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

APPLICATION FOR FURTHER REVIEW BY DEFENDANT-APPELLEE CITY OF DENVER IOWA OF COURT OF APPEALS DECISION DATED OCTOBER 23, 2019

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QUESTION PRESENTED FOR FURTHER REVIEW

1. Does the discovery rule apply in municipal utility overcharge disputes when the municipal utility's governing body has adopted a five-year refund period?

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STATEMENT SUPPORTING FURTHER REVIEW

Pursuant to Iowa Rule of Appellate Procedure 6.1103(1)(b) and specifically, subsections (1) and (2) of that rule, Defendant-Appellee, the City of Denver, Iowa ("City"), requests this Court grant its application for further review of the Iowa Court of Appeals' decision filed on October 23, 2019 because the Court of Appeals erred in refusing to apply the City's validly enacted local refund period. (Court of Appeals Opinion, at 5-6). In general, the question of whether municipal electric utility overcharge disputes may be subject to a local limitations period enacted under Article III, section 38A of the Iowa Constitution, or are instead subject to ordinary statutes of limitations, is "a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court." Iowa R. App. P. 6.1103(1)(b)(2).

ARGUMENT

I. BACKGROUND

This lawsuit arises from a dispute between a ratepayer and a municipal electric utility for charges the City mistakenly billed and collected. The City owns and operates a utility that

provides electricity to customers in exchange for payment of a rate that is billed monthly. (App. 72). The Denver City Council passed a resolution adopting the Iowa Utilities Board's rule entitling customers to a refund of up to five years for any overcharges. (App. 87-93; 101; 117-152). In this case, the City unknowingly issued monthly bills to Denver Sunset Nursing Home ("Sunset"), which were calculated using the wrong meter multiplier for over 28 years. (App. 185). The City was not aware of any potential overcharges until March 2014. (App. 14). Sunset filed suit in 2016, seeking recovery of damages for the inadvertent overcharges on a theory of "public utility duress". (App. 187). The City offered to pay Sunset a refund equal to five years of overcharges consistent with the City's policy. (App. 255).

In the district court, the City filed a motion for summary judgment requesting dismissal of Sunset's public utility duress claim, and an order limiting any refund to five years. (App. 10). Sunset filed a motion for partial summary judgment requesting judgment on the issue of the City's liability. (App. 24). In its

ruling on the parties' cross-motions for summary judgment, the district court limited Sunset's recovery to five years and did not apply the discovery rule. (App. 188-89).

II. THE COURT OF APPEALS ERRED IN APPLYING THE DISCOVERY RULE TO A MUNICIPAL UTILITY BILLING DISPUTE WHEN A LOCAL FIVE-YEAR REFUND PERIOD APPLIES.

The Court of Appeals first erred when it held Iowa Code section 614.1(4) and the discovery rule apply in this case instead of the City's resolution enacting a five-year refund period. (Court of Appeals Opinion, at 5). Specifically, the Court of Appeals erred in two respects. First, the statute of limitations and discovery rule do not apply when a municipal utility's governing body has enacted a refund period. Second, the application of the discovery rule cannot be based solely on the "contractual nature of the relationship" between the City and Sunset under Iowa Code section 614.1(4). (Court of Appeals Opinion, at 5).

A. The Court of Appeals Erroneously Disregarded the City's Resolution that Limited Sunset's Refund.

The Court of Appeals' application of the discovery rule under the "other actions not otherwise provided for" provision of Iowa Code section 614.1(4) is incompatible with Iowa law granting home rule authority to the City to promulgate its own refund period for utility overcharges. There are two reasons the Court of Appeals' decision conflicts with Iowa law.

First, the Denver City Council was not required to pass an ordinance to validly exercise its home rule authority to enact a refund period. (Court of Appeals Opinion, at 10-11). All authority of a city is vested in its council. Iowa Code § 364.2(1) (2019). The council exercises the city's powers by passage of a motion, resolution or ordinance. *Id.* § 364.3(1). This Court has considered city council resolutions to be a valid exercise of municipal home rule authority. *See Sioux City Police Officers' Ass'n v. City of Sioux City*, 495 N.W.2d 687, 693 (Iowa 1993) (analyzing city council anti-nepotism policy passed by resolution under Article III, Section 38A of Iowa Constitution). Thus, under Iowa law, the City validly adopted the five-year

refund period set forth in the Iowa Utility Board's ("IUB") regulations by incorporation in a council resolution. *See id.* The Court of Appeals therefore erred in concluding the City needed to pass an ordinance to validly enact an applicable refund period. *See* Court of Appeals Opinion, at 10. ("The City's reliance on its 'utility refund regulation' is hindered by the absence of a record on the pertinent municipal ordinance.").

Second, contrary to the Court of Appeals' opinion, the IUB regulation incorporated by reference validly established a five-year refund period. *See id.*, at 11 ("In any event, the IUB regulation does not limit Denver Sunset's recovery to "five years" as the City contends."). Specifically, the City chose to implement the Utilities Board's customer relation rules into its own utility policy, which was adopted by city council resolution. (App. 87-93; App. 117-152). The adopted regulations included a bill adjustment rule (Iowa Admin. Code rule 199—20.4(14)). (App. 87-93; App. 117-152). The rule includes a provision specifying customers are entitled to a refund of five years for overcharges. (App. 101). Customers of a public utility are

allowed the opportunity to request a greater refund from the IUB, as the regulating authority over public utility billing matters. (App. 101). The Denver City Council is the governing authority over all matters concerning the city's electric utility. *See* Iowa Code § 364.2(1). As the district court in this case correctly noted, a customer such as Sunset could request a refund over five years from the Denver City Council. (App. 189). Sunset, however, never in fact requested a refund from the City Council.[1]

In sum, the Court of Appeals erred in failing to apply the City's resolution limiting overcharge refunds because the City's resolution was a valid exercise of the City's regulatory authority under Article III, section 38A of the Iowa Constitution. This Court should reverse the Court of Appeals and affirm the

[1] Sunset's maintenance employee made inquiries to the City Administrator regarding a refund. (App. 192). The City Administrator is not the proper entity to whom a refund request must be directed, however, as the city council is the governing authority for the City's electric utility. Iowa Code § 364.2(1). In any event, Sunset's governing board of directors decided to file this lawsuit instead of seeking action from the City Council after it received the City Administrator's decision to apply the City's five-year refund regulation. App. 194-95.

district court's determination Sunset's recovery of refund is limited to five years.

B. Municipal Utility Charges are Not Part of an Unwritten Contract with Ratepayers.

The Court of Appeals concluded the City created a "contractual relationship" with Sunset. Court of Appeals Opinion, at 13. For the following reasons, this conclusion is erroneous.

It is axiomatic under Iowa law that any contract requires proof of an offer, acceptance, and consideration. *Bartlett Graine Co., LP v. Sheeder*, 829 N.W.2d 18, 23 (Iowa 2013). Consideration under any contract must be "bargained for." *Meincke v. Nw. Bank & Trust Co.*, 756 N.W.2d 223, 227 (Iowa 2008). Although the City argued in its brief there is an element to the utility-customer relationship that involves an exchange of services for money (*See* Final Brief of Appellee, at 22), the full legal context of the relationship between municipal utilities and their customers in Iowa demonstrates the relationship is not akin to an ordinary contractual relationship for several reasons.

First, there is no "bargained for" exchange as required for a finding of an ordinary contract under Iowa law, because the City's "offer" to serve, and Sunset's "acceptance" to pay for that service is not established by negotiation between the parties. Instead, the foundation of the relationship is established by the exclusive service territory granted to the city by the legislature and Iowa Utilities Board. *See* Iowa Code § 476.1B (subjecting municipal electric utilities to IUB regulation for assigned areas of service); *id.* § 476.23(1)-(2) (requiring municipal utilities to obtain IUB approval to establish or expand service territory); Iowa Admin. Code rs. 199—20.3(8) ("Service areas are defined by the boundaries on service area maps."), 20.3(10) (requiring municipal utilities to petition the Iowa Utilities Board for a certificate of authority to serve any customers within the territory of another electric utility).

In addition, the rate to be paid for electricity is established by ordinance, not by negotiation. *See* Iowa Code § 384.84(1) ("Rates must be established by ordinance of the council or by resolution of the trustees…"). The appropriate statute of

limitations is determined by properly characterizing the nature of the action. *Sandbulte v. Farm Bureau Mut. Ins. Co.*, 343 N.W.2d 457, 462 (Iowa 1984), *overruled on other grounds by Langwith v. Am. Nat'l Gen. Ins. Co.*, 793 N.W.2d 215, 223 (Iowa 2010). As the above authorities show, the Court of Appeals erred in concluding the cause of action in this case is purely contractual. Court of Appeals Opinion, at 13.

CONCLUSION

The City of Denver operates an electric utility for the benefit of all of its customers within the city and is self-regulating. Application of the discovery rule is not supported by Iowa law under the circumstances of this case. The City respectfully requests this Court reverse the Court of Appeals' decision refusing to apply the City's utility bill refund period and instead applying the discovery rule to allow an unlimited refund. The City further requests the Court affirm the district court's determination Sunset is limited to five years of refund for overcharges on its monthly electric invoices.

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CONDITIONAL REQUEST FOR ORAL ARGUMENT

In the event the Court grants the Application for Further Review, the City requests to be heard in oral argument.

CERTIFICATE OF FILING

The undersigned hereby certifies that the Application for Further Review of the Appellant was electronically filed via the Iowa Supreme Court's Electronic Data Management System (EDMS) on the 12th day of November, 2019.

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CERTIFICATE OF SERVICE

It is hereby certified that on the 12th day of November, 2019, the undersigned party, or person acting on its behalf, did file via EDMS the foregoing document, which gives notice thereof to the following:

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOUME LIMITATION FOR AN APPLICATION FOR FURTHER REVIEW

This Application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

> This Application has been prepared in a proportionally spaced typeface using Microsoft Word Bookman Old Style in size 14 font, and contains 1,650 words, excluding the parts of the Application exempted by Iowa R. App. P. 6.1103(4)(a).

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