property associated with MPW's customer's account such that the BFC is determined by calculating the rate times the account's number of REUs. (*See* Plaintiff's Response, p. 2).
6. MPW defines BFCs as a charge for reservation of capacity based on the total active REUs assigned to a property and a fixed charge to recover an amount equal to or greater than the sum of annual Renewal and Replacement (R&R). (*See* Plaintiff's Response, Exhibit B, MPW Cost Recovery Policy 7.2, pp. 4-5).
7. One REU is equal to 300 gallons per day or approximately 9,200 gallons per month. (*See* Plaintiff's Response, p. 2).
8. MPW has calculated its BFC based on REUs since the early 1990s.
9. A customer's initial REU determination is assessed based on an engineering formula and capacity assumptions made at the inception of service. (*See* Plaintiff's Response, p. 2).
10. A commercial customer is required to pay impact fees at the initiation of their account based on the number of REUs assigned to their account. (*See* Plaintiff's Response, pp. 2-3).

11. MPW's water bills sent to each of their commercial customers includes both the number of REUs assigned to that particular account as well as the number of gallons consumed for the particular billing cycle. (*See* Defendant's Reply, Exhibit G, Snee Farm Water Bill).
12. The BFC provides for MPW's fixed costs including but not limited to Renewal and Replacement, debt service, capital costs, operating and maintenance costs, and general administrative costs. (*See* Plaintiff's Response, p. 2).
13. BFC are used to finance MPW's general operations and maintenance, which will confer benefits generalizable to all customers. (*See* Plaintiff's Response, p. 13).
14. MPW allows customers to petition to decrease their REUs in order to reduce a customer's BFC. There are no out-of-pocket expenses for an MPW customer wishing to reduce its REUs. In so doing, a customer must give up their REUs, which could subject the customer to excessive use charge if the customer exceeds the capacity reservation relative to its new, lower number of REUs. (*See* Plaintiff's Response, p. 5; Motion for Summary Judgment p. 3; MPW Policies 5.3.2 Assessment of Impact Fees and 5.3.3 Impact Fee Management.)
15. If a commercial customer's water needs change in the future, the commercial customer may later increase its REUs by paying the applicable current impact fee per REU at the time of increase or the back BFC charges from the time the REU was reduced until increase, whichever is less. (*See* MPW Policy 5.3.3 Impact Fee Management.)
16. Snee Farm is a horizontal property regime for a mutli-family residential unit. (*See* Plaintiff's Response, Exhibit A.)
17. Snee Farm established an account with MPW in 1982 and was assigned 148 REUs, which is equal to the number of units at Snee Farm. (*See* Amended Summons & Complaint, p. 3; Defendant's Reply, Exhibit F, Lona Vest Deposition p. 42, ll. 20-23.)

18. Snee Farm paid significantly less for its impact fees based on 148 REUs in 1982 than today. In fact, it appears that Snee Farm paid no water impact fees in 1982 and only paid roughly \$39,088.35 in sewer impact fees. (*See* Defendant's Answer and Counterclaim to the Amended Complaint, Exhibit A.) According to impact fee rates in 2019, Snee Farm would pay \$1,103,932.00 in impact fees.<sup>1</sup> (*See* Plaintiff's Response, Exhibit Y, Mantz Draft Questions and Answers p. 16).
19. Going back years, Snee Farm actual water usage was less than the amount of water represented by its assigned REUs or approximately 1,332,000 gallons per month. (*See* Amended Summons & Complaint, p. 3).
20. Snee Farm has maintained the same level of REUs originally assigned to its account.
21. Snee Farm never sought to reduce the number of REUs assigned to its account.
22. Snee Farm employs a professional property management company that manages Snee Farm's expenses and homeowners' fees for the Snee Farm property owners. (*See* Defendant's Reply, Exhibit F, Lona Vest Deposition p. 12, ll. 13-21).
23. The professional property manager employed by Snee Farm knew that MPW charged a basic facility charge for the reservation of capacity or demand for a certain amount of water. (*See* Defendant's Reply Memorandum, Exhibit F, Lona Vest Deposition p. 12, ll. 1-12).
24. In 2018, MPW sent a letter to certain of its commercial customers, including Snee Farm, suggesting that the customer reduce their REU number based on the customer's apparent water needs as shown by their recent consumption ("the 2018 Letter"). The suggested REU reduction would result in a reduced monthly BFC for the customer. (*See* Plaintiff's Response, Exhibit H).

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<sup>1</sup> Based on rates listed in Mantz' Draft Questions and Answers, Water Impact Fees were \$2,295 and Sewer Impact Fees were \$5,164 in 2019.

25. MPW sent the 2018 Letters to 288 commercial customers and of those recipients, approximately 80 commercial customers responded and reduced their REUs. (See Motion for Summary Judgment, p. 3).
26. Snee Farm received a 2018 Letter from MPW suggesting that Snee Farm consider reducing its REUs from 148 to 76 based on Snee Farm's "average monthly consumption for [its] highest quarter....." (See Plaintiff's Response, Exhibit H).
27. Snee Farm did not contact MPW regarding the 2018 letter and, again, never tried to reduce its REUs.

### **STANDARD OF REVIEW**

Rule 56(c), SCRCP, provides that a circuit court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A moving party must meet its burden of showing there is "an absence of evidence to support the non-moving party's case." *Lord v. D.&J Enterprises, Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (S.C. 2014) citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (S.C. 1991). Once the moving party has met its burden, "the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial." *Id.* In reviewing a summary judgment motion, the facts and circumstances must be viewed in the light most favorable to the non-moving party. *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014). In order to withstand a motion for summary judgment, though, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial, meaning that the evidence presented "must meet the prerequisite

of being probative.” *Lemmons v. Macedonia Water Works, Inc.*, 431 S.C. 186, 847 S.E.2d 471 (Ct. App. 2020) *citing* *Bass v. Gopal, Inc.*, 384 S.C. 238, 246 n.6, 680 S.E.2d 917, 921 n.6 (Ct.App. 2009), *aff’d*, 395 S.C. 129, 716 S.E.2d 910 (S.C. 2011). “[A]ny evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative.” *Id.* “A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (S.C. 2006). Here the undisputed facts when applied to the applicable law justify a grant of summary judgment.

### **FINDING OF FACT**

#### **I. MPW’s ratemaking methodology does not violate South Carolina statutes.**

Plaintiff’s claim is based on a theory that MPW violated state statutes by basing its rates on assigned REUs that at times reflect a greater reservation of water capacity than the actual water usage by a particular commercial customer. Plaintiff asserts MPW has a duty to unilaterally right-size a commercial customer’s REUs for purposes of the BFC calculation. The question that must be answered is whether MPW’s BFC rate structure based on REUs reflecting reservation of water capacity rather than actual water usage violates South Carolina law.

S.C. Code Ann. § 5-31-250 grants a “board of commissioners of public works or any city or town” the authority to create, operate and manage a waterworks and “require payment...of such rates, tolls and charges as it may establish for the use of water....” Further, S.C. Code Ann. § 5-31-670 requires only that the charge for use of the water to be “reasonable compensation and charge a minimum and reasonable sewer charge for maintenance and construction of such sewerage system....”

The court has the ability to review a municipality's current rate system to determine whether such a rate system violates the municipality's authority or statutory requirement. If the court finds that the rate structure does not violate applicable South Carolina statute, it is not for the court to supplant the General Assembly or MPW's elected commissioners and invalidate MPW's rate methodology. Thus, in reviewing MPW's rate structure, the court can only determine whether or not the rate structure is permitted pursuant to South Carolina statute rather than condemn a rate structure because it is not optimal. After an in depth analysis of MPW's rate structure, this court finds that MPW's rate structure does not violate any South Carolina statute.

Here, the Town of Mount Pleasant, empowered by the statutes *supra*, has chosen to empower MPW to administer and orchestrate Mount Pleasant's water and sewer systems. S.C. Code Ann § 5-3-210 and 215 enables MPW governance by five elected commissioners as well as two additional commissioners: the Mayor of the Town of Mount Pleasant and the Chair of the Town's Water Supply Committee. MPW's commissioners chose the rate structure in order to collect money from its customers to run the water and sewer system. As a part of that rate structure, MPW's commissioners chose a BFC rate structure based on a commercial customer's assigned REUs. If MPW's chosen rate structure is "reasonable" pursuant to S.C. Code Ann. § 5-31-670, the rate structure is permissible.

Thus, ultimately, the question is whether MPW's rate structure of basing BFC on a customer's number of REUs is reasonable pursuant to S.C. Code Ann. § 5-31-670. In general, "water rates are entitled to a presumption of reasonableness, and a reviewing court will defer to the municipal corporation as long as the rates are nondiscriminatory, and are not arbitrary and capricious." 12 McMillian Mun. Corp. § 35:57 (3d ed.) (citation omitted). "Generally speaking, water rates as set by a municipality are presumed to be valid and reasonable until the contrary has

been established; and the burden of overcoming the presumption of validity and reasonableness rests with the challenging party.” *Id.* In South Carolina the “test of the reasonableness of rates established by a public service district is the service received.” *H.A. Sack Company, Inc. v. Forest Beach Public Service District* 272 S.C. 235, 238, 250 S.E.2d 340, 341 (1978) *citing* *Simons v. City Council of Charleston et al.*, 181 S.C. 353, 187 S.E. 545 (1936). “The burden of proof of the unreasonableness or arbitrariness of rates is upon the person attacking the rate schedule.” *Id. citing Shirk v. City of Lancaster*, 313 Pa. 158, 169 A. 557 (1933). In this litigation, Plaintiff has presented no allegations regarding the quality of service it has received or continues to receive. For this reason Plaintiff has not met the burden of showing MPW’s BFC rate structure is unreasonable.

Plaintiff argued S.C. Code Ann § 6-1-300(6) and the case, *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315, (2015) support its claim that MPW’s rates violate South Carolina statutes because allegedly the rates are not paid in return for a particular government service or program made available to the Plaintiff. However, both the S.C. Code Ann. § 6-1-300(6) and *Azar* relate to the way the funds collected are “spent,” not the rate structure or method of collection. In this case there are no allegations that the amounts collected were spent on anything other than water and sewer related expenses.<sup>2</sup> In fact, Plaintiff admits in its Response that, “the BFC are used to finance MPW’s general operations and maintenance, which will confer benefits generalizable to all customers [including Plaintiff]....” (*See* Plaintiff’s Response p. 13). Plaintiff states, “...the payers of excessive BFC are garnering no more or different benefit.” *Id.* Plaintiff’s share of BFC is higher than Plaintiff believes it should be, but Plaintiff’s receipt of services has not been diminished and there are no allegations that the money collected is spent on anything other than

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<sup>2</sup> Plaintiff’s expert, Bryan Mantz, testified that he took no issue with the collection of the funds, rather he believes charges should be allocated differently among MPW’s customer base according to actual customer use. (*See* Deposition of Bryan Mantz, 1/20/21 pp. 57-58, ll. 25-25).

water and sewer related services and expenses. S.C. Code Ann. § 6-1-300(6) and any related statutes are not applicable to the facts in this case.

Even if the court were to review the actual rate structure beyond the service provided, Plaintiff has presented no reliable evidence that MPW's rate structure is unreasonable. Plaintiff asserts that S.C. Code Ann. § 5-31-250, which gives utilities the ability to "require payment of such rates, tolls and charges as it may establish for the use of water and light," must be interpreted to require rates to be associated with actual volumetric use.<sup>3</sup> However, in order to accept Plaintiff's interpretation, the court must add the words and meaning to the statute to require volumetric or some measured amount of usage. If Plaintiff's interpretation were accepted, South Carolina utilities would be required to tie their entire rate to the amount of water or electricity a customer uses each month, ignoring the utilities' requirement to make the water or electricity available at the flip of a switch or the turning of a tap by covering fixed costs that do not decrease when a customer's actual volumetric use decreases. Such a rate structure is contrary to the recommendations by Plaintiff's own expert. Bryan Mantz, Plaintiff's expert, testified that he recommends a fixed charge as a part of a utility's rate system in order to support revenue stability because salaries and benefits as well as debt service, are all fixed costs for the utility regardless of customer usage. (*See* Mantz Deposition 1/13/21 pp. 90-91, ll. 7-9, 12-25, pp. 116-117, ll. 5-8, 20-4). This court does not accept Plaintiff's position as to the interpretation of S.C. Code Ann. 5-31-250. The word "use" cannot mean the literal volumetric use of a water or electricity and ignore the ability to use; availability of ready service; the reservation of capacity or on-demand service.

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<sup>3</sup> Section 5-31-250 of the South Carolina Code reads as follows: "[The utility] may supply and furnish water to citizens of the city or town and also electric, gas or other light and may require payment of such rates, tolls and charges as it may establish for the use of water and light."

Accepting that the statute does not *per se* deem a rate structure unreasonable simply because it is based on something other than actual volumetric use, the analysis turns to whether there are some other issues with MPW's BFC rate structure that render it unreasonable. For purposes of summary judgment, this court again looks to Plaintiff's own expert's analysis regarding the MPW's REU rate structure as compared to other BFC rate structures.

Many water utilities, including the City of Charleston, use a commercial customer's water meter size to determine a BFC charge. (*See* Hearing Transcript p. 14, ll. 19-22; Plaintiff presentation). Different size water meters are provided to customers according to anticipated use. Generally speaking, the greater the anticipated use, the larger the water meter size. The water meter size systems do not consider the commercial customer's actual volumetric water usage in determining the BFC. Rather, the only measure for the BFC calculation is the anticipated water demand when determining pre-service the water meter size. After service is established, the BFC is not dependent on whether any water flows through the water meter. Rather the BFC rate is determined based on the size of the water meter alone.

When Plaintiff's own expert was asked about a BFC based on a water meter size, Mantz testified that a water meter size BFC is reasonable even though such a system: 1) is unrelated to a customer's actual volumetric water or sewer use, 2) a customer is required to initiate procuring a new water meter if they want to reduce their BFC, 3) a customer must pay to have an old water meter removed and a new water meter installed if the customer wishes to reduce their REUs, and 4) if a customer wishes to someday increase their water capacity, the customer must pay for reinstallation of their old significantly larger water meter.

Water meter size BFC rates calculate a customer's fixed rate based on the size of the water meter. Mantz testified that in a water meter size rate structure, the initial assignment of a particular

water meter size is based on “potential of the [customer’s] demand”.... (See Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 23-25, ll. 14-25, pp. 45-46, ll. 12-6). The assignment of a larger water meter size is necessary for larger intended water usage. If the customer’s fixed rate is based on the size of the customer’s water meter, the fixed rate is necessarily based on future potential demand. In fact, Mantz testified that in a water meter size rate structure, if the customer does not use the water, their BFC charge remains the same. (See Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 30-31, ll. 5-20). Similarly, the number of REUs assigned to a customer at the time an account is established or a property is developed is based on the projected amount of water a customer may use in the future. (See Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 66-67, ll. 20-5). Thus simply because the BFC is based on potential future demand or a reservation of capacity rather than actual use does not prove the rate system is unreasonable.<sup>4</sup>

Also, like the REU rate structure, Mantz testified that the customer, not the utility, must initiate a change in their water meter size in order to reduce the calculated BFC. (See Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 29-30, ll. 3-4, pp. 31-32, ll. 21-4, pp. 45-46, ll. 12-2, pp. 55-56, ll. 7-6, pp. 100-101, ll. 14-6, pp. 103-104, ll. 24-9, p. 173, ll. 14-23). Mantz also affirmed that the utility has no responsibility to alert the customer to the possibility of reducing their water meter size. (See Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 31-32,

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<sup>4</sup> Plaintiff’s characterization that there was “quite a bit of dispute, even within MPW itself, how this idea of capacity reservation fits into the BFC calculation and whether MPW’s utilization is reasonable” is not supported by the evidence. Plaintiff cites to an email thread by Joe Crea from Raftelis Financial Consultants (MPW’s rate consultant at that time) as evidence that Crea disagreed with the BFC as some type of capacity reservation fee. However, a close reading of the entire document and conversation of emails makes it clear that there is no dispute. Rather, there was simply some discussion about what to call a fee required to be paid when a customer seeks to reinstate their REUs after decreasing the same. (See Defendant’s Reply, Exhibit E). Regardless, the name of the method is not as important as what it actually stands for, which is an assumption of future water use.

ll. 1-4). Water utilities using the water meter size rate structure do not unilaterally right size a customer's water meter size based on the customer's water usage. *Id.*

Clearly, Plaintiff's own expert does not believe that a rate system is unreasonable simply because the charges are based on something (such as a water meter size) other than the customer's actual volumetric use. Plaintiff has failed to show that MPW's REU BFC system is unreasonable such that it would violate the South Carolina statutes.

Further, there is no case law that indicates MPW's rate structure is unreasonable. In support of Plaintiff's claims, Plaintiff cites *Simons v. City Council of Charleston*, 181 S.C. 353, 187 S.E. 545 (1936), one of two South Carolina cases that discusses reasonableness in the context of water utility rates.<sup>5</sup> In *Simons*, the Supreme Court analyzed "whether a municipality has the power to make a pledge of income derived from a revenue producing project in the absence of a specific statutory grant of authority." *Id.* at 546. The plaintiff in that case, a taxpayer, alleged that the municipality did not have the authority to use revenues derived from its waterworks system to repay the costs of a project to increase the town's water supply. *Id.* While the court did note that a municipality is bound by the rule of reasonableness, it further elaborated that the proposed method in which the city chose to allocate those funds was within the *discretion of the city council* and "so long as the revenues it uses for the purposes named are derived from "reasonable" rates, *the court will not interfere with the discretion sought to be exercised.* *Id.* (emphasis added). In support of this contention the court added that "it is incumbent upon a municipal corporation to exercise its judgment in a manner that will inure to the greatest benefit of the city and its inhabitants." *Id.* Further, as mentioned previously in this brief, "[t]he service received is the test" as to

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<sup>5</sup> The other case, *Sloan v. City of Conway*, 347 S.C. 324, 555 S.E.2d 684, (2001), discusses S.C. Code Ann. § 5-31-670 in determining the reasonable rate requirement for water service to nonresidents – an issue that is not present in this case.

reasonableness, not the profit or amount collected by the utility. *Id.* at 547 and 45, citing 67 C.J. 1243.

Here, Plaintiff is not alleging that MPW is setting the rates in order to pay off bonds for a project like the municipality in *Simons* - it is alleging that MPW's rate structure is unreasonable.<sup>6</sup> And, as a result of those rates, Plaintiff believes that MPW's commercial customers have been overcharged and Plaintiff is entitled to a refund. Yet, again, Plaintiff has not alleged any complaints regarding the quality of service received, only that they believe they have paid too much for said service or "water rent" as the *Simons* court describes it. *Id.*

Plaintiff also cites to *City of Commerce v. Duncan & Godfrey, Inc.*, 277 S.E.2d 266 (Ga.Ct.App. 1981) for the position that the city has a legal duty to disclose to the customer the availability of a more favorable rate. However, the case cited is a Georgia case and there are no similar South Carolina cases creating such a duty.

For all the reasons stated above, there is no genuine dispute of material fact as to the reasonableness of MPW's rates and rate structure pursuant to South Carolina law, and therefore summary judgment is granted in favor of MPW and all of Plaintiff's claims are dismissed with prejudice.<sup>7</sup>

## **II. Plaintiff's causes of action should be dismissed due to Plaintiff's failure to mitigate damages.**

Snee Farm initiated this lawsuit because it has more REUs assigned to its account than its actual water usage. Ignoring the fact that REUs represent reservation of capacity rather than actual usage, Snee Farm failed to correct this perceived inaccuracy even though it had the opportunity to

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<sup>6</sup> When asked if he believed MPW has collected too much revenue over all, Plaintiff's expert responded in the negative. (See Exhibit C, Mantz Deposition 1/13/21, p. 129 ll. 7-24).

<sup>7</sup> All of Plaintiff's causes of action are reliant on a finding that MPW's rate structure violates South Carolina statutory law.

do so. Snee Farm never tried to reduce the 148 REUs assigned to its account, either before the filing of this lawsuit or after. Snee Farm is a corporate entity with a professional property manager. Prior to 2018, Snee Farm's professional property manager could have determined that Snee Farm had more REUs assigned to its account when compared with Snee Farm's actual water usage. (*See* Defendants Reply, Exhibit G). Other commercial customers reduced their REUs during this time. For instance, Plaintiff attached to the Response a confidential exhibit including a 2014 settlement agreement with a commercial customer whereby the customer had allegedly contacted MPW and sought to reduce its REUs. Because MPW did not reduce this customer's REUs in a timely fashion, MPW reimbursed the customer for BFC paid on the account. (*See* Plaintiff's Response, Exhibit G). Clearly, the particular commercial customer involved in the settlement was able to discern in 2014 that it had more REUs assigned to the MPW account than it needed based on its actual water usage.

In 2018, MPW completed an audit of its commercial customer accounts. At that time, MPW identified certain commercial customer accounts with a large number of unused REUs. MPW identified Snee Farm as one of those commercial customers. In an effort to bring the unused REUs to the attention of those commercial customers, MPW sent a letter to 288 commercial customers recommending a reduction in the assigned REUs. Even after receiving the 2018 letter, Plaintiff chose not to contact MPW to reduce its REUs. Instead Plaintiff initiated this lawsuit. By failing to take action to reduce its REUs, Plaintiff has failed to mitigate its alleged damages.

Plaintiff's claim that reducing its REUs would require Plaintiff to prejudice itself by complying with illegal practices is not persuasive. Plaintiff takes issue with MPW's policy of requiring a customer to surrender its REUs when that customer seeks to reduce its REUs for purposes of BFC. Plaintiff asserts that having to give up something it previously paid for is

“illegal.” However, again, this situation is akin to the water meter right sizing, which Plaintiff’s expert deems reasonable. Not unlike the customer who is required to replace its larger water meter in order to reduce its BFCs based on water meter size, MPW’s requirement that a customer give up assigned REUs in order to reduce its BFC is reasonable pursuant to the applicable statutes.

Mantz testified that in a water meter size rate structure if the customer chooses to right size, the customer is responsible for paying for and installing a new water meter. (*See* Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 31-32, ll. 21-15). Thus, the customer must immediately come out of pocket in order to right size a water meter that is larger than the customer’s current water needs. Mantz further testified that the utility should not have to pay for the customer’s smaller water meter because it is costly – an even greater deterrent to the customer who wishes to reduce its BFC charge in a water meter rate structure. (*See* Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 33, ll. 1-11).

Pursuant to MPW’s policies, MPW’s customers are required to give up REUs they previously paid impact fees for in order to right size. Unlike a water meter size customer, MPW’s customers have no out of pocket expense upon deciding to right size their REUs. The only expense MPW’s customer may have occurs if they later determine they wish to increase the number of REUs assigned to their property. In that case, MPW requires customers to repurchase REUs at the current impact fee rate or back pay unpaid BFC in order to have the REUs reinstated (whichever is less). (*See* MPW Policy 5.3.3). If the water meter size rate structure is reasonable and legal, as testified to by Plaintiff’s expert, then MPW’s system cannot be the basis for Plaintiff’s refusal to mitigate its alleged damages.

If someone purchases something but then decides to give up that asset, it cannot be illegal for the person to then be required to pay to repurchase the same asset. Similarly, it cannot be

illegal to require a water meter customer who may chose in the future to go back to a larger water meter, to purchase the larger meter. These are all business decisions that sophisticated commercial customers, like Plaintiff with the help of its retained professional property manager, must make in order to determine what is best for their own business and individual future needs. Giving up REUs would presumably benefit the business by reducing their BFC. So, determining whether to reduce REUs even if it means possibly repurchasing the same in the future is not an illegal choice, but rather a business decision similar to the accepted policy of paying to purchase and install a smaller water meter. Yet, Plaintiff complains because it wants the benefits of both retaining its REUs and having its BFC reduced. This court will not penalize MPW because Plaintiff never made the decision as to whether it wanted to maintain its REUs. Plaintiff failed to mitigate its damages that it seeks to be reimbursed in this lawsuit and for that reason MPW's Motion for Summary Judgment is granted as to all of Plaintiff's causes of action with prejudice because of Plaintiff's failure to mitigate damages.

### **III. Plaintiff's Claims are barred by the Voluntary Payment Doctrine.**

In South Carolina, “[i]t is well-settled law that money voluntarily paid with full knowledge of all material facts and without any fraud, duress, or extortion cannot be recovered, although there was no legal obligation to make such payment.” *Shockely v. Wickliffe*, 148 S.E. 476, 477 (S.C. 1929) (citing *Hardaway v. S.Rey.*, 73 S.E.1020, 1025 (S.C. 1912)). Plaintiff's MPW water bills included the number of REUs assigned to the particular account as well as the number of gallons used for each particular billing cycle. Further, the back side of each bill states: “[o]ne REU equals 9,200 gallons per month” and that “[a] Basic Facility Charge for residential and commercial

customers is a monthly base charge on the number of Residential Equivalency Units assigned.” The back of the bill also includes a further reference to MPW’s website and phone number to call for more information on other rates, fees and charges. (*See* Defendant’s Reply, Exhibit G). Finally, Plaintiff at all times employed and relied upon a professional property manager who manages multi-family units throughout the Charleston area, admits that she had access to the information and could have calculated how many REUs were being used by Plaintiff. (*See* Defendant’s Reply, Exhibit F, Lona Vest Deposition pp. 12, ll. 1-25, pp. 47-48, ll. 3-16). Thus Plaintiff was aware of and had access to all material facts and yet voluntarily paid their bill without questioning the same.

Certainly, after receiving the 2018 Letter, Plaintiff was well aware of unused REUs assigned to their account, yet many, including Plaintiff made no effort to reduce their REU assignments. Finally, Plaintiffs have made no allegations of fraud, duress or extortion that might impact the application of the voluntary payment doctrine. It is Plaintiff’s burden to allege and prove that the money at issue was paid under fraud, duress, or extortion. *Hardaway v. Southern Ry. Co.*, 90 S.C. 475, 488-89, 73 S.E.1020, 1025 (S.C. 1912). Plaintiff’s claims regarding voluntary payment doctrine fail because Plaintiff cannot meet this burden.

Plaintiff’s response that “you can’t live without water and sewer,” is unpersuasive. This point misconstrues the principals behind the voluntary payment doctrine. The point is not that Plaintiff is paying for a service it needs, but rather that Plaintiff paid without ever asking that its rate be lowered or its REUs be reduced.

For the reasons stated, this court dismisses Plaintiff’s complaint with prejudice due to the voluntary payment doctrine.

#### **IV. Plaintiff’s claimed damages are barred by the Statute of Limitations.**

Even assuming MPW's rates violated state law, Plaintiff's claims are barred by the statute of limitations because Snee Farm knew or should have known that it had a claim against MPW more than three years prior to initiating this lawsuit. As noted earlier, each bill contains the number of REUs assigned to the customer's account as well as the gallons consumed in the particular billing cycle. The back of each bill notes that "one REU equals 9,200 gallons per month." (*See* Defendant's Reply, Exhibit G). Plaintiff employs a professional property manager who received Plaintiff's water bills and reviews the same. Plaintiff claims that it has been "overcharged" for excessive REUs for years, yet Plaintiff had all necessary information before it to discover this claimed inequity simply by looking at its bills. Plaintiff's professional property manager testified that she knew that MPW charged a basic facility charge based on the bill, but she had never attempted to calculate the BFC and compare it to the total water gallon usage listed on the bills. (*See* Defendant's Reply, Exhibit F, Lona Vest Deposition pp. 12, ll. 1-25, pp. 47-48, ll. 3-16). As was discussed earlier, other commercial customers as early as 2014 sought out reductions in their REUs based on their volumetric water usage. Simply put, Plaintiff had all necessary information to start asking questions and determine whether or not it had "unused REUs" assigned to its account. For this reason, the statute of limitations bars Plaintiff's claims even assuming MPW's rates violate applicable statutes.

### **CONCLUSION**

Many of the facts in this case are undisputed. All parties agreed as to the structure of MPW's BFC rate structure and the ability of the Plaintiff to reduce their REU assignments, but the parties did not agree as to the implications of the rate structure or the ideal method by which Plaintiff could reduce its REUs. However, after performing a detailed analysis and comparison of the facts with the applicable law, this Court finds MPW's rate structure does not violate the

standards set by the applicable statutes. The General Assembly granted municipalities wide ranging freedom to determine how municipal utilities will set rates and which rate methodology they will employ. It is not for this court to supplant the General Assembly and invalidate MPW's rate methodology. Rather, this court's review of MPW's rate methodology is limited to a determination as to whether it violates the applicable statutes. It is not for this court to determine the optimal rate structure, but only if the rate structure in place meets the statutory requirements. This court finds that considering all of the facts, and specifically Plaintiff's expert testimony, in the light most favorable for the Plaintiff, summary judgment should be granted to MPW because Plaintiff cannot meet its burden of showing that MPW's rate system violates South Carolina law.

However, even if this court were to find MPW's BFC rate system violated South Carolina law, summary judgment should still be granted in MPW's favor because Plaintiff's claims are barred by the voluntary payment doctrine, the failure to mitigate damages, as well as the statute of limitations.

For these reasons, the Court grants MPW's motion for summary judgment and dismisses Plaintiff Class' claims in total with prejudice.

IT IS SO ORDERED.

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The Honorable R. Markley Dennis, Jr.

This \_\_\_ day of July, 2021



Charleston Common Pleas

**Case Caption:** Snee Farm Lakes Homeowners Association Inc VS Commission of  
Public Works for the Town of Mount Pleasant Th , defendant, et al  
**Case Number:** 2018CP1002764  
**Type:** Order/Summary Judgment

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