IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 22-0427

MISSOULA COUNTY,

Plaintiff-Appellant,

v.

STATE OF MONTANA; MONTANA DEPARTMENT OF CORRECTIONS; AND BRIAN GOOTKIN, in his official capacity as the Director of the Montana Department of Corrections,

Defendants-Appellees.

On Appeal from the Montana First Judicial District
Lewis and Clark County Cause No. ADV-2020-588
Honorable Judge Mike Menahan

APPELLEES' ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……..……...iv

STATEMENT OF THE ISSUES……..1

I. Whether the District Court properly applied the statutory one-year statute of limitations in granting the DOC's Motion for summary judgment on Missoula County's claim of breach of contract?……1

II. Whether the District Court correctly conluded that Missoula County failed to meet the threshold requirements of a special relationship to support its claim for breach of the implied covenant of good faith and fair dealing?.....1

III. Whether the District Court correctly determined that Missoula County could not recover tort damages for its claim of unjust enrichment based upon a valid contract, because it did not timely file its claim?.....1

IV. Whether the doctrine of sovereign innumity bars Missoula County's claims of breach of the implied contracts theories of covenant of good faith and fair dealing and of unjust enrichment?.....1

STATEMENT OF THE CASE…….....2

STATEMENT OF FACTS……3

STANDARD OF REVIEW…….……9

SUMMARY OF THE ARGUMENT 10

ARGUMENT.....12

I. The District Court Properly Applied the One-Year Statute of Limitations of §18-1-402(2), MCA When It Concluded the County’s Claim for Breach of the CJH Contract is Time-Barred.. 12

A. The District Court Also Properly Concluded that The County's Theories of Liability All Sounded in Contract and Are Foreclosed by the One Year Statute of Limitations Governing Contract Claims Against the State 15

II. The District Court Correctly Concluded the County Failed to Present Sufficient Evidence of a Special Relationship to Support a Claim for Damages in Tort.....18

A. There is No Special Relationship Between the Parties That Could Support a Claim for Tort Damages……19

B. Count V is Barred by the Statute of Limitations……..22

C. The DOC Cannot Be Held Liable for Acts of the Legislature Pursuant to §2-9-111, MCA……24

III. The District Court Properly Granted Summary Judgment on the County's Claim of Unjust Enrichment.....25

IV. Counts V and VII (Implied Covenant and Unjust Enrichment) are Barred by the Doctrine of Sovereign Immunity.……26

CONCLUSION.....28

CERTIFICATE OF COMPLIANCE.....29

CERTIFICATE OF SERVICE……29

TABLE OF AUTHORITIES

Cases

Alexander v. Mont. Developmental Ctr., 2018 MT 271, 393 Mont. 272, 430 P.3d 90 9

Associated Mgmt. Servs. v. Ruff, 2018 MT 182, 392 Mont. 139, 424 P.3d 571 25

Border States Paving v. State, Case No. ADV-92-1396, 1993 Mont. Dist. LEXIS 581 (Mont. 1st Jud. Dist. Ct., Jan. 28, 1993) 27

Borges v. Missoula Cty. Sheriff's Office, 2018 MT 14, 390 Mont. 161, 415 P.3d 976 9

Butler v. Peters, 62 Mont. 381, 205 P. 247 (1922).....27

Coll. Sav. Bank. V. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).....26

Dewey v. Stringer, 2014 MT 136, 375 Mont. 176, 325 P.3d 1236.....16

Dist. No. 55 v. Musselshell County, 245 Mont. 525, 802 P.2d 1252 (1990) 28

Grant Creek Heights, Inc. v. Missoula County, 2012 MT 177, 366 Mont. 44, 285 P.3d 1046 10

Johnson v. Dist. VII, Human Res. Dev. Council, 2009 MT 86, 349 Mont. 529, 204 P.3d 714 10

Kinniburgh v. Garrity, 244 Mont. 350, 798 P.2d 102 20

Lutey Construction-The Craftsman v. State, 257 Mont. 387, 851 P.2d 1037 (1993)..... 12, 17, 22

Mont. Digital, LLC v. Trinity Lutheran Church, 2020 MT 250, 401 Mont. 482, 473 P.3d 1009..... 10, 25

Northern Montana Hospital v. Knight, 248 Mont. 310, 811 P.2d 1276 (1991).....16

Peretti v. State, 238 Mont. 239, 777 P.2d 329 (1989) 26, 27

Phelps v. Frampton, 2007 MT 263, 339 Mont. 330, 170 P.3d 474.....18

Plakorus v. Univ. of Mont., 2020 MT 312, 402 Mont. 263, 477 P.3d 311 ..... passim

Speer v. State, 2020 MT 45, 399 Mont. 67, 458 P.3d 1016 9

Stephens v. Safeco Ins. Co. of Am., 258 Mont. 142, 852 P.2d 565 (1993) 20

Story v. Bozeman, 242 Mont. 436, 791 P.2d 767 ..... passim

Wallis v. Sup. Ct., 207 Cal. Rptr. 123 (Cal. Ct. App. 1984) 19

Warrington v. Great Falls Clinic, LLP, 2019 MT 111, 395 Mont. 432, 443 P.3d 369 20

Wing v. State, 2007 MT 72, 336 Mont. 423, 155 P.3d 1224 10

Wolfe v. Flathead Elec. Coop., Inc., 2018 MT 276, 393 Mont. 312, 431 P.3d 327 12

Statutes

§ 1-2-101, MCA 14

§ 17-7-103, MCA 23

§ 17-7-122, MCA 23

§ 18-1-404, MCA 26

§ 27-2-202, MCA 13

§ 28-1-211, MCA 18, 27

§ 2-9-102, MCA 26

§ 2-9-111, MCA 24

§ 7-32-2242, MCA 2, 3, 8

§ 17-7-113, MCA 5

§ 17-7-132, MCA 23

§ 18-1-402, MCA ..... passim

Rules

M.R. Civ. P. 56 9

Constitutional Provisions

Art. II, § 18, Mont. Const.....26

STATEMENT OF ISSUES PRESENTED[1]

The Defendants-Appellees, State of Montana, Montana Department of Corrections and Brian Gootkin, (hereafter the "DOC") restate the issues on appeal as follows:

1. Whether the District Court properly applied the statutory one-year statute of limitations in granting the DOC's motion for summary judgment on Missoula County's claim of breach of contract?
2. Whether the District Court correctly concluded that Missoula County failed to meet the threshold requirements of a special relationship to support its claim for breach of the implied covenant of good faith and fair dealing?
3. Whether the District Court correctly determined that Missoula County could not recover tort damages for its claim of unjust enrichment based upon a valid contract, because it did not timely file its claim?
4. Whether the doctrine of sovereign immunity bars Missoula County's claims of breach of the implied contracts theories of covenant of good faith and fair dealing and of unjust enrichment?

[1] It appears that Plaintiff-Appellant Missoula County ("County") has abandoned its claim for declaratory relief found in Count I. The Defendants-Appellees will not, therefore, address it in their Answer Brief.

STATEMENT OF THE CASE

The Plaintiff-Appellant, Missoula County ("County") filed a Complaint in the Montana First Judicial District Court on April 23, 2020, against the Defendant-Appellees, State of Montana, Montana Department of Corrections and Brian Gootkin, its Director ("DOC"). The County alleged breach of contract, breach of the implied covenant of good faith and fair dealing and unjust enrichment, all relating to the reimbursement rates that the DOC paid to the County for holding DOC inmates in the Missoula County detention center and the Missoula Assessment and Sanction Center ("MASC"). Further, the County sought declaratory rulings interpreting § 7-32-2242, MCA.

The County initially filed a motion for partial summary judgment as to Counts I and II on November 9, 2020, related to the declaratory rulings. The DOC responded and then filed its own motion for summary judgment on all counts on March 4, 2021. The County filed a cross motion for summary judgment on Counts III-VIII on April 14, 2021. All motions were fully briefed as of May 26, 2021.

After participating in mandatory settlement discussions, the parties resolved Counts II, IV, VI and VIII, all related to the MASC contract, and filed a Rule 41 Stipulated Dismissal of partial claims, disposing of those counts on February 10, 2022. DC Doc. 80.

On June 6, 2022, the First Judicial District Court issued its Order on Cross Motions for Summary Judgment, granting the DOC's motion for summary judgment on Counts I, III, V, and VII, and denying the County's motions for summary judgment on the same claims. DC Doc. 81.

On August 4, 2022, the County timely filed its Notice of Appeal.

STATEMENT OF FACTS

The DOC detains inmates in Montana county detention centers, including the Missoula County Detention Facility, pursuant to Mont. Code Ann. § 7-32-2242(1). *Appellant's Appendix* 3, DC Doc. 18, *Schlauch Affidavit,* ¶ 4. Section 7-32-2242(2)(a), MCA, requires the DOC to pay the costs of holding a person "at a rate that is agreed upon by the arresting agency and the detention center that covers the reasonable costs of confinement, excluding capital constructions costs." DOC refers to inmates placed in county detention centers as "county jail holds." *Id.*, ¶¶ 4-5.

In 2012, DOC staff worked with the Montana Association of Counties, the Montana Sheriffs and Peace Officers Association, the Montana Highway Patrol and the county commissioners for Cascade and Fergus counties to develop a Per Diem Rate Calculation Worksheet ("2012 Worksheet"). *App. 3,* DC Doc. 18, *Schlauch Aff., ¶ 6; App. 2.* DC Doc. 17*, Elliott Aff.*, Ex. 1. All counties holding DOC inmates could use the 2012 Worksheet to submit information to the DOC regarding

the costs of county jail holds, which enabled the DOC and counties to determine what constituted "reasonable costs" in negotiating reimbursement rate agreements. *App. 3,* DC Doc. 18, *Schlauch Aff.*, ¶ 6.

The 2012 Worksheet was not used by the DOC as the definitive and final method by which reimbursement rates were determined. Often there were additional data and discussions exchanged between the DOC and the counties before the parties reached an agreement on the final rate, at which time the parties would memorialize the agreement. *Id.,* ¶ 7.

Based upon calculations using the 2012 Worksheet, the DOC and the County entered into a *County Detention Center Reimbursement Agreement,* effective January 23, 2015, for its county jail holds. Contract # 15-029-CJH ("CJH Contract"). The DOC agreed to reimburse the County at a rate of $88.73 per inmate per day. *App. 2,* DC Doc. 17, *Elliott Aff.,* ¶ 4; Ex. 2. Although the initial terms of the contract ended on January 31, 2016, it renewed automatically for a two-year period after the initial term. *Id., p. 1, Sec. II.B.* Thus, the Contract was in effect from January 23, 2015, until it expired on January 31, 2018.

Contrary to the County's Statement of Facts, the DOC did not provide testimony during the 2015 legislative session, related to a proposed cap on reimbursement rates for county jail holds. Rather, in preparation for the session, the Governor's 2017 Biennium budget requested funding for secure care contract

beds without any limit on reimbursement rates. *Appellees' Supplemental Appendix B.1,* DC Doc. 48, Defs.' Ex. J, at D-56. When House Bill 2 ("HB 2"), the general appropriations bill, was initially introduced, it did not contain any language regarding a cap on the county jail hold reimbursement rates. *Supp. App. B.2,* DC Doc. 48, Defs.' Ex. K, at D-3 & D-4. However, during the waning days of the legislative session, lawmakers became concerned after "reading newspaper articles about how the counties were making bank on the state, and that became a concern." *Supp. Aff. B,* DC Doc. 48, Defs.' Appendix A, Pl.'s Audio Ex. C, at 16:21.[2]

Between April 18 and 23, 2015, DOC employees responded to requests from the Office of Budget Planning and Programming (OBPP) and from Legislative Services Division, seeking information about the potential fiscal effect of a cap on the reimbursement rate. *App. 4,* DC Doc. 41, Pl.'s Exs. 3 & 6; *App. 5,* DC Doc. 49, Defs.' Ex. G. These are inquiries and responses made in the ordinary and routine course of the state budget process. *See* §17-7-113, MCA. At an April 23, 2015, Free Conference Committee hearing, legislators added an amendment to HB2 capping the jail reimbursement rates. They were concerned that counties were using State funds to service their facility construction debts and "kind of taught

[2] The time stamp for the online recording linked in DC Doc. 48, Defs.' Appendix A is 8:17:50.

them a lesson" by imposing the rate cap. *Supp. App. B,* DC Doc. 48, Appendix A, Defs.' Ex. L, at 6:38:45.[3]

On April 24, 2015, the 2015 Montana Legislature passed HB 2, including a statement of intent in the HB2 appropriations bill for the 2017 biennium: "It is the intent of the legislature that the department of corrections may pay no more than $69.00 per day to hold an inmate in any county detention center." 2015 HB 2 at D-8. HB 2 went into effect July 1, 2015, through June 30, 2017.

On June 1, 2015, then Administrator of DOC's Business Management Services Division, Pat Schlauch, wrote to Missoula County Sheriff T.J. McDermott and notified him that, beginning July 1, 2015, the county jail hold reimbursement rate would be automatically capped at $69 per inmate per day. *App. 3,* DC Doc. 18, *Schlauch Aff., ¶ 10;* Ex. A.

As negotiated, the DOC paid the County under the CJH Contract on a monthly basis at the rate of $88.73. *Supp. Aff. A,* DC Doc. 33, *Stone Aff.*, ¶ 4. Generally, the DOC made payments to the County for a given month approximately one to two months later. *Id.* Effective July 1, 2015, however, DOC began reimbursing the County for county jail holds at a rate of $69 per inmate per day. *Id.,* ¶ 5; Ex. C.

[3] The time stamp for the online recording linked in DC Doc. 48, Appendix A is 14:40:28.

The County inaccurately supports its claims about the actions of the DOC during the 2015 Legislative session in its Statement of Facts with exhibits and statements that pertain only to the 2017 legislative session and 2019 biennial budget. *See Appellant's Brief,* pp. 7-8, referencing DC Doc. 41, *Aff. Anna Conley*, Exs. 10, 13, 14 and 18. Each of these exhibits relate only to the 2017 legislative session.

When DOC prepared its 2019 biennium budget, it used the $69 rate when projecting county jail hold costs. This projection was not an explicit request for the $69 cap to continue, as evidenced by the fact that the Governor's 2019 biennium budget did not include the $69 rate cap language. *Supp. Aff. B.3,* DC Doc. 48, Defs.' Ex. N, at D-63 to -64; *Supp. Aff. B.4,* Ex. O, at D-134. It was merely one of two facts (rate and volume) that affected DOC's budget estimates.

Neither the DOC nor the Governor requested the Legislature to continue the $69 rate cap to help control county jail hold costs. In fact, continuing the rate was only one of a number of options the Legislative Fiscal Division presented in its pre-session report:

- Including restrictive language in HB 2 for the funding of this request that would be similar to the language approved for the 2017 biennium and that would cap the rate the department could pay counties for housing state offenders at $69.00 per bed per day
- Increasing the funding to address the shortfall associated with funding costs in accordance with the existing rate development structure that has, until the 2015 Legislature set the $69.00 per bed per day limit

- Increase the funding to address the base shortfall that resulted when FY 2017 funding was moved to FY 2016 to address funding sho[r]tfalls in FY 2016.

Supp. Aff. B.4, DC Doc. 48, Defs.' Ex. O, at D-156.

The 2017 Legislature heard extensive testimony from county sheriffs, commissioners, and associations in opposition to continuing the $69 rate cap for the 2019 biennium. *Supp. Aff.*, D.C. Doc. 48, Defs.' Appendix A, Pl.'s Audio Exs. C, at 5:46;[4] D, at 2:54:50 and 2:57:47;[5] Defs.' Ex. M, at 2:48.[6] A separate bill was even introduced to amend §7-32-2242(a), MCA, to require DOC to pay "actual costs" for county jail holds. *Supp Aff. B.5,* DC Doc. 48, Defs.' Ex. P, §§ 1-2. That bill died in committee, evidencing the Legislature's desire to continue the rate cap.

Ultimately, the Legislature decided to both continue the $69 rate cap and focus on reducing the number of state inmates who are housed in county jails to control county jail hold costs. The final version of House Bill 2 for the 2019 biennium stated:

> it is the intent of the legislature that the department of corrections pay no more than $69 per day to house inmates in county jails. It is further intended by the legislature that the department house no more than 250 inmates in county jails by January 1, 2018, unless the budget director and the director of the department of corrections jointly determine a need to house more than 250 inmates in county jails due to safety concerns. Further it is the intent of the legislature that the department use these funds to house inmates in state-owned facilities

[4] The time stamp for the online recording linked in Appendix A is 8:07:15.
[5] The time stamps for the online recording linked in Appendix A are 10:58:43 and 11:01:48.
[6] The time stamp for the online recording linked in Appendix A is 8:03:06.

> to the maximum extent possible before housing them in contracted secure custody beds.

2017 HB 2, at D-6 & D-7. The bill went into effect from July 1, 2017, to June 30, 2019. 2017 HB 2, at D-6 & D-7, §§ 2, 9.

The CJH Contract expired, at the latest, on January 31, 2018. Thus, there was no contractual relationship between the parties on the issue of county jail hold reimbursement rates when the 2019 legislative session began. By March 16, 2018, DOC had paid the County for county jail holds through the month of January 2018 and all prior months. *Supp. Aff. A,* DC Doc. 33, *Stone Aff.,* Ex. C.

STANDARD OF REVIEW

This Court reviews a district court's grant or denial of summary judgment *de novo*, applying the criteria of M.R. Civ. P. 56. *Speer v. State*, 2020 MT 45, ¶ 17, 399 Mont. 67, 458 P.3d 1016 (citing *Alexander v. Mont. Developmental Ctr.*, 2018 MT 271, ¶ 10, 393 Mont. 272, 430 P.3d 90). Summary judgement is proper only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c)(3).

The Court reviews a district court's conclusions of law by determining whether the district court's interpretation and application of the law was correct. *Alexander*, ¶ 10(*citing Borges v. Missoula Cty. Sheriff's Office,* 2018 MT 14, ¶ 16, 390 Mont. 161, 415 P.3d 976). The Court reviews for correctness a court's application of statutes of limitations. *Grant Creek Heights, Inc. v. Missoula*

County, 2012 MT 177, ¶ 13, 366 Mont. 44, 285 P.3d 1046 (*citing Johnson v. Dist. VII, Human Res. Dev. Council*, 2009 MT 86, ¶ 18, 349 Mont. 529, 204 P.3d 714); *see also Wing v. State*, 2007 MT 72, ¶ 9, 336 Mont. 423, 155 P.3d 1224.

On a motion for summary judgment, this Court reviews for correctness whether the moving party presented substantial evidence sufficient to support a special relationship to pursue a good faith and fair dealing claim. *See Story v. Bozeman*, 242 Mont. 436, 451, 791 P.2d 767, 776 (1990). The standard of review governing proceedings in equity is codified at § 3-2-204(5), MCA, which directs the appellate court to review all questions of fact to determine if the court's findings are clearly erroneous and review the court's conclusions of law for correctness. *Mont. Digital, LLC v. Trinity Lutheran Church*, 2020 MT 250, ¶ 9, 401 Mont. 482, 473 P.3d 1009.

SUMMARY OF THE ARGUMENT

The district court properly granted summary judgment for the DOC on Count III for breach of the CJH Contract on the grounds the claim was barred by the one-year statute of limitations governed by §18-1-402, MCA. The court properly determined that Title 18 governs contracts involving Montana state agencies and §18-1-402(2), MCA, does not contain any language limiting its statute of limitations applications only to Title 18 contracts. Because the Complaint was filed more than one year after any potential cause of action could

have accrued for breach of the express CJH Contract, Count III is time-barred and must be dismissed.

The district court correctly concluded that the County could not sustain a claim to tort damages for the breach of the implied covenant of good faith and fair dealing. In Montana, this cause of action arising from a contract requires the parties to have a special relationship, which is a threshold requirement a plaintiff must establish before considering whether the defendant committed the alleged tort. The district court properly determined that the County did not present sufficient evidence to support each element of a special relationship in granting summary judgment for the DOC on Count V.

The district court properly granted summary judgment to the DOC on the County's equitable claim of unjust enrichment in Count VII. The court determined that the parties had a valid contract and, but for its failure to timely file under §18-1-402, MCA, the County had the ability to recover contract damages under that contract for any breach. For the period after the contract expired, the County continued to accept DOC county jail holds with full knowledge of the legislatively imposed reimbursement rate caps.

The County's claims of breach of the implied covenant of good faith and fair dealing and of unjust enrichment are barred by the doctrine of sovereign immunity. While the State has waived sovereign immunity for a limited number of actions,

there has been no waiver of sovereign immunity for implied-in-fact contracts. Finally, the DOC cannot be sued for damages by the County, as a governmental subdivision of the state because there is no statutory or constitutional provision that authorizes one governmental subdivision to sue another for damages.

ARGUMENT

I. The District Court Properly Applied the One-Year Statute of Limitations of § 18-1-402(2), MCA When It Concluded the County's Claim for Breach of the CJH Contract is Time-Barred.

The County cannot recover on Count III, its claim for breach of the CJH Contract, because the applicable statute of limitations expired before the Complaint was filed. Breach of contract actions against Montana state agencies are subject to the one-year statute of limitations set forth in §18-1-402(2), MCA, which "provides that contract actions against the State, where no settlement procedure is provided to resolve conflicts, must be brought within one year after the cause of action arises." *Lutey Construction-The Craftsman v. State,* 257 Mont. 387, 389-90, 851 P.2d 1037, 1038 (1993). A breach of contract action begins to accrue when breach occurs. *See e.g.*, *Wolfe v. Flathead Elec. Coop., Inc.*, 2018 MT 276, ¶ 9, 393 Mont. 312, 315, 431 P.3d 327, 329.

Neither the CJH Contract nor DOC's administrative rules provide a settlement procedure, and thus subsection (2) of § 18-1-402, MCA, applies. The County was required to file an action for breach of contract within one year of the

alleged breach. It is undisputed that the CJH Contract terminated no later than January 31, 2018, which means that January 2018 was the last month that the County could have been contractually entitled to the $88.73 per inmate per day reimbursement rate provided for therein. No contractual agreement existed for any months after that date. The DOC paid the County on March 16, 2018, for January 2018 county jail holds at a reimbursement rate of $69.00 per inmate per day. Thus, if any breach of contract occurred due to DOC paying the $69.00 rate, it occurred no later than March 16, 2018. The statute of limitations began to accrue on that date, and it expired one year later on March 16, 2018.

The County filed the Complaint in this case on April 23, 2020, more than two years after the cause of action accrued. Because the County failed to file this action before the expiration of the statute of limitations, Count III is barred by the statute of limitations and must be dismissed.

The County continues to argue that the one-year statute of limitations in §18-1-402, MCA does not apply to the CJH Contract because it is an agreement developed under Title 7 of the Montana Code Annotated as an Interlocal Agreement. As such, the County posits that any claim for breach of the contract should be subject to the 8-year contract statute of limitations found in § 27-2-202, MCA. *Appellant's Brief,* p. 12. However, there is no basis for this Court to limit the applicability of §18-1-402 to only those specific types of state contracts

addressed in Title 18. No such limiting language exists in §18-1-402, and this Court's rulings do not support the limitation.

Title 18, Chapter 4, Part 1 applies to all contract actions against the State of Montana:

> The district courts of the state of Montana shall have exclusive original jurisdiction to hearing, determine, and render judgment on any claim or dispute arising out of *any express contract* entered into with the state of Montana or any agency, board, or officer thereof.

§ 18-1-401, MCA (*emphasis added*). The County asks this Court to create an exception for Interlocal Agreements, pursuant to Title 7, in which the State is a party. However, a court's duty, in statutory construction, "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA.

The County contends that the nature of the CJH Contract is inherently different from a Title 18 contract. *Appellant's Brief,* p. 12. The DOC does not dispute that the CJH Contract was for the purpose of facilitating a Title 7 statute, but the Contract is still subject to the Title 18 statutes governing express contracts where a Montana state agency is a party. Title 7 does not provide a separate statute of limitations for contracts created under it. The district court correctly found that §18-1-402(2), MCA does not contain any language limiting its application solely to Title 18 contracts. *Supp. App. C,* DC Doc. 81, p. 9.

This Court has also applied § 18-1-402's one-year statute of limitations to other types of express state contracts. In *Plakorus v. Univ. of Mont.,* the Court declared that the State is subject to suit "on any claim or dispute arising out of any express contract" with the State or a state entity or officer, citing §18-1-401, MCA. "Such claims are governed by Title 18, ch. 1, part 4" and a plaintiff "must file suit within one year. . . after the claim accrues. *See § 18-1-402, MCA.*" *Plakorus v. Univ. of Mont.,* 2020 MT 312, ¶ 13, 402 Mont. 263, 477 P.3d 311.

It is clear that the one-year statute of limitations under §18-1-402, MCA applied in this instance to the express CJH Contract between the DOC and the County. The County filed its Complaint more than one year after any potential cause of action for breach of the CJH Contract could have accrued. The district court correctly concluded that Count III is time-barred and dismissed the claim.

A. The District Court Also Properly Concluded that The County's Theories of Liability All Sounded in Contract and Are Foreclosed by the One-Year Statute of Limitations Governing Contract Claims Against the State.

The County contends that the District Court applied the incorrect statute of limitations to its "tortious claims for breach of the Covenant of Good Faith and Fair Dealing or the equitable remedy of Unjust Enrichment." *Appellant's Brief,* p. 13. A breach of the implied covenant represents a breach of the contract itself. *Story v. Bozeman,* 242 Mont. 436, 450, 791 P.2d 767, 775 (1990). A claim for breach of contract, however, may sound in tort or in contract, and the action

remains subject to the statute of limitations for the applicable theory. *Northern Montana Hospital v. Knight,* 248 Mont. 310, 315, 811 P.2d 1276 (1991).

This Court has instructed that "the gravamen of the plaintiff's complaint, not the label the plaintiff attached to it, governs the applicable law. . .. 'Consequently, we look to the substance of the complaint to determine the nature of the action and which statute of limitations applies.'" *Plakorus,* ¶ 14 (*internal citations omitted*). The applicable statute of limitations "depends on whether each of the [Plaintiff's] claims sounds in contract or in tort." *Plakorus,* ¶ 15.

"A party's claim sounds in contract if it relates to 'the violation of a specific contractual provision[.]'. . . But tort liability is 'not negated simply because the parties have entered into a contract concerning the same subject matter.'" *Plakorus,* ¶ 16 *(internal citations omitted*). The Court:

> explained the fundamental differences between breaching a contractual duty and committing a tort:
>
> > Contract obligations are based on the manifested intention of the parties to a bargaining transaction, whereas tort obligations are imposed by law—apart from and independent of promises made and therefore apart from the manifested intention of the parties—to avoid injury to others. … The breach of a purely contractual duty does not constitute the sort [of] active negligence or misfeasance necessary to impose liability under tort law.
>
> *Dewey,* ¶ 22 (internal quotations and citations omitted).

Plakorus, ¶ 16. The *Plakorus* Court held that §18-1-402, MCA applied to the plaintiff's privacy and negligence claims against the State—even though they were ostensibly torts—because the claims arose from the State defendant's duties under the employment contract. *Plakorus,* ¶ 19.

Similarly, in Count V, the County claimed the DOC breached the implied covenant "by failing to honor the obligations to adhere to and support the agreed upon obligations under the agreements" when it "participat[ed] in or fail[ed] to object to legislative caps that undermine [DOC's] contractual obligations…." *App. 1,* DC Doc. 1. In Count VII, the County asserted that the County continued to "meet its contractual obligations" while the DOC "benefitted by failing to reimburse the County for reasonable costs." *Id.*

Despite the County's attempts to characterize these claims as torts, the allegations made in the Complaint establish that these claims sound in contract; therefore, the applicable statute of limitations is found in § 18-1-402(2), MCA. *See Lutey Construction-The Craftsman v. State,* 257 Mont. 387, 393-94, 851 P.2d 1027 (plaintiff's claimed breach of the implied covenant is as much a part of the contract as the express terms and thus is governed the statute of limitations for State contract). These claims are time-barred as well. The district court's grant of summary judgment for Counts V and VII should be affirmed.

II. The District Court Correctly Concluded the County Failed to Present Sufficient Evidence of a Special Relationship to Support a Claim for Damages in Tort.

The DOC disputes the County's assertion that their claim for breach of the implied covenant of good faith and fair dealing lies in tort. In *Story,* this Court held that all contracts included an implied covenant of good faith and fair dealing and that a breach of the covenant is a breach of the contract. *Story v. Bozeman,* 242 Mont. 436, 450, 791 P.2d 767, 775 (1990). Contract damages are the appropriate remedy except in "exceptional circumstances" where bad faith justifying tort damages exist. *Id*. at 451, 791 P.3d at 776. No such exceptional circumstances are present here, and thus Count V can only be construed as an implied contract claim.

"The conduct required by the implied covenant of good faith and fair dealing is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." § 28-1-211, MCA. This Court has stated that the covenant "is a mutual promise implied in every contract that the parties will deal with each other in good faith, and not attempt to deprive the other party of the benefits of the contract through dishonesty or abuse of discretion in performance." *Phelps v. Frampton*, 2007 MT 263, ¶ 29, 339 Mont. 330, 170 P.3d 474 (quotations omitted.)

Tort damages for breach of the implied covenant of good faith and fair dealing requires the existence of a special relationship, which is not present here. Additionally, regardless of whether they are seeking tort damages or contract

damages, the facts asserted by the County in support of Count V do not give rise to a breach of the implied covenant of good faith and fair dealing. Finally, Count V is barred by the statute of limitations for the same reason that Count III is time-barred.

A. There is No Special Relationship Between the Parties That Could Support a Claim for Tort Damages.

Count V cannot be construed as a tort claim because the undisputed facts of this case reveal that the case is not one of the "exceptional circumstances" described in *Story v. Bozeman*. *Story* holds that, in order for tort damages to be available for a breach of the implied covenant of good faith and fair dealing, there must be a special relationship between the parties characterized by the following factors:

> (1) the contract must be such that the parties are in inherently unequal bargaining positions; [and] (2) the motivation for entering the contract must be a non-profit motivation, i.e., to secure peace of mind, security, future protection; [and] (3) ordinary contract damages are not adequate because (a)they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party 'whole'; [and] (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability.

Story, 242 Mont. at 451, 791 P.2d at 776 (*quoting Wallis v. Sup. Ct.,* 207 Cal. Rptr. 123, 129 (Cal. Ct. App. 1984)). "Substantial evidence of each and all of these essential elements must be presented to the court, or the court will

direct that there is no special relationship." *Kinniburgh v. Garrity,* 244 Mont. 350, 354, 798 P.2d 102, 105 (*citing Story, supra*).

The County cannot satisfy the first element because the parties, here, are not in unequal bargaining positions. This case does not involve a situation where an unsophisticated consumer is dealing with a bank or insurance company. *See, e.g., Stephens v. Safeco Ins. Co. of Am.*, 258 Mont. 142, 146, 852 P.2d 565, 568 (1993); (finding inherently unequal bargaining power in the insurance contract context because "the insured usually has no voice in the preparation of the insurance policy…"); *Warrington v. Great Falls Clinic, LLP*, 2019 MT 111, ¶ 16, 395 Mont. 432, 443 P.3d 369 (citing *Wallis* to find no unequal bargaining power where the plaintiff was not in a position of having "no option but to sign the contract as defendant dictated"). Rather, the instant case involves two governmental entities who negotiated a contract with advice of and representation by counsel on both sides.

The County asserts that it presented substantial evidence in the disparity in bargaining power between the DOC and the County "due to DOC's effective control over its own budget---and therefore the rate it could offer---via its close relationship with the legislature. . ." *Appellant's Brief,* p. 16. Inherently unequal bargaining positions relate to disparities which exist

at the time of the agreement, such that one party is in a position to have considerably more control over the terms of the agreement. The DOC's relationship with the State Legislature is not the relationship that the Court must examine for purposes of assessing a bad faith tort claim—it is the relationship between the DOC and the County, and those parties were not inherently on unequal footing when negotiating and entering into the CJH Contract.

Additionally, the County cannot show that ordinary contract damages would be insufficient here. The County believes that it should have received a higher reimbursement rate pursuant to the Contract than it actually received. These are inherently contract damages. There are not independent damages for the County at issue here, and its claim that it has "spent countless hours attempting to work with DOC to address this issue" does not require going outside of the contract realm.

Finally, the DOC did not take advantage of any special vulnerability the County had regarding the legislative appropriation of funds for the CJH contract. As demonstrated in the legislative history set out above, the DOC's budget requests and activity before the Legislature were both honest and reasonable, and it is the Legislature's independent actions that the County takes issue with.

Because the County failed to present sufficient evidence to support each and every one of the essential elements of a special relationship, the district court correctly concluded there was no special relationship, no exceptional circumstances and therefore, no breach of the implied covenant of good faith and fair dealing.

B. Count V is Barred by the Statute of Limitations.

Regardless whether Count V is construed as a tort or contract claim, §18-1-402's one-year statute of limitations applies and bars recovery against the DOC. In *Lutey Construction-The Craftsman v. State,* this Court held that a claim for breach of the implied covenant of good faith and fair dealing "is as much a part of the contract as the express terms, and therefore, is governed by the statute of limitations for State contract actions." *Lutey Construction,* 257 Mont. 387, 393-94, 851 P.2d 1037, 1041 (1993). The Court's recent holding in *Plakorus v. Univ. of Mont.* also requires that any claim arising from a State contract, whether tort or contractual in nature, be subject to § 18-1-402. *Plakorus*, ¶ 16 (holding that "[a] party's claim sounds in contract if it relates to the violation of a specific contractual provision" (internal quotations omitted)). In *Plakorus,* this Court held that §18-1-402 applied to a plaintiff's privacy and negligence claims against the State—

even though they were ostensibly torts—because the claims arose from the State defendant's duties under the employment contract. *Plakorus,* ¶ 19.

The County's claim under Count V is based upon the assertion that the DOC did not do enough before the Legislature to prevent the implementation of the reimbursement rate caps, which the DOC interpreted as a cap on what it could pay. None of the materials submitted by the County regarding the legislative history of the reimbursement rate caps demonstrate dishonesty in fact or unreasonable conduct by DOC employees. The Executive's budget is set and submitted to the Legislature by the Governor and OBPP. *See* § 17-7-103, -122, MCA. Agency representatives are required to appear and be heard regarding a request for state money when requested to do so. § 17-7-132, MCA. DOC employees acted in the customary manner of appearing before the Legislature to be heard regarding their Executive's request for state money.

Further, it is undisputed that the CJH Contract terminated on January 31, 2018. If there is no contract, then there is no claim for breach of the implied covenant, and thus only the DOC's actions before the Legislature prior to January 31, 2018, (in the 2017 Legislative session) could be considered relevant to Count V. However, the County did not file its

complaint until April 23, 2020, more than one year after any relevant acts could have occurred. For this reason, Count V must be dismissed.

C. The DOC Cannot Be Held Liable for Acts of the Legislature Pursuant to § 2-9-111, MCA.

Ultimately, Count V fails because the County is seeking to hold the DOC liable for the reimbursement rate caps imposed by the Legislature. DOC employees acted honestly and reasonably in regard to legislative testimony pertaining to DOC's budget, and thus they did not breach the implied covenant of good faith and fair dealing. The Legislature's actions—not those of the DOC—are the cause of the County's claimed damages, and § 2-9-111(2), MCA, clearly and unambiguously states the DOC "is immune from suit for a legislative act or omission by its legislative body." Legislative acts include appropriations made in HB 2.

The legislative history the County submitted regarding the reimbursement rate caps for the CJH Contract reveal that it was the *Legislature's* decision to impose these rate caps, not the DOC's decision. The DOC did not withhold any information from the Legislature regarding the effects of HB 2 would have on county jail hold contracts, and, in fact, there were a number of opponents present who expressly advocated for the counties. Nevertheless, the Legislature chose to impose the rate caps. The Montana Legislature has determined, by passing § 2-9-111, MCA, that state

agencies like the DOC shall not be held liable for its actions, and thus the County is barred from recovering against the DOC on Counts V and VII.

III. The District Court Properly Granted Summary Judgment on the County's Claim of Unjust Enrichment.

The County seeks consideration of its unjust enrichment claim if the DOC is not liable under Counts III and V. "Unjust enrichment is an equitable claim for restitution to prevent or remedy inequitable gain by another." *Associated Mgmt. Servs. v. Ruff*, 2018 MT 182, ¶ 64, 392 Mont. 139, 424 P.3d 571. "Unjust enrichment is generally available when an adequate legal remedy does not exist." *Mont. Digital, LLC v. Trinity Lutheran Church,* 2020 MT 250, ¶ 11, 401 Mont. 482, 473 P.3d 1009 (internal citations omitted). However, "[a] valid contract defines the obligation of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment." *Ruff*, ¶ 67, (quoting Restatement (Third) of Restitution, § 2(2)). "Consequently, unjust enrichment applies in the contract context only when a party renders a valuable performance or confers a benefit upon another under a contract that is invalid, voidable, 'or otherwise ineffective to regulate the parties' obligations." *Id.*

Here, the district court correctly concluded that the parties had a valid contract. "But for Missoula County's failure to timely file, it could have recovered under that contract for DOC's breach. …[T]he facts clearly show any breach based on the DOC's failure to pay the contracted for rate began as early as July 2015."

Supp. Aff. C, DC Doc. 81, p. 12. Having knowledge of the breach in 2015, the County nonetheless allowed the DOC to continue to be in breach and did not bring a claim until nearly four years had elapsed. The district court correctly found that the County cannot now use the doctrine of unjust enrichment to regain the position it lost through delaying filing its contract claim. *Id.,* pp. 12-13.

IV. Counts V and VII (Implied Covenant and Unjust Enrichment) are Barred by the Doctrine of Sovereign Immunity.

The County's claims of breach of the implied covenant of good faith and fair dealing, and the equitable remedy of unjust enrichment must be dismissed because they are barred by the doctrine of sovereign immunity.

The State of Montana—and its agencies—cannot be sued in its own courts "without its plain and specific consent to suit either by constitutional provision or by statute." *Peretti v. State*, 238 Mont. 239, 244, 777 P.2d 329, 332 (1989). A waiver must be express and unequivocal. *Coll. Sav. Bank. V. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 680 (1999). While the State has waived sovereign immunity for a limited number of actions, such as certain tort claims (*see* Art. II, § 18, Mont. Const.; § 2-9-102, MCA) and breach of express contract claims (*see* § 18-1-404, MCA), there has been no waiver of sovereign immunity for implied-in-fact contracts. In *Peretti,* this Court held that "[b]ecause the legislature intended only to waive the State's immunity as to express contracts as is readily apparent from the title, we hold that § 18-1-404(1), MCA, does not

subject the State to liability on implied contracts." *Peretti*, 238 Mont. at 245, 777 P.2d at 333. Both the implied covenant of good faith and fair dealing and the equitable remedy of unjust enrichment are merely implied contract theories for which there is no waiver of sovereign immunity. The implied covenant of good faith and fair dealing is an obligation imposed by law and not by the express terms of a contract. *See, e.g.,* § 28-1-211, MCA; *Story v. City of Bozeman,* 242 Mont. 436, 701 P.2d 767 (1990). Thus, it is an implied-in-fact contract for which the State has not consented to be sued on. The same is true of a claim of unjust enrichment. *Butler v. Peters*, 62 Mont. 381, 383, 205 P. 247, 248 (1922) ("A quasi or implied contract is one where liability exists from implication of law arising from facts and circumstances or presumed intention, based upon the doctrine of unjust enrichment, the implied agreement being one defining the duty of the defendant rather than his intentions."); *Border States Paving v. State*, Case No. ADV-92-1396, 1993 Mont. Dist. LEXIS 581, at *7 (Mont. 1st Jud. Dist. Ct., Jan. 28, 1993) ("Implied contracts based on the theory of unjust enrichment are not actions on an express contract, even if the relief requested is for services performed that stemmed from an underlying contract.").

This Court has also recognized the concept of governmental immunity, which bars suits for damages between government entities absent express or implied statutory authority. In *Dist. No. 55 v. Musselshell County,* a school district

sued the county after school levy figures were erroneously calculated by a county official. *Dist. No. 55 v. Musselshell County,* 245 Mont. 525, 802 P.2d 1252 (1990). This Court held that "[g]enerally courts will not allow suits between governmental entities unless express or implied statutory authority exists," and applied governmental immunity to the facts of the case because "in the absence of a specific statutory or constitutional provision, one governmental subdivision may not sue another for damages." *Id.,* 245 Mont. at, 529, 802 P.2d at 1254.

This case also involves claims between two governmental entities, one of which is a county, and thus governmental immunity applies as well as sovereign immunity. The County is not permitted to sue the State for damages absent specific statutory authority, and no such authority exists for claims under the implied covenant of good faith and fair dealing or unjust enrichment. The only damages claims at issue in this case that the DOC has consented to be sued for are claims based on the express contract and, as set forth above, this claim also fails. For these reasons, Counts V and VII are barred by the doctrine of sovereign and governmental immunity and must be dismissed.

CONCLUSION

The district court correctly granted summary judgment to the DOC on the County's breach of contract, breach of the implied covenant of good faith and fair

dealing and unjust enrichment claims. We ask this Court to affirm the district court's Order on Counts III, V, and VII.

Respectfully submitted August 7, 2023.

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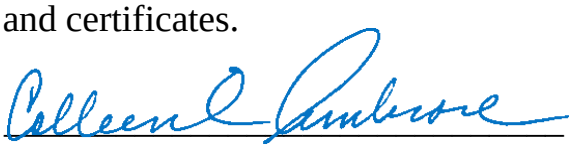
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27, M.R.App.P., I hereby certify that this brief is printed with proportionally spaced Times Roman typeface of 14 points; is double-spaced except footnotes and block quotes; and the word count of 6,762 is less than the 10,000 word limit, exclusive of tables and certificates.



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CERTIFICATE OF SERVICE

I, Colleen E. Ambrose, hereby certify that on the 7th day of August 2023, I served true and accurate copies of the foregoing brief on all parties to this action by electronic service. Each attorney of record is registered for electronic service through the Court's eService process.

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