IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-0643
Bremer County No. CVCV005656

DENVER SUNSET NURSING HOME,
Plaintiff-Appellant,

v.

CITY OF DENVER, IOWA,
Defendant-Appellee

APPEAL FROM THE IOWA DISTRICT COURT
FOR BREMER COUNTY
HONORABLE CHRIS FOY, DISTRICT COURT JUDGE

FINAL BRIEF OF APPELLEE

Randall H. Stefani
Maria E. Brownell
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309
(515) 243-7611
(515) 243-2149 (fax)
rstefani@ahlerslaw.com
mbrownell@ahlerslaw.com
ATTORNEYS FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. DID THE DISTRICT COURT ERR IN LIMITING SUNSET'S RECOVERY OF REFUND FROM A MUNICIPAL UTILITY TO FIVE YEARS?

Authorities

Iowa Constitution, Art. III, § 38A
Iowa Code § 384.84 (2017)
Iowa Code § 476.1(4) (2017)
Iowa Code § 476.1B (2017)
Iowa Code § 476.25 (2017)
Iowa Code § 614.1(4) (2017)
199 Iowa Admin. Code 20.4(14) (2018)
Denver, Iowa, Code § 14.04.010 (May 2004)
Acts Ret.-Life Communities, Inc. v. Town of Columbus, 789 S.E.2d 527 (N.C. Ct. App. 2016)
Anderson v. Yearous, 249 N.W.2d 855 (Iowa 1977)
Aryeh v. Canon Bus. Sols., Inc., 55 Cal. 4th 1185, 292 P.3d 871 (2013)
Bradley v. Manternach, No. 06-1622, 2007 WL 3376777 (Iowa Ct. App. 2007)
Chariton Feed & Grain, Inc. v. Harder, 369 N.W.2d 777 (Iowa 1985)
City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa 2008)
Earl v. Clark, 219 N.W.2d 487 (Iowa 1974)
Eppling v. Seuntjens, 254 Iowa 396, 117 N.W.2d 820 (1962)
Fults v. City of Coralville, 666 N.W.2d 548 (Iowa 2003)
Hensler v. City of Davenport, 790 N.W.2d 569 (Iowa 2010)
Hunter v. Union State Bank, 505 N.W.2d 172 (Iowa 1993)
Iowa Waste Systems, Inc. v. Buchanan County, 617 N.W.2d 23 (Iowa Ct. App. 2000)
Iowa Tel. Ass'n v. City of Hawarden, 589 N.W.2d 245 (Iowa 1999)
K&W Electric, Inc. v. State, 712 N.W.2d 107 (Iowa 2006)
Legg v. West Bank, 873 N.W.2d 763 (2016)
Matter of Estate of Voss, 553 N.W.2d 778 (Iowa 1996)

McMurray v. City of West Des Moines, 642 N.W.2d 273 (2002)
Schulte v. Wageman, 465 N.W.2d 285 (Iowa 1991)
Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonz. L. Rev. 271 (2007-2008 ed.)
54 C.J.S. Limitations of Actions § 235 (2018)

2. DID THE DISTRICT COURT ERR IN DETERMINING THERE IS NO ISSUE OF MATERIAL FACT CONCERNING FRAUDULENT CONCEALMENT AND ESTOPPEL?

ROUTING STATEMENT

The City of Denver, Iowa ("Denver") agrees with the Routing Statement found in the Denver Sunset Nursing Home's ("Sunset") brief.

STATEMENT OF THE CASE

Denver agrees with Sunset's statements regarding relevant events and disposition of the case in the district court, but respectfully offers the following supplement with notable procedural history.

Denver owns and operates a municipal utility that provides electricity to customers in exchange for payment of a rate that is billed monthly. (App. 72). Sunset sued the City of Denver to recover for electric overcharges appearing on each of its monthly bills for 29 years of electric utility service. (App. 187). Denver was not aware of any potential overcharges until March 2014. (App. 14). Denver attempted to tender a refund equal to five years of overcharges consistent with its utility policy before Sunset filed suit. (App. 255).

In its ruling on the parties' motions for summary judgment, the district court determined the core issue

presented was whether the law permitted Sunset to recover a refund on each of its monthly invoices reflecting an agreement for Denver to supply electricity from May 1985 to March 2016. (App. 188).

This case commenced with Sunset's Petition requesting damages associated with a cause of action known as "public utility duress." (App. 7). Denver filed its motion for summary judgment on May 19, 2017, alleging Sunset's cause of action was not applicable to it as a self-regulating municipal utility, and was limited or barred by the statute of limitations. (Denver Brief in Support of Motion for Summary Judgment, pp. 3-8).

Sunset filed a motion to amend its petition on June 5, 2017. (App. 22). Sunset represented in its motion the amendment would not prejudice Denver's defense because it would not change the facts giving rise to the lawsuit and no substantive depositions had been taken. (App. 22). Sunset's Amended and Substituted Petition alleged "public utility duress," along with claims for damages under theories of negligence, misrepresentation, breach of contract, unjust enrichment, and strict liability. (App. 75-76). Sunset claimed

damages due to "intentional conduct of the City of Denver" due to "duress imposed by the City and its monopoly."[1] (App. 76).

Denver resisted the motion to amend and moved for more specific statement as to the additional claims for damages in Count II of the Amended and Restated Petition. (App. 78-79).

Sunset filed a motion for partial summary judgment on June 5, 2017, requesting a judgment as to liability. (App. 24). Sunset's Motion to Amend Petition and the parties' respective motions for summary judgment were submitted to the district court on July 7, 2017. (App. 185). The district court orally granted Sunset's motion to amend and substitute its petition before arguments on the parties' motions for summary judgment were submitted. (App. 182). The court's rulings took into consideration all of Sunset's claims in its amended and substituted petition. (App. 188; App. 259).

[1] State law requires the Iowa Utilities Board to establish mandatory exclusive service territories for electric utilities, including areas served by municipal utilities. Iowa Code § 476.25 (2017).

STATEMENT OF FACTS

Denver agrees with Sunset's statement of facts with the following clarifications. First, Denver's municipal electric utility is governed by the Denver City Council. (App. 12; Memorandum of Law in Support of City's Motion for Summary Judgment, at p. 4). Denver has a refund policy of five years. (App. 87-116; App. 117-168). Consistent with this policy, Denver offered a refund to Sunset equal to five years of overcharges. (App. 255). Sunset's representative, Ron Milius, was informed the appropriate decision making body for refunds is the city council. (App. 248).

Second, although Sunset's brief discusses the parties' relative responsibilities associated with reading the meter, it is important to note Sunset's meter correctly measured the output of electricity at all relevant times. (App. 13; App. 18; App. 20). In 1985, an independent contractor installed Sunset's meter and set the multiplier based upon his chosen method of wiring. (App. 17-19). Although the wiring allowed the meter to correctly measure Sunset's electricity usage, the contractor miscalculated the applicable rate multiplier. (App. 18; App. 20).

Denver was unaware of any issue regarding the multiplier until March 2014. (App. 14).

When Denver's electrical superintendent reviewed the wiring in connection with the citywide meter replacement program, he discovered the wiring method undertaken by Denver's independent contractor did not correspond to the applicable multiplier and remedied the issue. (App. 210). Sunset's billing has thus been correct since April 2014. (App. 177). The multiplier for Sunset's current meter is 80. (App. 225). The multiplier value does not reveal whether the current transformer ratio has been properly calculated based on the meter's internal wiring. (App. 17).

The most salient fact before this Court on appeal is the nature of the claims presented to the district court. Sunset has claimed Denver should be subject to unlimited liability for unknowingly preparing and sending *each monthly bill* for electricity with an erroneously calculated multiplier. Pl.'s Brief, p. 8 ("The City of Denver…overcharged the Denver Sunset Nursing Home for electricity over a period of nearly 29 years starting in 1985….*After* the City's electric meter was installed

the Nursing Home and the meter's "multiplier" was misapplied by the City and its personnel, *the Nursing Home was billed for 200% of its actual electricity usage from May 22, 1985 until about approximately March 24, 2014*....After learning of ***the errors*** during a board of directors meeting on September 19, 2016, the Nursing Home brought the instant suit." (Emphasis added.)); *see also* Amended and Substituted Petition, ¶3 ("It was recently discovered that the City of Denver *has been charging* the Plaintiff Nursing Home for electricity which the City has not provided." (Emphasis added.)); ¶8 ("The Plaintiff, Denver Sunset Nursing Home *made excess payments to* the City of Denver for electricity under duress imposed by the City and its monopoly." (Emphasis added.)); ¶9 (The Plaintiff, Denver Sunset Nursing Home has been *damaged by the intentional conduct* of the City of Denver." (Emphasis added)).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY LIMITED SUNSET'S RECOVERY OF REFUND TO FIVE YEARS.

A. Preservation of Error.

Denver agrees error has been preserved regarding the application of the discovery rule to Sunset's unjust enrichment claim.

B. Scope and Standard of Review.

Denver agrees with Sunset's statement of the scope and standard of review.

C. Analysis.

For the reasons discussed below, the district court was correct to limit Sunset's recovery to five years for four primary reasons. First, the district court's decision is consistent with Denver's own home-rule regulation governing its electric utility refunds. Second, the evidence does not substantively support Sunset's unjust enrichment claim, making the analysis of Denver's statute of limitations defense unnecessary.

Third, the district court properly applied the successive actions doctrine to the underlying claims for refund on each

invoice. The doctrine is the applicable rule of accrual in this case. Finally, the district court's decision is consistent with Iowa Supreme Court and Iowa Court of Appeals precedent concerning the application of statutes of limitations and the discovery rule to the underlying claims made in Sunset's Amended and Substituted Petition.

1. The City of Denver's Utility Refund Regulation Governs.[2]

The City of Denver is a municipal corporation with the

---

[2] Although the district court did not appear to rely upon this argument in either of its rulings that limited Sunset's recovery to five years, the argument was urged by Denver throughout the proceedings below. Specifically, Denver urged this argument in its briefing in support of its motion for summary judgment and in resistance to Sunset's motion for summary judgment. (Memorandum of Law in Support of City's Motion for Summary Judgment, at p. 8; Combined Resistance to Plaintiff's Motion for Summary Judgment and Reply to Plaintiff's Resistance to City's Motion for Summary Judgment, at pp. 1-4; App. 87-152). Denver further argued its local regulations controlled the refund period in its Resistance to Plaintiff's Motion to Reconsider Proposed Ruling on Motions for Summary Judgment. (App. 183). Finally, Denver advanced the argument in its Brief in Support of its Resistance to Plaintiff's Motion to Reconsider, Amend, and Enlarge Ruling on Motions for Summary Judgment. (Brief in Resistance to Plaintiff's Motion to Reconsider, Amend, and Enlarge Ruling on Motions for Summary Judgment, ps. 5-6). The appellate court may affirm "'on any basis appearing in the record and urged by the prevailing party.'" *Iowa Tel. Ass'n v. City of Hawarden*, 589

authority to exercise any power not inconsistent with state law. Iowa Constitution, Art. III, § 38A. ("Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government…."). Iowa Code section 384.84 specifically places authority over municipal utility rates and services in the hands of cities themselves. *See* Iowa Code § 384.84 (2017) ("The governing body of a city utility, combined utility system, city enterprise, or combined city enterprise may establish, impose, adjust, and provide for the collection of rates and charges…."); *see also* Iowa Code § 476.1(4) (setting forth jurisdiction of the Iowa Utilities Board as excluding municipally-owned utilities); *Id.* § 476.1B (stating legislative pronouncement of home rule for municipal utilities and municipally-owned utility furnishing electricity who are not subject to regulation by the Iowa Utilities Board except for specific enumerated exceptions not applicable to this case).

N.W.2d 245, 252 (Iowa 1999) (quoting *Matter of Estate of Voss*, 553 N.W.2d 778, 879 n.1 (Iowa 1996)). The issue presented by Denver's ordinance is therefore properly before this Court on appeal. *Id.*

This legal landscape demonstrates that debt collection and refunds are the province of the municipal utility as the regulating authority. Here, Denver chose to exercise its home rule authority by incorporating the Iowa Utilities Board's bill adjustment regulation into its local code of ordinances for all electric utility customers. Denver, Iowa, Code § 14.04.010 (May 2004), *available at* http://cityofdenveriowa.com/city-code/.[3] Specifically, Denver chose to implement the Utilities Board's customer relation rules which include the Utilities Board's bill adjustment rule (199 Iowa Admin. Code § 20.4(14)), in Denver's fiscal policy, which was adopted by resolution of the Denver City Council. (App. 87-93; App. 117-152). The Iowa Utilities Board's bill adjustment rule includes a provision specifying customers

[3] Denver, Iowa, Code § 14.04.010 reads:

> 14.04.010 State Regulations Adopted. The "Regulations Governing Service Supplied by Electric Utilities" required by the Iowa State Commerce Commission, Utilities Division in compliance with Chapter 490A, Code of Iowa, 1966 are hereby adopted by reference as the official regulations governing service supplied by the City of Denver electric utility. An official copy of the "Regulations" as adopted is on file in the office of the City clerk and is available for public inspection. (Ord. 2-66 §l, 1966).

are entitled to a refund of five years for overcharges. (App. 101). A public utility customer may appeal to the Iowa Utilities Board, as the regulating authority for public utilities, for a greater refund on a case-by-case basis.[4] (App. 101).

Applying Denver's regulation to the circumstances in this case, Sunset's remedy for a municipal utility overcharge is a five-year refund. (App. 87-152). The Denver refund policy is Sunset's remedy at law and as a result, the district court did not err in limiting Sunset to five years of recovery.

Regardless of the fact Sunset is seeking to recover more than the amount provided under Denver's refund policy, Denver's utility regulation is a valid exercise of home rule authority that is not preempted. *See Hensler v. City of Davenport*, 790 N.W.2d 569, 585 (Iowa 2010) ("For conflict preemption to apply, the local ordinance must be "irreconcilable" with state law, meaning the conflict must be 'obvious, unavoidable, and not a matter of reasonable debate.'"

[4] In the case of Sunset, it would therefore have the right to appeal to the Denver City Council as the regulating authority for a refund of greater than five years. Sunset, however, has not exercised this right as of the time of filing this appeal.

(quoting *City of Davenport v. Seymour*, 755 N.W.2d 533, 538 (Iowa 2008))). Iowa Code section 614.1(4) provides a five year statute of limitations for "all other actions not otherwise provided for." Iowa Code § 614.1(4) (2017). Denver's uniform customer policy provides a remedy of five years of refund for overcharges. Iowa Code Chapter 614 is not placed in issue. The policy's refund term is thus not irreconcilable with the residual category of the statute of limitations in section 614.1(4).

Moreover, in matters of local policy within a city's legislatively-granted discretion, courts will not "second-guess whether it was a 'good or bad decision.'" *Fults v. City of Coralville*, 666 N.W.2d 548, 555 (Iowa 2003) (quoting *McMurray v. City of West Des Moines*, 642 N.W.2d 273, 280 (2002)). Here, the Denver City Council determined the Iowa Utility Board's five-year refund policy should be its own utility policy. This Court should affirm the district court's determination Sunset's recovery of refund is limited to five years.

2. Unjust Enrichment is Not Available.

Because the undisputed facts do not support the elements of Sunset's claim for unjust enrichment, the statute of

limitations defense and the discovery rule discussion are not applicable. The doctrine of unjust enrichment is a remedy of restitution, sometimes referred to as a quasi-contract or an implied-in-law contract theory. *Iowa Waste Systems, Inc. v. Buchanan County*, 617 N.W.2d 23, 29 (Iowa Ct. App. 2000). Such "contracts" do not arise from the traditional bargaining process, but rather, "rest on a legal fiction arising from considerations of justice and the equitable principles of unjust enrichment." *Hunter v. Union State Bank*, 505 N.W.2d 172, 177 (Iowa 1993). Importantly, the doctrine only operates in the absence of a contract. *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 791 (Iowa 1985). Thus, the existence of a contract between the parties generally bars the unjust enrichment claim as a matter of law. *Id.*

To call upon the court's equitable jurisdiction for recovery under a claim of unjust enrichment, Sunset must demonstrate: (1) it conferred a benefit upon Denver to its own detriment, (2) Denver had an appreciation of receiving the benefit, (3) Denver accepted and retained the benefit under circumstances making it inequitable for there to be no return payment for its value,

and (4) there is no at-law remedy that can appropriately address the claim. *Buchanan Cty.*, 617 N.W.2d at 30.

In *Chariton Feed and Grain v. Harder*, 369 N.W.2d 777 (Iowa 1985), the Iowa Supreme Court examined the second element requiring an appreciation of receiving a benefit at the other party's expense. In *Harder*, two parties were designated as landlord and tenant under a stock-share lease. *Harder*, 369 N.W.2d 777, 779. The landlord received the benefit of the feed for the livestock, but the tenant under the lease was the party responsible for paying the supplier for the feed. *Id.* at 790. The tenant defaulted in his payment obligations to a third-party feed supplier, the plaintiff. *Id.* at 780. The supplier sued the landlord in equity, claiming the landlord had been unjustly enriched. *Id.* at 790. The Court held the necessary element of knowledge was lacking since the landlord did not know the tenant was not paying. *Id.*

> This rule assumes that the recipient enjoys greater knowledge of the circumstances under which the service is rendered than does the provider of the service. The facts of the instant appeal do not conform to that model. Harder knew no more of Davidson's precarious finances than did Chariton Feed. Similarly, Chariton Feed made no mistake as

> to the party with whom it dealt. Davidson ordered the grain, accepted delivery and promised to pay. Chariton Feed did not mistakenly deliver the goods to Harder, who, knowing of Chariton Feed's error, accepted them in bad faith.

Id. at 791.

Similarly, in this case, Sunset concedes Denver had no knowledge of the multiplier calculation issue until March 2014. (Pl.'s Brief, at p. 32 ("Finally, it is significant that the City itself had long failed to recognize the multiplier problem despite its unfettered access to the meter, the meter card, and the associated records."); Pl.'s Brief in Support of Motion for Partial Summary Judgment, at p. 9). The district court correctly found Denver lacked the requisite knowledge of receiving a benefit to which it was not entitled when it determined:

> There is nothing in the summary judgment record to indicate or suggest that either party or any of their respective officers, employees, representatives or agents knew or should have known that the Utility was using an incorrect rate multiplier for the meter or was overcharging Plaintiff for the electricity supplied to and used at its long-term care facility at any time between May 22, 1985, and March 24, 2014.

(App. 186). The district court did not err in declining to apply the discovery rule to Sunset's claim of unjust enrichment when

there was no evidence to support that Denver knew it had benefitted from the overcharges.

3. The District Court Properly Premised the Limitation Period Upon the Contractual Nature of the Relationship Consistent with the Continuing Violations Doctrine.

Although Denver does not necessarily agree the relationship between a municipal utility and its ratepayers is purely contractual due to the regulatory nature of the role of municipal utilities in Iowa, the district court nonetheless characterized Sunset's claims for refund as claims arising under a contract to receive electric utility services from Denver each month. (App. 188). As the district court noted, "[t]he Utility offered to sell and Plaintiff agreed to purchase electricity at a set rate per kilowatt." (App. 188). The district court thus found Sunset's claims accrued upon issuance of each separate erroneous invoice. (App. 185-186, 188).

The wrong at the center of Sunset's lawsuit is Denver's monthly application of the incorrect rate multiplier on each of Sunset's bills. (App. 185). Iowa law provides when an alleged wrongful act is continuous or repeated such that separate and

successive actions for damages arise, the statute of limitations period runs from the occurrence of each such injury. *Anderson v. Yearous*, 249 N.W.2d 855, 860 (Iowa 1977); *see also* 54 C.J.S. Limitations of Actions § 235 (2018). Under this doctrine, recovery is limited to those actions accruing during the statutory period preceding the inception of the current action for damages. *See Earl v. Clark*, 219 N.W.2d 487, 491 (Iowa 1974) (holding that in a continuing tort, the burden of segregating successful damages arising before and after the commencement of the five-year limitations period falls on the defendant); *see also Eppling v. Seuntjens*, 254 Iowa 396, 404, 117 N.W.2d 820, 825 (1962) (limiting recovery to damages sustained during the last five years where first of continuing damages accrued over six years before commencement of action).

This principle applied by Iowa courts is sometimes also referred to as the "continuing violations" or "continuing accrual" rule. *See, e.g.*, Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonz. L. Rev. 271, 279 (2007-2008 ed.) ("Graham") (discussing the "continuing violations" doctrine); *see also Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1199, 292 P.3d 871,

880 (2013) (discussing and applying the "continuing accrual" doctrine); *Aryeh*, 55 Cal. 4th at 1192, 292 P.3d at 876 n.3 (separately defining the doctrines as different branches of the same tolling rule in California).

The rule is applicable to toll the statute of limitations period and provide recovery for separate wrongs in a series of misconduct as each event occurs within the statutory limitation period. Graham, 43 Gonz. L. Rev., at 281. The California Supreme Court has articulated the doctrine as an alternative rule of accrual when the underlying acts would each sustain an independent right of action against the defendant:

> Generally speaking, continuous accrual applies whenever there is a continuing or recurring obligation: 'When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period. Because each new breach of such an obligation provides all the elements of a claim—wrongdoing, harm, and causation' —each may be treated as an independently actionable wrong with its own time limit for recovery…. [*T]he theory of continuous accrual supports recovery only for damages arising from those breaches falling within the limitations period.*

Aryeh, 55 Cal. 4th at 1199, 292 P.3d at 880 (emphasis added)

(internal quotations and citations omitted).(emphasis added)). *But see Acts Ret.-Life Communities, Inc. v. Town of Columbus*, 789 S.E.2d 527, 531 (N.C. Ct. App. 2016) (concluding repeated overbilling of water charges due to water utility's initial reclassification of water rates was not a continuing violation, but rather only "continual ill effects from an original violation," and barring Plaintiffs' recovery).

In Iowa, when both the continuous accrual doctrine and the discovery rule are available, the Iowa Supreme Court first examines the continuous accrual doctrine. *See, e.g., K&W Electric, Inc. v. State*, 712 N.W.2d 107, 117 (Iowa 2006) ("Before addressing the issue of what K & W knew or should have known after the 1993 flood, we consider the plaintiff's contention that each flood gave rise to a new claim at which time the statute of limitations began anew.").

Here, the district court's ruling is in accord with Iowa law because it limits Sunset's recovery to those damages that occurred as a result of Denver collecting overcharges on each separate monthly invoice issued within five years prior to Sunset's filing of its petition. As a result, the district court was

correct in applying the five-year statute of limitations in Iowa Code section 614.1(4) with no discovery rule to toll accrual of Sunset's claims on monthly invoices prior to December 2011.

4. The District Court's Decision is Consistent with Precedent Concerning Application of Statutes of Limitations.

The court's conclusion is also consistent with the general legislative policy underlying statutes of limitations. Statutes of limitations represent a decision by our legislature that some matters should no longer be litigated.

> They represent expedients, rather than principles. They are practical and pragmatic devices used to spare our courts from the added burden from the litigation of stale claims, and the citizen from the need to defend after memories have long since faded, witnesses have died or disappeared, and evidence lost.

Schulte v. Wageman, 465 N.W.2d 285, 286 (Iowa 1991). The necessity of applying an appropriate limitations period is not always well-received by a plaintiff. As was aptly recognized, however, by the Court of Appeals in *Bradley v. Manternach*, No. 06-1622, 2007 WL 3376777, at *2 (Iowa Ct. App. 2007):

> The harsh results that may be perceived from the application of the statute of limitations and the discovery rule stem from legislative policy decisions

> and not from judicial application. *See Schlote*, 676 N.W.2d at 194 (stating statutes of limitations "have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate …"); *Gates v. John Deere Ottumwa Works*, 587 N.W.2d 471, 475 (Iowa 1998) (discussing the discovery rule recognizes that public interest in predictability and finality of litigation overrides the harsh results for an individual plaintiff).

Bradley, 2007 WL 3376777, at *2. The public interest in predictability and finality of litigation must therefore override the concern over a perceived harsh result for an individual plaintiff. *Id.* In order to determine the appropriate statute of limitations for a particular cause of action, the court looks to the foundation of the action. *Legg v. West Bank*, 873 N.W.2d 763 (2016).

The foundation of the action in this case is an agreement between Denver and its electric utility customers to furnish electric services in exchange for monthly payment. This arrangement is an "other action" for which the court could find the limitation period is five years. *See* Iowa Code §614.1(4). There is no precedent for application of the discovery rule. As

a result, the district court did not err in its application of the statute of limitations.

The cases listed by Sunset on pages 26 to 28 of its appellate brief are distinguishable for two primary reasons. First, none of those cases involved a municipal utility agreement for monthly billing in exchange for services. Uniform application of a five-year refund under either Denver's own utility refund policy or Iowa Code section 614.1(4) promotes the legislative policy underlying the statute of limitations. *See Bradley*, 2007 WL3376777, at *2. Second, none of the cases listed by Sunset involve a claim of unjust enrichment. This Court should decline Sunset's invitation to create new law in this regard.

II. THE DISTRICT COURT CORRECTLY DETERMINED THERE IS NO ISSUE OF MATERIAL FACT CONCERNING FRAUDULENT CONCEALMENT AND ESTOPPEL.

A. Preservation of Error.

Denver agrees error has been preserved regarding Sunset's claims of post-2014 fraudulent concealment and estoppel.

B. Scope and Standard of Review.

Denver agrees with Sunset's statement of the scope and standard of review.

C. Analysis.

The District Court correctly found there was no issue of material fact on Sunset's claims of fraudulent concealment or equitable estoppel preventing application of Denver's statute of limitations defense in this case. First and foremost, Sunset's claim Denver's City Administrator fraudulently concealed the claim from Sunset is a red herring. The record is undisputed Denver did not learn of Sunset's multiplier and meter issue until March 2014. (App. 21; Pl.'s Proof Brief, at p. 8). Upon learning of the issue, the billings going forward were corrected. (App. 21; App.18). Thus, beginning in April 2014, Sunset began receiving and paying invoices in an amount roughly half of what they had ever previously been receiving. Sunset concedes there were no damages between 2014 and 2016 (Pl.'s Proof Brief, at p. 8).

Furthermore, the evidence does not support the requisite element Denver knowingly made a false statement on each invoice. (Pl.'s Proof Brief, at p. 32). Sunset has also not claimed

Denver failed to carry out a necessary practice, procedure, or inspection that led to a failure to disclose the multiplier issue before 2014. (App. 75-77). There is no support for an estoppel claim. This red herring cannot resuscitate and save the claims for monthly overcharges on each invoice occurring between 1985 and 2011. The district court did not err in failing to apply the discovery rule on the basis of either Sunset's fraudulent concealment or equitable estoppel arguments.

CONCLUSION

In this case, recovery of 28 years of monthly invoices from the City of Denver, Iowa, is not supported by governing law in multiple respects. Denver operates an electric utility for the benefit of all of its customers within the city and is self-regulating. Denver was as ignorant of the multiplier issue as Sunset was. For all of the reasons expressed on the record and in this brief, Denver respectfully requests this Court affirm the district court's determination Sunset is limited to five years of refund for overcharges on its monthly electric invoices.

REQUEST FOR ORAL ARGUMENT

Denver requests to be heard in oral argument on this appeal.

/s/ Randall H. Stefani
Randall H. Stefani

/s/ Maria E. Brownell
Maria E. Brownell
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309
(515) 243-7611
(515) 243-2149 (fax)
rstefani@ahlerslaw.com
mbrownell@ahlerslaw.com
ATTORNEYS FOR APPELLEE

CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing final brief was electronically filed via the Iowa Supreme Court's Electronic Data Management System (EDMS) on the 15th day of August, 2018

/s/ Randall H. Stefani

Randall H. Stefani
Maria E. Brownell
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309
(515) 243-7611
(515) 243-2149 (fax)
rstefani@ahlerslaw.com
mbrownell@ahlerslaw.com
ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

It is hereby certified that on the 15th day of August, 2018, the undersigned party, or person acting on its behalf, did file via EDMS the foregoing document, which gives notice thereof to the following:

David J. Dutton
Erich D. Priebe
3151 Brockway Road
PO Box 810
Waterloo, Iowa
DuttonD@wloolaw.com
PriebeE@wloolaw.com
Attorneys for Plaintiff-Appellant

/s/ Randall H. Stefani

Randall H. Stefani
Maria E. Brownell
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309
(515) 243-7611
(515) 243-2149 (fax)
rstefani@ahlerslaw.com
mbrownell@ahlerslaw.com
ATTORNEY FOR APPELLEE

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOUME LIMITATION

This final brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

> This proof brief has been prepared in a proportionally spaced typeface using Microsoft Word Bookman Old Style in size 14 font, and contains 4,500 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Randall H. Stefani

Randall H. Stefani
Maria E. Brownell
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309
(515) 243-7611
(515) 243-2149 (fax)
rstefani@ahlerslaw.com
mbrownell@ahlerslaw.com
ATTORNEY FOR APPELLEE

01510138-1\10381-003