IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
February 7, 2023 Session

ROBERT L. WHITWORTH ET AL. v. CITY OF MEMPHIS ET AL.

Appeal from the Chancery Court for Shelby County
No. CH-21-0423 Jim Kyle, Chancellor

No. W2021-01304-COA-R3-CV

Appellant city residents sued the City of Memphis for breach of contract, breach of implied contract, unjust enrichment, and promissory estoppel related to inadequate garbage collection services provided by the City. Residents also sought a constructive trust and a declaratory judgment. The trial court dismissed the breach of contract action upon its conclusion that the provision of garbage collection services was a government function that did not create an enforceable contract between the city and its residents. The trial court dismissed the residents' other contractual claims on the basis that they were barred by sovereign immunity. Finally, the trial court dismissed the claims for constructive trust and declaratory judgment upon its conclusion that they did not state a claim for relief under the circumstances. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed And Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which KENNY ARMSTRONG and CARMA DENNIS MCGEE, JJ., joined.

Frank L. Watson, III, William F. Burns and William E. Routt, Memphis, Tennessee, for the appellants, Robert L. Whitworth, Denson Ward, III, Patricia A. Possel, Robert E. Possel, and Sue G. Ward.

Christopher L. Vescovo, Stephen W. Vescovo, and Isaac S. Lew, Memphis, Tennessee, for the appellees, City of Memphis.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 21, 2021, Appellant Robert L. Whitworth filed a complaint for damages against Appellee the City of Memphis ("the City") in Shelby County Chancery Court ("the trial court").[1] A day later, an amended complaint was filed to add four additional plaintiffs, Patricia A. Possel, Robert E. Possel, Sue G. Ward, and Denson Ward, III (together with Mr. Whitworth, "Appellants") and to include class action allegations. Appellants thereafter sought leave to amend their complaint a second time, which was granted by consent. The second amended complaint is therefore the operative complaint for purposes of the appeal.

Appellants' complaint related to substandard garbage services provided to Memphis residents in a particular area of the city referred to as "Area E." According to Appellants, following the annexation of Area E, the City chose to employ a third-party vendor for trash pick up services in that area, unlike other areas of the city. Despite Area E residents paying the monthly line item fee required for trash services mandated by Memphis ordinance, the complaint alleged that the third-party vendors "have failed and refused to provide weekly garbage, recycling and bi-weekly bulk and yard waste pick up, leaving trash literally piling up in Area E." As a result, Area E residents have "not receive[d] the services for which they contracted and for which they have paid." The complaint further detailed numerous media pieces indicating that the failures were systemic and well-known. Based on these facts, Appellants asserted five claims against the City: (1) breach of contract; (2) breach of the implied duty of good faith and fair dealing; (3) unjust enrichment, breach of implied contract, and promissory estoppel; (4) constructive trust; and (5) declaratory judgment.

The City filed a motion to dismiss on June 4, 2021. Therein, the City argued that each of Appellants' five claims failed for different reasons. For example, with regard to the breach of contract and the breach of the implied duty of good faith and fair dealing claims, the City asserted that no contract existed between the City and Appellants. With regard to the quasi-contractual claims, the City claimed immunity, or in the alternative, that these claims failed as a matter of law. The City further argued that Appellants could not show they were entitled to a constructive trust and or a declaratory judgment. So the City asked that the complaint be dismissed in its entirety.

Appellants responded in opposition to the City's motion. In support, Appellants filed the declarations of three of the five named plaintiffs and another Area E property owner, detailing the manner in which fees are charged, how services were advertised and guaranteed, and what services were rendered to Area E residents.

A hearing on the City's motion was held on September 12, 2021. The trial court then entered an order granting the City's motion on October 8, 2021. Therein, the trial court essentially credited the City's argument as to each of the five claims contained in Appellants' complaint. Appellants therefore appealed to this Court.

[1] Memphis Light, Gas, and Water ("MLGW") was also a named defendant, but it was voluntarily dismissed and is not at issue in this appeal.

II. ISSUES PRESENTED

Appellants raise a single issue in this appeal, as taken from their brief: "Do residents have contractual and/or equitable causes of action against a municipality that promises to provide trash collection services for a line-item fee and, after receiving payment, fails to adequately provide the promised services?" As we perceive it, the sole issue in this appeal is whether the trial court erred in granting the City's motion to dismiss.

III. STANDARD OF REVIEW

The Tennessee Supreme Court has previously outlined the standard of review where a party defending an action files a motion to dismiss the plaintiff's complaint for failure to state a claim upon which relief can be granted:

> A [Tennessee Civil Procedure] Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. ***Highwoods Props., Inc. v. City of Memphis***, 297 S.W.3d 695, 700 (Tenn. 2009); ***Willis v. Tenn. Dep't of Corr.***, 113 S.W.3d 706, 710 (Tenn. 2003); ***Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.***, 986 S.W.2d 550, 554 (Tenn. 1999); ***Sanders v. Vinson***, 558 S.W.2d 838, 840 (Tenn. 1977). The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. ***Leggett v. Duke Energy Corp.***, 308 S.W.3d 843, 851 (Tenn. 2010); ***Trau-Med of Am., Inc. v. Allstate Ins. Co.***, 71 S.W.3d 691, 696 (Tenn. 2002); ***Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc.***, 878 S.W.2d 934, 938 (Tenn. 1994); ***Cornpropst v. Sloan***, 528 S.W.2d 188, 190 (Tenn.1975) (overruled on other grounds by ***McClung v. Delta Square Ltd. P'ship***, 937 S.W.2d 891, 899–900 (Tenn. 1996)). A defendant who files a motion to dismiss "'admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action.'" ***Brown v. Tenn. Title Loans, Inc.***, 328 S.W.3d 850, 854 (Tenn. 2010) (quoting ***Freeman Indus., LLC v. Eastman Chem. Co.***, 172 S.W.3d 512, 516 (Tenn. 2005)); *see* ***Edwards v. Allen***, 216 S.W.3d 278, 284 (Tenn. 2007); ***White v. Revco Disc. Drug Ctrs., Inc.***, 33 S.W.3d 713, 718 (Tenn. 2000); ***Holloway v. Putnam Cnty.***, 534 S.W.2d 292, 296 (Tenn. 1976).
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> In considering a motion to dismiss, courts "'must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.'" ***Tigg v. Pirelli Tire Corp.***, 232 S.W.3d 28, 31–32 (Tenn. 2007) (quoting ***Trau-Med***, 71 S.W.3d at 696); *see* ***Leach v. Taylor***, 124 S.W.3d 87, 92–93 (Tenn. 2004); ***Stein v. Davidson Hotel Co.***, 945 S.W.2d 714, 716 (Tenn. 1997); ***Bellar v. Baptist Hosp., Inc.***, 559 S.W.2d 788, 790 (Tenn. 1978); *see also* ***City of Brentwood***

> ***v. Metro. Bd. of Zoning Appeals***, 149 S.W.3d 49, 54 (Tenn. Ct. App. 2004) (holding that courts "must construe the complaint liberally in favor of the plaintiff by . . . giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts"). A trial court should grant a motion to dismiss "only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." ***Crews v. Buckman Labs. Int'l, Inc.***, 78 S.W.3d 852, 857 (Tenn. 2002); *see* ***Lanier v. Rains***, 229 S.W.3d 656, 660 (Tenn. 2007); ***Doe v. Sundquist***, 2 S.W.3d 919, 922 (Tenn. 1999); ***Pemberton v. Am. Distilled Spirits Co.***, 664 S.W.2d 690, 691 (Tenn. 1984); ***Fuerst v. Methodist Hosp. S.***, 566 S.W.2d 847, 848 (Tenn. 1978); ***Ladd v. Roane Hosiery, Inc.***, 556 S.W.2d 758, 759–60 (Tenn. 1977). We review the trial court's legal conclusions regarding the adequacy of the complaint de novo. ***Brown***, 328 S.W.3d at 855; ***Stein***, 945 S.W.2d at 716.

Webb v. Nashville Area Habitat for Human., Inc., 346 S.W.3d 422, 426 (Tenn. 2011).[2]

IV. ANALYSIS

A. Breach of Contract

Appellants' first cause of action is for breach of contract. "In order to make a prima facie case for a breach of contract claim, a plaintiff must allege: '(1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract.'" ***Tolliver v. Tellico Vill. Prop. Owners Ass'n***, 579 S.W.3d 8, 25 (Tenn. Ct. App. 2019) (quoting ***C & W Asset Acquisition, LLC v. Oggs***, 230 S.W.3d 671, 676–77 (Tenn. Ct. App. 2007)). The central question here involves whether a contract exists upon which a breach of contract action may lie.

In order to establish a contract, Appellants made the following allegations in their complaint:

> By virtue of imposing trash collection fees upon [Appellants] and the Class Members and informing them of the weekly and bi-weekly trash collection dates that their trash would be collected, a contract was formed between the City [] and the [Appellants] and Class Members for the weekly collection of solid waste and the bi-weekly collection of bulk/yard waste, based upon the

[2] Although Appellants filed declarations in response to the City's motion to dismiss, the trial court does not reference them in its order dismissing this case. Indeed, even Appellants insist that this case should be decided upon the motion to dismiss standard, rather than converted to a motion for summary judgment. *See* ***Belton v. City of Memphis***, No. W2015-01785-COA-R3-CV, 2016 WL 2754407, at *3 (Tenn. Ct. App. May 10, 2016) (holding that motion to dismiss is converted to a motion for summary judgment only "where a trial court *considers* matters outside the pleadings" (emphasis added)).

rates billed by MLGW at the City's direction.[3]

The trial court ruled that no contract existed between Appellants and the City for trash collection services because the City was performing "an ordinary government function." Appellants counter that such may be the case for other types of government services, such as the services of the police or fire department, but the collection of fees for trash services is indicative of a contractual relationship. In support, Appellants note that trash services are subject to fees beyond simple tax collection. And trash services terminate when the fees are not paid. *See* City of Memphis, Code of Ordinances, § 9-56-16(B) [hereinafter, "Code of Ordinances"] ("In the event that all or any portion of the solid waste disposal fee remains unpaid after 30 days . . . the city shall cease the collection of solid waste from that premises."). Moreover, Appellants argue that there was a sufficient meeting of the minds as to this purported contract by virtue of printed flyers promulgated by the City outlining the particulars of the trash pickup, as well as ordinances that regulate, inter alia, the types of containers that must be used. Thus, Appellants do not point to a traditional written agreement as evidence of a contract, but to a series of statutes, ordinances, and public statements that combine to create what they contend is an enforceable contract for garbage collections services.

In contrast, the City contends that the trial court correctly determined that the trash services at issue stemmed from a government service, rather than a contract. In support, the City notes that municipalities are authorized by statute to impose and collect fees for trash services. *See* Tenn. Code Ann. § 68-211-835(g)(1) (authorizing a municipality "to impose and collect a solid waste disposal fee" for the purposes of "establish[ing] and maintain[ing] solid waste collection and disposal services"). Under the auspices of this statute, the City adopted ordinances governing the collection of fees for trash disposal within its borders. The City further points out that it is generally accepted that garbage removal services are government functions. *See, e.g.*, ***Town of Carthage, Tennessee v. Smith Cnty.***, No. 01-A-01-9308-CH00391, 1995 WL 92266, at *6 (Tenn. Ct. App. Mar. 8, 1995) ("Providing for the expeditious removal and disposal of solid waste is certainly a governmental function."); 7 *McQuillin Mun. Corp.* § 24:250 (3d ed. 2022) ("The gathering

[3] In their reply brief, Appellants clarify that the type of contract they assert was created in this case is unilateral—that is, a contract that was accepted through performance. *See* ***Rode Oil Co. v. Lamar Advert. Co.***, No. W2007-02017-COA-R3-CV, 2008 WL 4367300, at *6 (Tenn. Ct. App. Sept. 18, 2008) (quoting 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 3.4, at 205 (3d ed.2004) ("In forming a unilateral contract only one party makes a promise: the offeror makes the promise contained in the offer, and the offeree renders some performance as acceptance.")). Under this theory, Appellants contend that the City offered garbage collection to Area E residents, which Area E resident accepted by paying monthly service fees.

Appellants, however, do not mention their theory that the alleged contract at issue is unilateral in either their initial brief or their complaint. Generally, reply briefs are not vehicles for raising new legal theories. ***Owens v. Owens***, 241 S.W.3d 478, 499 (Tenn. Ct. App. 2007) ("A reply brief is a response to the arguments of the appellee. It is not a vehicle for raising new issues."). Still, our analysis herein that no contractual rights exist applies regardless of whether the purported contract was bilateral or unilateral.

of garbage is not a trade, business, or occupation, but it is a public duty, to be performed by a city in a manner that will best promote the health of the inhabitants.").

The City also notes that Appellants cite no legal authority of any kind for their assertion that the collection of a fee transforms this government service into a contractual obligation. Indeed, the City points out that the Tennessee Supreme Court has previously held that a city may impose a fee to defray the costs of even its police powers—the very powers Appellants admit are non-contractual. *See* ***Memphis Natural Gas Co. v. McManless***, 194 S.W.2d 476, 483 (Tenn. 1946) (holding, in a case involving inspection fees imposed by a public utility, that "[e]ven if the purpose of the assessment was limited to the exercise of the police power, fees imposed to defray the expenses of that exercise are not objectionable"); *cf.* 7 *McQuillin Mun. Corp.* § 24:250 (explaining that governmental entities provide garbage services under either their general or police powers).

Moreover, the City points out that at least one case has concluded that the payment of a fee for a government service does not create an enforceable contract between the governmental entity and its residents. *See* ***Skyrise Apartments, Inc. v. City of Rockford***, 83 Ill. App. 3d 447, 403 N.E.2d 1334 (1980). In ***Skyrise Apartments***, the City of Rockford contracted with a private garbage collection company to provide garbage services to its residents pursuant to an ordinance allowing such a contract. ***Id.*** at 448. This contract, however, did not provide for garbage services for hotels, motels, or apartment buildings containing five or more units. ***Id.*** The owners of an apartment building sued the city, arguing that the new contract violated the then-in-effect ordinance providing for garbage collection.[4] The trial court dismissed the complaint, and the owners appealed.

As relevant to this case, the owners of the apartment building argued on appeal that "[t]he moneys expended by the plaintiffs for garbage collection are recoverable as moneys had and received by the city, which saved that money by wrongfully withholding garbage collection service from the plaintiffs." In resolving this issue, the Court first held that because "the function [i.e., trash collection] was a governmental one[,] . . . the failure to perform it is not the basis for an action in damages." ***Id.*** at 732.

The Court also rejected the owners' contention that they had a contract with the city obligating the city to perform garbage collection services:

> Inasmuch as the plaintiffs had no contract with the city whereby the city agreed to provide them refuse services, there is no basis for the contention that the city should reimburse the plaintiffs for the amounts the plaintiffs

[4] During the pendency of the ***Skyrise Apartments*** litigation, the city amended its ordinance to reflect that that five-unit apartment buildings were eliminated from garbage collection service. Still, the city argued that the new ordinance was not required to exclude these dwellings from garbage services because the new contract amended the old ordinance by implication when it chose to exclude apartment buildings from the new contract. ***Id.***

> have expended for private refuse collection. The expectations of the plaintiffs, as a particular group of persons, do not create a contract and it would indeed set an unfortunate precedent if private expenditures could be turned into public obligations without more basis of right than appears here. . . . The basis of this claim is neither a private contract nor a public obligation and we see no basis for money damages.
> . . . [R]ecovery of damages under these circumstances would seem to us to set a most unfortunate precedent in measuring civic responsibility. Whether the city properly amended its ordinance or not, the city is not answerable in damages since there was never any contract between it and the plaintiffs . . . .

Id. at 733.

Appellants appear to assert that that ***Skyrise Apartments*** is not reflective of Tennessee law,[5] citing ***Ussery v. City of Columbia***, 316 S.W.3d 570 (Tenn. Ct. App. 2009), which Appellants characterize as holding that a city's violation of ordinances may serve as a basis for a breach of implied contract action. Appellants' argument misapprehends ***Ussery*** in two significant respects. First, even setting aside the distinction between the breach of an express contract and the breach of an implied contract,[6] Appellants are incorrect that the ***Ussery*** court held that the city's ordinances created an implied contract. While the ***Ussery*** panel did affirm the underlying judgment on the basis that the city had violated its own ordinances promising pay raises to its employees, it specifically held that the evidence was insufficient to create a contract implied at law.[7] ***Id.*** at 583 ("[T]he ordinances do not reach the level of a contract implied in law."). Only because the issue of the violation of the ordinances, outside of any contractual action, was tried by consent, was this Court able to affirm the underlying judgment. ***Id.*** at 583–84. Here, Appellants have framed their claims solely as contractual or quasi-contractual in nature, not as a violation of an ordinance or a statute by the City. Neither do Appellants assert that such a claim was tried by consent. There is "no duty on the part of the court to create a claim that the pleader does not spell out in his complaint." ***Moses v. Dirghangi***, 430 S.W.3d 371, 376 (Tenn. Ct. App. 2013) (citing ***Utter v. Sherrod***, 132 S.W.3d 344 (Tenn. Ct. App. 2003)). Thus, the ***Ussery*** panel's ultimate holding that the city's violation of ordinances was sufficient in that particular situation to set forth a cause of action apart from a breach of contract is wholly inapposite here.

Second, and perhaps most importantly, the plaintiffs in ***Ussery*** were employees of the city and their claims were related to employment. ***Id.*** at 573. Because "the employer-employee relationship is contractual in nature[,]" it was not unreasonable to apply contract

[5] Appellants do not actually discuss ***Skyrise Apartments*** in either their initial or reply briefs.

[6] As discussed, *infra*, Appellants' action for breach of an implied contract is barred by sovereign immunity. Sovereign immunity was not discussed in ***Ussery***. *See generally* ***id.*** at 576–89.

[7] The trial court also found that the ordinances were insufficient to create an express contract, which was not appealed. ***Id.*** at 582. So in ***Ussery***, neither an express nor an implied contract was created.

principles to that particular situation. ***Id.*** at 578 (quoting ***Hamby v. Genesco, Inc.***, 627 S.W.2d 373, 375 (Tenn. Ct. App. 1981)). The same is simply not true in this case.

Here, like the plaintiffs in ***Skyrise Apartments***, Appellants are seeking damages related to subpar government services provided to them. But, unlike the employer-employee relationship, government functions are typically not characterized as contractual in nature under Tennessee law. As an initial matter, to the extent that Appellants rely on various ordinances and statutes, we begin with the "presumption that ordinances and statutes are not contractual in nature."[8] ***Id.*** at 581 (citing ***Dodge v. Bd. of Educ. of Chicago***, 302 U.S. 74, 58 S. Ct. 98, 82 L. Ed. 57 (1937)). Other law confirms the correctness of that presumption in this situation. Indeed, like in Illinois, Tennessee law confirms that garbage collection performed by a municipality is a government function. *See* Tenn. Code Ann. § 68-211-835(g)(1); ***Town of Carthage***, 1995 WL 92266, at *6. This is illustrated by the fact that a municipality may charge a fee for garbage collection services that are not utilized by a resident. *See* ***City of Bolivar v. Goodrum***, 49 S.W.3d 290, 294 (Tenn. Ct. App. 2000) (holding that waste disposal "fees may be legally imposed on residents regardless of whether the services are actually utilized"); ***Horton v. Carroll Cnty.***, 968 S.W.2d 841, 846 (Tenn. Ct. App. 1997) (holding that a county "may legally impose a monthly fee on all its rural residents for solid waste disposal services regardless of whether the services are actually utilized"). And the Tennessee Supreme Court has previously made clear that "the mere collection of fees from a given service does not per se transform an otherwise public function into a private one." ***City of Memphis v. Bettis***, 512 S.W.2d 270, 273 (Tenn. 1974) (citing ***Nashville Trust Co. v. City of Nashville***, 182 Tenn. 545, 188 S.W.2d 342 (Tenn. 1944); ***McMahon v. Baroness Erlanger Hospital***, 43 Tenn. App. 128, 306 S.W.2d 41 (Tenn. Ct. App. 1957)) (stating that this rule is "long held").

Given that the garbage collection at issue here is a government service, we cannot conclude that it bestows any rights on residents that may be enforced via a breach of contract action. Importantly, Tennessee law is clear that municipalities are generally immune from suit for actions arising from their government functions. ***Bettis***, 512 S.W.2d at 272–73 ("The rule in Tennessee is that a municipality is immune from liability arising from the acts of its agent while carrying out a governmental function[.]"); ***Vaughn v. City of Alcoa***, 194 Tenn. 449, 453, 251 S.W.2d 304, 305 (Tenn. 1952) ("In this State a municipality is liable in damages for tort to its citizens only if it was negligent in the operation of one of its proprietary functions as distinguished from its governmental functions or if it created or maintained a nuisance in the performance of one of its governmental functions."); *cf.* Tenn. Code Ann. § 29-20-201(a) ("Except as may be otherwise provided in this chapter [involving governmental tort liability], all governmental entities shall be immune from suit for any injury which may result from the activities of

[8] In addition to the various statues and ordinances governing garbage collection, Appellants also cite their declarations, which detail alleged oral statements by City officials that they assert are part and parcel of the contract here.

such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.").[9] Appellants' attempt to frame this action as a breach of contract cannot alter the fundamental truth that their claim relates the performance of a government function by the City. Simply put, the City collected fees as authorized by statute and ordinance to perform a government function. That the City did not perform this function up to par does not transform a government function into a contractual one, nor does it rebut the presumption that the relevant statutes and ordinances do not create a contractual relationship for which a breach of contract action may lie. Thus, we conclude that Appellants can prove no set of facts demonstrating the existence of an enforceable contract between themselves and the City. As such, their breach of contract action must fail. *See* ***Tolliver***, 579 S.W.3d at 25.

B. Implied Duty of Good Faith and Fair Dealing

Appellants next argue that the trial court erred in dismissing their claim for breach of the implied duty of good faith and fair dealing. The duty of good faith and fair dealing is implied in every Tennessee contract. *See* ***Dick Broad. Co. of Tennessee v. Oak Ridge FM, Inc.***, 395 S.W.3d 653, 660 (Tenn. 2013). However, "a claim based on the implied covenant of good faith and fair dealing is not a stand alone claim; rather, it is part of an overall breach of contract claim." ***Jones v. LeMoyne-Owen Coll.***, 308 S.W.3d 894, 907 (Tenn. Ct. App. 2009) (citing ***Lyons v. Farmers Ins. Exch.***, 26 S.W.3d 888, 894 (Tenn. Ct. App. 2000)). Thus, "there must be a contract to contain the covenant." ***Id.*** Because there was no contract between Appellants and the City, there was no duty of good faith and fair dealing for the City to breach. As such, the trial court did not err in dismissing this claim.

C. Equitable Claims

Appellants next assert that the trial court was incorrect to dismiss their equitable claims—that is, their claims for unjust enrichment, implied contract, and promissory estoppel. The City asserts that these claims are barred by the doctrine of sovereign immunity. In the alternative, the City contends that each claim was properly dismissed for failure to make out a prima facie case.

"The doctrine of sovereign immunity is a principle of the common law as old as the law itself, that the king is not bound by any statute, if he be not expressly named to be so bound." ***Colonial Pipeline Co. v. Morgan***, 263 S.W.3d 827, 848 (Tenn. 2008) (quotation marks and citations omitted). In Tennessee, the concept of sovereign immunity is enshrined

[9] This case does not involve torts, and the City has not invoked the Tennessee Governmental Tort Liability Act ("GTLA"). *Cf.* ***Simpson v. Sumner Cnty.***, 669 S.W.2d 657, 659 (Tenn. Ct. App. 1983) (holding that implied contracts and quasi contracts "have traditionally been classified as *ex contractu*" and are not torts). Immunity under the GTLA is therefore not at issue in this appeal.

in our constitution: "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." Tenn. Const. art. I, § 17. "The traditional construction of the clause is that suits cannot be brought against the State unless explicitly authorized by statute." ***Colonial Pipeline***, 263 S.W.3d at 849. The Tennessee General Assembly essentially adopted this traditional construction when it enacted Tennessee Code Annotated section 20-13-102, which states as follows: "No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property. . . ." *See* ***Colonial Pipeline***, 263 S.W.3d at 849 (stating that the Tennessee General Assembly "adopted a comparable position" to the common law rule in enacting this statute). For purposes of our immunity statutes, "the state" refers to not only the State of Tennessee, but also "its departments, commissions, boards, institutions and municipalities[.]" ***Davidson v. Lewis Bros. Bakery***, 227 S.W.3d 17, 19 (Tenn. 2007).

Thus, in order to entertain a suit against the State or one of its municipalities, we must first determine if the governmental entity has consented to being sued by looking to legislation waiving sovereign immunity. "[C]ourts will interpret a statute as waiving [] sovereign immunity only if the legislation waives sovereign immunity in plain, clear, and unmistakable terms." ***Smith v. Tennessee Nat'l Guard***, 551 S.W.3d 702, 709 (Tenn. 2018) (quotation marks omitted) (quoting ***Mullins v. State***, 320 S.W.3d 273, 283 (Tenn. 2010)). In other words, "waiver of sovereign immunity must be explicit, not implicit." ***Colonial Pipeline***, 263 S.W.3d at 853. As the Tennessee Supreme Court has explained:

> In determining whether a statute satisfies this standard, we focus "on the actual words chosen and enacted by the legislature." ***Mullins***, 320 S.W.3d at 283. Courts lack authority to abrogate the State's sovereign immunity and must avoid inadvertently broadening the scope of legislation authorizing suits or claims against the State. ***Hill v. Beeler***, 199 Tenn. 325, 286 S.W.2d 868, 869 (1956).

Tennessee Nat'l Guard, 551 S.W.3d at 709.

The City argues that the trial court correctly dismissed Appellants' claims for unjust enrichment, implied contract, and promissory estoppel on the basis of the City's sovereign immunity, citing ***Harakas Constr., Inc. v. Metro. Gov't of Nashville & Davidson Cnty.***, 561 S.W.3d 910 (Tenn. Ct. App. 2018). In ***Harakas Construction***, a construction company sued the metropolitan government of Nashville and Davidson County ("Metro") for, inter alia, unjust enrichment, implied contract, and promissory estoppel. ***Id.*** at 926. The city responded by arguing that these claims were barred by sovereign immunity. The trial court agreed, finding that there was "no statute or ordinance that allows [the plaintiff's] equitable claims against Metro." ***Id.*** at 922. The construction company thereafter appealed to this Court***. Id.***

The first question that this Court addressed was whether the trial court erred in dismissing what it characterized as the construction company's "equitable claims" under the doctrine of sovereign immunity. Citing Tennessee Code Annotated section 20-13-102(a), the Court framed its inquiry as whether a statute explicitly authorized the equitable claims against Metro. ***Id.*** at 924–25 (quoting ***Bratcher v. Hubler***, 508 S.W.3d 206, 208–10 (Tenn. Ct. App. 2015)). The plaintiff pointed to both Metro's Charter and its "Emergency Procurement Ordinance." After considering the explicit language of those provisions, however, the Court concluded that they did not "show[] an intent to consent to be sued for unjust enrichment and promissory estoppel." And because Tennessee courts "will not find a waiver of sovereign immunity in the absence of an enactment 'clearly and unmistakably disclosing an intent upon the part of the Legislature to permit such litigation,'" the Court held that the plaintiff had failed to "show[] that Metro has waived its sovereign immunity." ***Id.*** at 926 (quoting ***Bratcher***, 508 S.W.3d at 210).

So then, ***Harakas*** stands for the proposition that unless the plaintiff can show a legislative enactment in which the defendant city unmistakably consents to be sued, claims of implied contract, unjust enrichment, and promissory estoppel may be barred by sovereign immunity. And other courts have come to similar conclusions. For example, in ***Greenhill v. Carpenter***, 718 S.W.2d 268 (Tenn. Ct. App. 1986), the plaintiff attempted to sue the state under the theory of an implied contract claim. We rejected the claim on the basis of sovereign immunity:

> A determination that plaintiff is not suing on an express contract leaves her with no authority upon which to sue the state. As already noted, Article I, § 17, of the Tennessee Constitution provides that suits against the state may only be brought "in such manner and in such courts as the Legislature may by law direct." The above-cited Code section grants permission to bring suit only on express contracts.[10] Plaintiff has cited no statute authorizing a suit against the state on an implied contract, and our research has found none. *See* ***Carlson v. Highter***, 612 F. Supp. 603 (E.D. Tenn. 1985). We conclude that the trial court properly dismissed plaintiff's suit on the grounds of sovereign immunity.

Greenhill, 718 S.W.2d at 273; *see also* ***Woolsey v. Hunt***, 932 F.2d 555, 567 (6th Cir. 1991) (citing ***Greenhill***, 718 S.W.2d at 273) ("Tennessee does not recognize the enforcement of

[10] The statute, Tennessee Code Annotated section 29-10-101, was repealed following the initiation of the suit in ***Greenhill***. ***Id.*** at 273. The statutes governing claims against the State that are heard by the Tennessee Claims Commission provide that the Commission may hear claims involving "[a]ctions for breach of a written contract between the claimant and the state which was executed by one (1) or more state officers or employees with authority to execute the contract[.]" Tenn. Code Ann. § 9-8-307(a)(1)(L). The City's argument as to any express contract that exists in this case is only that there is no such express contract. As such, the question of any immunity that extends to a claim of that kind has not been addressed in this appeal.

implied contract claims against the state."); *cf.* ***Wells v. State***, No. M2002-01958-COA-R3-CV, 2003 WL 21849730, at *2 (Tenn. Ct. App. Aug. 8, 2003) (describing ***Greenhill*** as holding that a claim "was on an implied contract rather than an express contract and therefore not within the court's jurisdiction").

In their attempt to reverse the trial court's application of immunity, Appellants have pointed to a handful of cases in which they assert equitable claims against municipalities have been countenanced by Tennessee courts. For example, in ***City of Lebanon v. Baird***, 756 S.W.2d 236 (Tenn. 1988), the Tennessee Supreme Court stated that "the concepts of estoppel or of implied contract have been used to remedy the unjust enrichment of a city." ***Id.*** at 245. Later, in ***EnGenius Ent., Inc. v. Herenton***, 971 S.W.2d 12 (Tenn. Ct. App. 1997), this Court held that a trial court erred in dismissing a promissory estoppel claim against a city. ***Id.*** at 20. The problem with Appellants' reliance on these cases, however, is that none of the cited cases discuss sovereign immunity in any fashion. *See* ***Baird***, 756 S.W.2d at 245–46 (involving a claim that the city entered into a written contract with the defendant, then failed to enact the ordinance that authorized the contract; affirming the trial court's finding that there was no estoppel or implied contract claim based on the facts of the case); ***EnGenius***, 971 S.W.2d at 18–21 (reversing the trial court's judgment that the plaintiff failed to make out a prima facie claim of unjust enrichment and promissory estoppel); *see also* ***London & N.Y. Land Co. v. City of Jellico***, 103 Tenn. 320, 52 S.W. 995 (Tenn. 1899) (allowing third-party contractor to obtain the benefit of an invalid contract without any discussion of immunity); ***Memphis Gaslight Co. v. City of Memphis***, 93 Tenn. 612, 30 S.W. 25 (Tenn. 1894) (allowing the plaintiff to recover against the City even though no written contract was at issue for earlier years without any discussion of sovereign immunity); ***Trull v. City of Lobelville***, 554 S.W.2d 638 (Tenn. Ct. App. 1976) (holding that a city could be held to its implied promise without any discussion of sovereign immunity). As such, it is entirely unclear whether immunity was raised as a defense to the actions against the cities at issue. And "[i]t is axiomatic that judicial decisions do not stand for propositions that were neither raised by the parties nor actually addressed by the court." ***Staats v. McKinnon***, 206 S.W.3d 532, 550 (Tenn. Ct. App. 2006) (citing ***Shousha v. Matthews Drivurself Serv., Inc.***, 210 Tenn. 384, 390, 358 S.W.2d 471, 473 (Tenn. 1962)). So these cases are inapposite to the question of whether claims of unjust enrichment, implied contract, and promissory estoppel are barred by sovereign immunity.

Moreover, even if these cases could provide the authorization for suit that is necessary to waive sovereign immunity, none of the cases involve the situation presented here, where citizens are suing a municipality under the theory that the payment of fees for government services creates an implied contract or other quasi-contractual right to recover against a municipality. Instead, the cited cases typically involve municipalities ostensibly contracting with third-parties to provide a benefit to the city, but the contracts being invalidated due to some infirmity. *See* ***Baird***, 756 S.W.2d 236 (involving contract that was ultra vires because not authorized by ordinance); ***London & N.Y. Land Co.***, 52 S.W. 995 (involving contract with third-party for street improvements that was invalid because it was

voted on at a city council meeting without sufficient notice); ***Memphis Gaslight Co.***, 30 S.W. 25 (contract for some years not written as required by city charter, where other years were covered by a written contract); ***EnGenius***, 971 S.W.2d 12 (where the parties were still in the negotiation phase of contracting); ***Trull***, 554 S.W.2d 638 (contract not authorized by city council); *cf.* ***Elizabethton Hous. & Dev. Agency, Inc. v. Price***, 844 S.W.2d 614, 618 (Tenn. Ct. App. 1992) (noting, in a case where the governmental entity was seeking damages against a private party, that estoppel claims against government agencies are only allowed in "exceptional circumstances" such as "when the agency induced the party to give up property or a right in exchange for a promise" or "when the government induces a private party to relinquish a cause of action"). The trial court recognized that these cases were not analogous to the present situation, characterizing the cited cases as involving proprietary functions, rather than government functions. And as previously discussed, unlike proprietary functions, governmental entities have long enjoyed robust immunity for actions taken in furtherance of their governmental functions. *See* ***Vaughn***, 251 S.W.2d at 305. As such, we cannot conclude that any of the cited cases provide support for Appellants' contention that claims of unjust enrichment, implied contract, or promissory estoppel related to the provision of garbage collection services as a government function are somehow excepted from traditional notions of sovereign immunity.[11]

In sum, unlike the plaintiff in ***Harakas***, Appellants have made no effort in their appellate brief to point to a single statute or ordinance that they assert explicitly evinces the City's consent to be sued for unjust enrichment, implied contract, and/or promissory estoppel. As previously discussed, it is these legislative enactments that we must look to in order to determine whether sovereign immunity has been waived. ***Colonial Pipeline***, 263 S.W.3d at 849; ***Bratcher***, 508 S.W.3d at 210. Under these circumstances, we conclude that sovereign immunity applies to bar Appellants' claims for unjust enrichment, implied contract, and promissory estoppel. The trial court therefore did not err in dismissing these claims. All other arguments relative to these claims are pretermitted.

D. Constructive Trust

Appellants next assert that the trial court erred in dismissing their claim for a constructive trust. Neither party disputes the requirements of this claim. As we have previously explained,

> "A constructive trust may only be imposed against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment or questionable means, has obtained an interest in property which he ought not

[11] Our holding in this case is therefore limited to the question of immunity for unjust enrichment, implied contract, and promissory estoppel in the context of government, rather than proprietary, functions.

in equity or in good conscience retain."

Story v. Lanier, 166 S.W.3d 167, 185 (Tenn. Ct. App. 2004) (quoting ***Intersparex Leddin KG v. Al-Haddad,*** 852 S.W.2d 245, 249 (Tenn. Ct. App. 1992)). There are four types of cases where Tennessee have imposed constructive trusts:

> (1) where a person procures the legal title to property in violation of some duty, express or implied, to the true owner; (2) where the title to property is obtained by fraud, duress or other inequitable means; (3) where a person makes use of some relation of influence or confidence to obtain the legal title upon more advantageous terms than could otherwise have been obtained; and (4) where a person acquires property with notice that another is entitled to its benefits.

Myers v. Myers, 891 S.W.2d 216, 219 (Tenn. Ct. App. 1994) (citations omitted). When the trial court determines that a trust should be imposed, "the court, in equity, removes the property from the person holding title, the trustee, and puts the property in trust for the benefit of the person harmed, the beneficiary." ***Findley v. Hubbard***, No. M2017-01850-COA-R3-CV, 2018 WL 3217717, at *8 (Tenn. Ct. App. July 2, 2018) (citing ***Tanner v. Tanner***, 698 S.W.2d 342, 346–47 (Tenn. 1985); ***Browder v. Hite***, 602 S.W.2d 489, 492–93 (Tenn. Ct. App. 1980)).

After incorporating their prior allegations concerning the City's alleged wrongdoing, Appellants stated in their complaint only the following with regard to their claim for a constructive trust:

> A constructive trust arises contrary to intention and in invitum [against an unwilling party], against one who, by commission of a wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. As a result of the wrongful conduct alleged above, [the City has] obtained garbage collection fees from [Appellants] and the Class Members which, in equity and good conscience, [it] should not hold and enjoy. Therefore, this Court should establish a constructive trust from which [Appellants] and the Class Members may claim funds rightfully belonging to them.

The trial court found that this was insufficient to make out a claim for a constructive trust because the failure to adequately collect trash is not the type of wrongful conduct that is contemplated by the caselaw. In addition, the trial court noted that the wrongful conduct was performed by the third-party trash collectors, rather than the City.

On appeal, Appellants' argument is also limited. Specifically, their argument as to how the facts of this case warrant a constructive trust is confined to the following:

> [I]t is entirely inequitable for the City to represent to its residents that it will provide trash collection services and to use its influence as a municipality to obtain fees for these services without providing the promised services. The City has thus procured legal title to the fees paid by [Appellants] and putative class in violation of their duty to provide trash collection services, inequitably, and on favorable terms to it through the exercise of its influence as a municipality. [Appellants] have sufficiently stated a claim for constructive trust.

Respectfully, Appellants' allegations and their arguments on appeal are insufficient to make out a prima facie claim for a constructive trust. Here, Appellants' allegations essentially amount to a claim that the City required residents to pay a fee for a service that was substandard. Certainly, we share the trial court's concern that the City's residents were not provided with the services that they were both paying for and desperately needed. But these allegations simply do not indicate that the City utilized anything amounting to fraud, duress, abuse of confidence, artifice, or concealment in their dealings with residents on this issue. ***Intersparex Leddin,*** 852 S.W.2d at 249. Instead, the City imposed fees on residents for services as authorized by both statute and ordinance. The City allegedly failed to provide these services in an appropriate manner. Appellants have cited no analogous caselaw to suggest that this situation falls within one of the recognized situations where a constructive trust may be imposed. As such, the trial court did not err in dismissing this claim.

E. Declaratory Judgment

Appellants finally assert that the trial court erred in dismissing their declaratory judgment claim. The Tennessee Declaratory Judgment Act provides as follows:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Tenn. Code Ann. § 29-14-103. This statute "permits persons interested in a written contract to obtain a declaratory judgment concerning their rights, status, or other legal relations under the contract." ***Dobbs v. Guenther***, 846 S.W.2d 270, 275 (Tenn. Ct. App. 1992). The statute is to be construed liberally, but the statute will only grant relief "to parties who have a real interest in the litigation . . . and when the case involves present rights that have

accrued under presently existing facts." ***Id.*** (citations omitted).

In the complaint, Appellants sought two separate declarations: (1) that "by imposing and collecting trash collection fees from [Appellants] and the Class Members, [the City] owed the legal obligation to timely and properly collect trash on a weekly and bi-weekly basis, pursuant to the pick-up schedules established by [the City], and that [the City] ha[s] breached this legal obligation"; and (2) that the City has "breached their contractual duties or other duties created by law, which has proximately caused damages to [Appellants] and the Class Members."

In dismissing this claim, the trial court ruled that Appellants could not obtain a declaratory judgment because there was no "private contractual rights" created by the offering of trash services by the City. On appeal, the City further argues that Appellants' declaratory judgment claim is merely duplicative of its other claims, which have been dismissed on other grounds. *See* ***Miami Yacht Charters, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh****,* No. 11-21163-CIV-GOODMAN, 2012 U.S. Dist. LEXIS 57041, at *2, 2012 WL 10100125 (S.D. Fla. 2012) (noting that "[a] court must dismiss a claim for declaratory judgment if it is duplicative of a claim for breach of contract and, in effect, seeks adjudication on the merits of the breach of contract claim"); ***Narvaez v. Wilshire Credit Corp.,*** 757 F. Supp. 2d 621, 636 (N.D. Tex. 2010) (dismissing as "redundant" a declaratory judgment claim that was asserted in addition to a claim for of breach of contract); ***Camofi Master LDC v. Coll. P'ship.***, 452 F. Supp. 2d 462, 480 (S.D.N.Y. 2006) (emphasizing that the declaration sought would "already be addressed in the breach of contract claim" and, thus, that "a declaratory judgment would not further clarify legal relations among the parties"). We agree that this claim was properly dismissed.

In their brief, Appellants clearly articulate the purpose of their declaratory judgment claim: to resolve a dispute "over the existence of the contractual relationship between the City and Area E residents." Thus, Appellants essentially seek a declaration that they have a contract with the City and for the Court to explain the "rights, status, and legal relationship with the City under the contract[.]" But this claim has been resolved by our holding that no such contract was in fact created, as discussed *supra*. As such, there is no contract to construe or explain in this case. So Appellants' claim for a declaratory judgment concerning the enforceability and parameters of such a contract must also fail.

V. CONCLUSION

The judgment of the Shelby County Chancery Court is affirmed, and this cause is remanded to the trial court for all further proceedings as may be necessary and consistent with this Opinion. Costs of this appeal are taxed to Appellants, Robert L. Whitworth, Patricia A. Possel, Robert E. Possel, Sue G. Ward, and Denson Ward, III, for which execution may issue if necessary.

s/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE