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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOHN W. McWILLIAMS, Plaintiff and Appellant, v. CITY OF LONG BEACH, Defendant and Respondent	B200831 (Los Angeles County Super. Ct. No. BC361469)

APPEAL from an order of the Superior Court of Los Angeles County, Anthony J. Mohr, Judge. Reversed in part, affirmed in part.

Wolf Haldenstein Adler Freeman & Herz, Francis M. Gregorek, Rachele R. Rickert; Tostrud Law Group, Jon A. Tostrud; Chimicles & Tikellis, Timothy N. Mathews; Cuneo Gilbert & Laduca and Sandra W. Cuneo for Plaintiff and Appellant.

Colantuono & Levin, Michael G. Colantuono, Sandra J. Levin, Amy C. Sparrow, Tiana J. Murillo; Robert E. Shannon, Belinda R. Mayes, Heather Mahood and Monte H. Machit for Defendant and Respondent.

INTRODUCTION

This is a class action brought by plaintiff John W. McWilliams against defendant City of Long Beach (City) challenging the legality of the City's telephone users tax (TUT). McWilliams appeals an order of dismissal entered after the trial court sustained the City's demurrer to his complaint. We reverse in part and affirm in part.

Under the Government Claims Act, before filing a tax refund action, the plaintiff must first file a claim containing the information required by Government Code section 910.[1] The main issue on appeal is whether McWilliams is entitled to present a claim on behalf of the entire class, or whether each member of the purported class is required to file an individual claim prior to filing suit. We hold that under *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241 (*Ardon*), McWilliams can file a class claim for a TUT refund.

The City contends *Ardon* is inapplicable because McWilliams was required to comply with the City's claims procedures, which do not permit tax refund claims on behalf of a class. We reject this argument. The City is not authorized under the Government Claims Act to establish its own claims procedure for TUT refunds and, in any case, the City's claims procedures do not require McWilliams or other payers of the TUT to file a claim prior to pursuing a tax refund action.

We nonetheless hold McWilliams's complaint does not state sufficient facts to support the fifth cause of action for violation of due process and sixth cause of action for a writ of mandate. These causes of action of action are based on McWilliams's assertion that he cannot obtain a clear and certain remedy if the TUT is ultimately found unlawful. McWilliams, however, concedes that in light of *Ardon*, these causes of action are moot. Accordingly, we affirm the order of dismissal with respect to the fifth and sixth causes of action in the complaint but reverse the order with respect to the remaining causes of action.

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[1] Unless otherwise stated, all future section references are to the Government Code.

BACKGROUND

1. *Allegations in the Complaint*

The complaint alleges the following. Pursuant to Long Beach Municipal Code section 3.68, the City imposes a 10 percent TUT on amounts paid for telephone services by persons or entities located within the City. The TUT is paid for by service users (taxpayers) and collected by service providers (telephone companies). If a service user refuses to pay the TUT, the City can impose a 25 percent penalty. McWilliams is a resident of the City who has paid and continues to pay the TUT.

Long Beach Municipal Code section 3.68.050, subdivision (d) excludes from the TUT amounts paid for telephone services exempt from the tax imposed under section 4251 of title 26 of the Internal Revenue Code (Federal Excise Tax). Under numerous federal court decisions and a 2006 Internal Revenue Service notice, the Federal Excise Tax only applies to long distance service charged by time and distance. Today, however, "most long distance telephone service is charged under a postalized fee structure where the amount of the charge depends only upon the amount of elapsed transmission time and not the distance of the call." The Federal Excise Tax and thus the TUT cannot be imposed on such services. The City has nevertheless unlawfully collected and continues to collect to the TUT from McWilliams and other class members on telephone service exempt from the Federal Excise Tax.

Long Beach Municipal Code section 3.68.160 sets forth a means of obtaining a refund of TUT improperly collected. This section provides:

"A. Whenever the amount of any tax has been overpaid or paid more than once or has been erroneously or illegally collected or received by the City Treasurer-City Tax Collector under this Chapter, it may be refunded as provided by this Section.

"B. A *service supplier* may claim a refund or take as a credit against taxes collected and remitted the amount overpaid, paid more than once, or erroneously or illegally collected or received, when it is established in a manner prescribed by the City Treasurer-City Tax Collector that the service user from whom the tax has been collected did not owe the tax; provided, however, that neither a refund nor a credit shall be allowed

unless the amount of the tax so collected has either been refunded to the *service user* or credits to charges subsequently payable by the service user to the person required to collect and remit.

"C. No refund shall be paid under the provisions of this section unless the claimant established his or her right thereto by written records showing entitlements thereto."[2] (Italics added.)

This refund provision does not provide a mechanism for an individual service user (i.e., taxpayer) to seek a refund of illegally collected TUT. Further, under section 799 of the Public Utilities Code, taxpayers cannot require service providers to seek refunds on their behalf.

On August 11, 2006, McWilliams sent a letter to the City demanding on his own behalf and on behalf of similarly situated taxpayers a refund of the TUT improperly collected and a cessation of improper collection of the TUT. The City did not respond to this claim.

In September 2006, the City purported to amend Long Beach Municipal Code section 3.68. Under the amended code, telephone charges exempt from the Federal Excise Tax are not exempt from the TUT. This amendment was enacted without electoral approval in violation of Article XIIIC of the California Constitution, commonly known as Proposition 218.

Based on these allegations, the complaint sets forth six causes of action. The first cause of action is for declaratory and injunctive relief preventing further collection of the TUT. The second cause of action is for declaratory and injunctive relief preventing the "unconstitutional" amendment to Long Beach Municipal Code regarding the TUT.

The third cause of action is for money had and received and the fourth cause of action is for unjust enrichment. In these causes of action, McWilliams seeks a refund of improperly collected TUT on his own behalf and on behalf of all members of the class.

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[2] We quote the complaint regarding the content of Long Beach Code section 3.68.160.

The fifth cause of action is for violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The complaint alleges that because the City "provides neither adequate pre-deprivation nor post-deprivation relief" to taxpayers for unlawfully collected taxes, the City has violated the due process rights of McWilliams and all class members.

Finally, the sixth cause of action is for a writ of mandate. The complaint alleges the City "is obligated, but has failed, to provide adequate pre-deprivation or post-deprivation remedies for the illegal collection of the [TUT]." Plaintiff seeks a writ of mandate requiring the City to provide an adequate remedy.[3]

2. *Procedural History*

On November 8, 2006, McWilliams filed his complaint against the City. The City demurred to the complaint on January 2, 2007.

In its memorandum in support of the demurrer, the City argued the complaint failed to state facts sufficient to constitute a cause of action for three reasons. First, the City argued that under *Woosley v. State of California* (1992) 3 Cal.4th 758 (*Woosley*), McWilliams could not assert a pre-lawsuit claim with the City on behalf of the entire class. Because such a claim is a prerequisite to an action for a tax refund, plaintiff cannot maintain a class action seeking a tax refund as a matter of law.

The City's second argument was that McWilliams failed to file a claim with the City as required by the City's municipal code. Alternatively, the City argued that if the letter dated August 11, 2006, could be considered a "claim," it did not substantially comply with the requirements of the Long Beach Municipal Code.

Finally, the City argued that equitable relief was unwarranted because McWilliams had an adequate remedy at law, namely a tax refund.

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[3] Except as stated *post*, we express no opinion about the merits of the first four causes of action in the complaint, including but not limited to the allegation that the TUT is unlawful and the allegation that the City unlawfully amended its municipal code.

On April 13, 2007, the trial court sustained the demurrer with 60 days leave to amend. In its minute order the trial court stated the demurrer was sustained "for the reasons stated." The transcript of the hearing on demurrer indicates the trial court found McWilliams could not file a pre-lawsuit claim on behalf of the class under *Woosley*. The court, however, rejected the City's argument that equitable relief was unavailable on the ground that declaratory relief was available if the TUT was indeed unlawful.

On May 8, 2007, the trial court held a hearing on an ex parte application filed by McWilliams. At that hearing McWilliams's counsel stated that McWilliams would not amend his complaint before the expiration of the 60-day period granted by the court. Relying on this representation, the trial court entered a minute order stating the case "is ordered dismissed."

On June 12, 2007, the trial court entered an order of dismissal prepared by the McWilliams's counsel. McWilliams filed a timely appeal of the June 12, 2007, order of dismissal.

On August 20, 2008, after the parties filed their briefs in this court, we stayed the appeal pending the resolution of the *Ardon* case in the California Supreme Court. The *Ardon* opinion was published on July 25, 2011.

On August 26, 2011, we lifted the stay and requested additional briefing regarding the affect of *Ardon*, if any, on the issues in this case. Both parties responded by filing additional briefs, which we have considered.

CONTENTIONS

McWilliams argues *Ardon* is dispositive of this appeal and mandates our reversal of the trial court's order of dismissal. He also contends the complaint states facts sufficient to support each of his first four causes of action but concedes his fifth and sixth causes of action are moot.

The City argues *Ardon* does not require reversal of the order of dismissal because McWilliams was not required to present a claim pursuant to section 910. Rather, the City contends, plaintiff was required to comply with the City's claims procedure, which does not permit tax refund claims on behalf of a class.

Additionally, the City argues McWilliams is barred from obtaining equitable relief because he has an adequate remedy at law. Finally, the City contends McWilliams' due process and writ of mandate claims fail because "post-deprivation relief" is available.

DISCUSSION

1. *Standard of Review*

We review the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) We assume all of the facts alleged in the complaint are true and make all reasonable inferences from those facts in favor of plaintiff. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883; *Kruss v. Booth* (2010) 185 Cal.App.4th 699, 714.) "However, the assumption of truth does not apply to contentions, deductions, or conclusions of law and fact." (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102.)

2. *McWilliams Was Required to Present a Claim in the Manner Set Forth in the Government Claims Act, Not in the Manner Stated in the Long Beach Municipal Code*

Under the Government Claims Act, "no suit for 'money or damages' may be brought against a public entity until a written claim has been presented to the public entity and the claim either has been acted upon or is deemed to have been rejected. (Gov. Code, §§ 905, 945.4.)"[4] (*Hart v. County of Alameda* (1999) 76 Cal.App.4th 766, 778.) Section 910 provides that a claim must contain certain information, "including the name and address of the claimant; the address to which the claimant desires notices to be sent; the date, place, and other circumstances of the incident that gave rise to the claim; a general description of the obligation or loss; the names of the public employees who

[4] The parties agree that McWilliams seeks "money or damages" within the meaning of the Government Claims Act (see *City of Los Angeles v. Superior* Court (2008) 168 Cal.App.4th 422, 430) and that McWilliams's claim was deemed rejected because the City did not respond to it (see § 912.4, subd. (c)).

caused the loss; and the amount of the loss if that amount is less than $10,000." (*City of Los Angeles v. Superior Court*, *supra*, 168 Cal.App.4th at p. 427.)

"Before 1959, taxpayer and other claims against the state, local and municipal governments were governed by myriad state statutes and local ordinances. Finding this system too complex, the Legislature enacted the Government Claims Act (the Act), which established a standardized procedure for bringing claims against local governmental entities." (*Ardon*, *supra*, 52 Cal.4th at p. 246.)

The Act limited the authority of local entities to adopt their own claims procedures. As a general rule claims for money or damages against local public entities are governed by the procedures set forth in the Act unless the claim falls within specified exceptions. (§ 905). If the claim falls into one of the specified exceptions, and the claim is not "governed by any other statutes or regulations expressly relating thereto, [it] shall be governed by the procedure prescribed in any charter, ordinance or regulation adopted by the local public entity." (§ 935, subd. (a).)

Here, the only ostensible exception to the general rule is stated in section 905, subdivision (a), which permits local claims procedures for "[c]laims under the Revenue and Taxation Code or other *statute* prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification, or adjustment of any tax, assessment, fee, or charge or any portion thereof, or of any penalties, costs, or charges related thereto." (Italics added). The City contends Long Beach Municipal Code section 3.68.160 is a "statute" within the meaning of section 905, subdivision (a). We reject this argument.

The Act itself defines the term "statute" as "an act adopted by the Legislature of this State or by the Congress of the United States, or a statewide initiative act." (§ 811.8.)[5] Long Beach Municipal Code section 3.68.160 does not fall within the plain

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[5] Section 811.8 was enacted in 1963, about four years *after* the enactment of section 703, the predecessor to section 905. (Stats. 1959, ch. 1724, pp. 4133-4134; Stats. 1963, ch. 1681, p. 3267). The City contends that when the Legislature enacted section 811.8 it did not intend to affect section 905, subdivision (a). In construing a statute, however,

language of this definition. (*Volkswagen Pacific, Inc. v. City of Los Angeles* (1972) 7 Cal.3d 48, 61-62 (*Volkswagen Pacific*) [city charter and ordinance relating to tax refund were not "statutes" within the meaning of section 905, subdivision (a)][6]; *County of Los Angeles v. Superior Court* (2008) 159 Cal.App.4th 353, 361 (*Oronoz*) [section of the county code relating to claims for money or damages was not a "statute" within the meaning of section 905, subdivision (a)]; see also *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 463 [the term "statute" in section 811.2 does not include local ordinances or regulations].) McWilliams therefore was only required to file a pre-lawsuit claim in compliance with the Act, and was not required to comply with claims procedures of the Long Beach Municipal Code.

The City contends our conclusion is contrary to the holding in *Pasadena Hotel Development Venture v. City of Pasadena* (1981) 119 Cal.App.3d 412 (*Pasadena Hotel*), which was decided by this court. There, the issue was whether to apply the limitations period specified in Revenue and Taxation Code section 5097, subdivision (a)(2) or the limitations period stated in a city charter provision relating to tax refunds. (*Pasadena Hotel*, at pp. 413-414.) The court held the statute did not relate to the taxpayer's claim and that the limitations period of the city charter applied. (*Id.* at pp. 415-416.)

In a footnote, the court stated "[t]he reference [in section 905, subdivision (a)] to 'the Revenue and Taxation Code or other statute' is not a limitation upon the type of tax claims excepted from the coverage of the [Torts Claims Act], aside from section 935."

"we presume the Legislature has knowledge of all prior laws and enacts and amends statutes in light of those laws." (*In re Marriage of Cutler* (2000) 79 Cal.App.4th 460, 475.) Further, section 811.8 was enacted pursuant to Senate Bill No. 42 (1963-1964 Reg. Sess.) on the same day former section 703 was renumbered to section 905 pursuant to Senate Bill No. 43 (1963-1964 Reg. Sess.). We thus presume that when the Legislature enacted section 811.8, it was aware of section 905, subdivision (a).

[6] Arguably the discussion in *Volkswagen Pacific* on this issue was dicta. (See *Volkswagen Pacific*, *supra*, 7 Cal.3d at p. 63 [section 945.6 was the applicable statute of limitations "whether section 905, subdivision (a), is read to either exclude or include the instant tax refund action . . . ."].)

(*Pasadena Hotel*, *supra*, 119 Cal.App.3d at p. 415, fn. 3.) This conclusion was based on the court's analysis of legislative history. The Law Revision Commission (the commission) stated the predecessor to section 905, subdivision (a)—former section 703, subdivision (a)—broadly applied to "all 'claims for tax exemption, cancellation or refund.' (See 2 Cal. Law Revision Com. Rep. (1959) p. A-117.)" (*Pasadena Hotel*, at p. 415, fn. 3.) The court reasoned that because former section 703, subdivision (a) was "enacted *in the form proposed by the commission*, the intent of the commission in regard to [its] meaning may be deemed to be the intent of the Legislature." (*Pasadena Hotel*, at p. 415, fn. 3, italics added.)

This analysis of legislative history was incorrect. Former section 703, subdivision (a) was not enacted in the form proposed by the commission. Under the commission's proposal "the standardized procedures of the Act embodied in section 910 would not have applied to '[c]laims under the Revenue and Taxation Code or other *provisions of law* prescribing procedures for the refund . . . of any tax . . . .' (Recommendation and Study Relating to The Presentation of Claims Against Public Entities (Jan. 1959) 2 Cal. Law Revision Com. Rep. (1959) p. A-12, italic added [proposed former § 703, subd. (a)].) However, the Legislature specifically rejected this proposal and instead enacted former section 703, subdivision (a) (now § 905, subd. (a)), which exempted from section 910 'claims under the Revenue and Taxation Code or other *statute* prescribing procedures for the refund . . . of any tax . . . .' (Stats. 1959, ch. 1724, § 1, pp. 4133-4134, italics added.)" (*Ardon*, *supra*, 52 Cal.4th at p. 247.) We therefore cannot deem statements by the commission regarding former section 703, subdivision (a) to be the intent of the Legislature.

Accordingly, to the extent *Pasadena Hotel* impliedly determined that a city charter provision relating to tax refunds was a "statute" within the meaning of section 905, subdivision (a), that determination was incorrect. This conclusion is consistent with our holding in *Oronoz* and the statements made by the California Supreme Court regarding the issue in *Volkswagen Pacific*.

The City also cites *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65 (*Batt*) to support its position. *Batt*, however, relied primarily on *Pasadena Hotel* in its discussion of whether a municipal ordinance was a statute within the meaning of section 905, subdivision (a). (*Batt*, at pp. 79, 83.) We thus decline to follow *Batt* on this issue.

3. *Long Beach Municipal Code Section 3.68.160 Does Not Require Service Users Such as McWilliams to File a Claim for a Refund of TUT as a Prerequisite to Pursuing a Tax Refund Action*

Under the plain language of Long Beach Municipal Code section 3.68.160, a *service user* such as McWilliams cannot file a claim for a refund of TUT. Instead, such a claim must be filed by a *service provider*. Accordingly, even assuming Long Beach Municipal Code section 3.68.160 were permitted under the Government Claims Act, McWilliams and the class he purports to represent are not barred from pursuing their action against the City as a result of their alleged failure to comply with the City's claims procedures.[7]

4. *Under Ardon, McWilliams Can File a Section 910 Class Claim*

In *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 457 (*City of San Jose*), in a nuisance and inverse condemnation class action, the California Supreme Court held that the plaintiff could file a section 910 claim on behalf of the entire class.

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[7] Moreover, Long Beach Municipal Code section 3.68.160 does not state a claim under that provision is a prerequisite to file a lawsuit against the City. Section 935, subdivision (b) provides that if a local claims procedure is permitted for a claim for money or damages, "[t]he procedure so prescribed *may* include a requirement that a claim be presented and acted upon as a prerequisite to suit thereon." (Italics added.) Here, Long Beach Municipal Code section 3.68.160 provides that a service provider "may" file a claim for a refund of illegally collected TUT (L.B. Mun. Code, § 3.68.160(B)) and that a refund "may" be provided under this section (L.B. Mun. Code, § 3.68.160(A)) if certain conditions are satisfied (L.B. Mun. Code, § 3.68.160(B) & (C)). It also states "[n]o refund shall be paid *under the provisions of this section* unless the claimant has submitted a claim pursuant to this section." (L.B. Mun. Code, § 3.68.160(D), italics added.) The ordinance does *not* require a service provider, much less a service user such as McWilliams, to file a claim before filing an action in court for a refund of TUT.

In *Woosley*, the plaintiff asserted a class claim for tax refunds under certain provisions of the Vehicle Code and Revenue and Taxation Code which did not expressly provide for such claims. The court held the plaintiff could not maintain class claims because article XIII, section 32 of the California Constitution[8] prevents the judiciary "from expanding the methods for seeking tax refunds expressly provided by the Legislature." (*Woosley*, *supra*, 3 Cal.4th at p. 792.) The court further stated that the holding of *City of San Jose* "should not be extended to include claims for tax refunds." (*Woosley*, at p. 789.)

In *Ardon*, the issue was whether section 910 "allows taxpayers to file a class action claim against a municipal governmental entity for the refund of local taxes." (*Ardon*, *supra*, 52 Cal.4th at p. 245.) The court held: "[N]either *Woosley*, which concerned the interpretation of statutes *other* than section 910, nor article XIII, section 32 of the California Constitution, applies to our determination of whether section 910 permits class claims that seek the refund of local taxes. We therefore conclude that the reasoning of *City of San Jose*, which permitted a class claim against a municipal government in the context of an action for nuisance under section 910, also permits taxpayers to file a class claim seeking the refund of local taxes under the same statute." (*Ardon*, at p. 245.)

Under *Ardon*, McWilliams was entitled to file a section 910 claim for a TUT refund on behalf of the class he purports to represent. The trial court's reliance on *Woosley* and its decision that McWilliams could not file such a class claim was error.

The City argues article XIII, section 32 of the California Constitution and the public policy underlying it prohibit McWilliams from seeking a refund of TUT on behalf of a class because Long Beach has not expressly authorized class claims. *Ardon*, however, rejected the same argument asserted by a plaintiff seeking a TUT refund from the City of Los Angeles. (*Ardon*, *supra*, 52 Cal.4th at pp. 251-252.)

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[8] Article XIII, section 32 of the California Constitution provides: "After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

5. *The Complaint States Sufficient Facts to Support the First Four Causes of Action*

a. *First and Second Causes of Action for Declaratory and Injunctive Relief*

As stated *ante*, the first cause of action is for declaratory and injunctive relief challenging the legality of the TUT and the second cause of action is for declaratory and injunctive relief challenging the legality of the City's amendment to its municipal code relating to the TUT. The City contends McWilliams cannot maintain these two equitable causes of action because it has an adequate remedy at law, namely a tax refund. In support of its position, the City cites *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129 (*Flying Dutchman*).

We reject the City's argument. In *Flying Dutchman*, the plaintiff failed to pay the disputed tax before filing its lawsuit. The court held that under the "pay first, litigate later" rule of article XIII, section 32 of the California Constitution, the plaintiff was prohibited from seeking injunctive and declaratory relief. (*Flying Dutchman*, *supra*, 93 Cal.App.4th at pp. 1132, 1136.) The present case is distinguishable from *Flying Dutchman* because McWilliams allegedly paid the TUT due before filing this action and has allegedly continued to pay the tax during the pendency of the suit. Where, as here, the plaintiff pays the challenged tax before the court adjudicates the merits of the plaintiff's claims, the plaintiff may obtain declaratory and injunctive relief upon entry of judgment. (*Ardon*, *supra*, 52 Cal.4th at p. 252 ["article XIII, section 32 does not purport to limit a court's authority to fashion a remedy if it determines a tax is illegal, including its authority to issue an injunction against further collection of the challenged tax"].)

b. *Third and Fourth Causes of Action for Money Had and Received and Unjust Enrichment*

Apart from the City's arguments relating to class claims, which we have rejected, the City does not make any arguments relating to the third cause of action for money had and received and fourth cause of action for unjust enrichment. We thus find no reason to affirm the trial court's order sustaining the City's demurrer to these causes of action.

6. *The Complaint Does Not State Sufficient Facts to Support the Fifth and Sixth Causes of Action*

In his supplemental brief, plaintiff concedes that his fifth cause of action for violation of due process and sixth cause of action for writ of mandate are moot because they have an adequate "post-deprivation" remedy in light of *Ardon*, namely a class claim for a tax refund.[9] The trial court therefore correctly sustained the City's demurrer to these causes of action.

DISPOSITION

The order of dismissal dated June 12, 2007, is reversed with respect to the first, second, third and fourth causes of action of the complaint, and affirmed with respect to the fifth and sixth causes of action of the complaint. In the interests of justice, both parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

[9] The fifth and sixth causes of action are based on *McKesson Corp. v. Florida Alcohol & Tobacco Div.* (1990) 496 U.S. 18.