

SC94208

IN THE
SUPREME COURT OF MISSOURI

CITY OF AURORA, MISSOURI, *et al.*,

Plaintiffs/Respondents/Cross-Appellants,

v.

**SPECTRA COMMUNICATIONS GROUP,
LLC, D/B/A CENTURYLINK, *et al.*,**

Defendants/Appellants/Cross-Respondents.

**Appeal from the Twenty-First Judicial Circuit, St. Louis County, Missouri
Honorable David Lee Vincent, III, Division IX**

RESPONDENTS'/CROSS-APPELLANTS' REPLY BRIEF

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ARGUMENT

- I. The trial court erred in denying summary judgment on Count XVI because there was no dispute of fact and Harrisonville was entitled to judgment as a matter of law on the breach of contract claim in that the trial court ruled that Embarq failed to pay license taxes, the Harrisonville Contract is not an illegal mandatory franchise, and it is supported by consideration.**

The trial court explained its decision on each and every count in the summary judgment motion except for its decision on Count XVI, the breach of contract claim. LF p. 1678. The trial court erred in entering its cursory denial of summary judgment on Count XVI because there was simply no dispute and the trial court ruled that Appellants (including “Embarq” and collectively, “CenturyLink”) committed the actions that constitute a material breach of the Rights-of-Way Use Agreement (“Harrisonville Contract”) under the plain terms of the contract. LF pp. 588; 1678.

The Harrisonville Contract required Embarq, as a licensed occupant of the City’s rights-of-way, in order to use and occupy the City of Harrisonville’s (“City” or “Harrisonville”) rights-of-way, to enter into an agreement and comply with several obligations. LF p. 586. One of those requirements was that Embarq must pay license taxes. LF p. 588. The trial court determined that there was no dispute of fact that Embarq failed to pay license taxes that were owed to Harrisonville. LF p. 1678. Therefore, there is no dispute that Embarq materially breached the Harrisonville Contract and that attorneys’ fees are due to the Cities for the enforcement of the contract. LF p.

590.

a. The Court has jurisdiction over the City's Cross-Appeal

The Court has jurisdiction to hear the City's cross-appeal of the denial of partial summary judgment on Count XVI, and it may direct the judgment the trial court should have entered. *James v. Paul*, 49 S.W.3d 678, 682 (Mo. 2001). As Embarq recognizes, there is an exception to the general rule of non-appealability of denials of summary judgment. *See* CenturyLink's Response Brief ("App. Rep. Br.") pp. 98-99. One of the purposes behind exercising this exception is to prevent piecemeal appeals. *See Wilson v. Hungate*, 434 S.W.2d 580, 583 (Mo. 1968). Here, review of the denial of summary judgment on Count XVI is appropriate because it would prevent piecemeal appeals, given that the trial court certified its decision for appeal and CenturyLink's appeal of the grant of summary judgment is already before the Court.

The denial of summary judgment on Count XVI is also sufficiently intertwined with the grant of summary judgment to warrant review. The trial court's order and judgment expressly found that there was no genuine issue of material fact that Embarq "failed to pay taxes, as required by law, under the Cities' respective License Tax Ordinances...." LF p. 1678. This conclusion establishes a material breach of the Harrisonville Contract. LF p. 588. Therefore, contrary to Embarq's arguments, the issue relevant to the determination of this cross-appeal is one of the same that is relevant to Embarq's appeal. The underlying facts and issues of law establishing the breach of contract are identical to the underlying facts and issues of law establishing Embarq's failure to pay the license taxes. Thus, because the trial court's decision on summary

judgment on Counts I-V “leads directly to the conclusion” that summary judgment should have been granted on Count XVI, the issues are sufficiently intertwined, the court has jurisdiction to consider this cross-appeal, and judicial economy would be served by such consideration. *Lero v. State Farm Fire and Cas. Co.*, 359 S.W.3d 74, 82 (Mo. App. 2011); *James*, 49 S.W.3d at 682 (reviewing denial of summary judgment “as a matter of judicial efficiency and economy.”). Embarq’s attempt to distinguish *James* from this appeal fails because Embarq ignores that it indeed was the “same conduct” that established both the failure to pay taxes under Counts I-V and the breach of contract under Count XVI. App. Rep. Br. p. 100.

This exception has been exercised even where the appeal is not “challenging both the grant of summary judgment to its adversary and the denial of summary judgment to itself.” See *Carman v. Wieland*, 406 S.W.3d 70, 73 (Mo. App. 2013); App. Rep. Br. p. 99. The cases cited by Embarq in support of its argument that the Court should not exercise jurisdiction here are inapposite and inaccurately summarized. For instance, in *Intermed Ins. Co. v. Hill*, 367 S.W.3d 84, 85 n.1 (Mo. App. 2012), the court declined to exercise jurisdiction because the appellant did not make clear that a direction to the trial court to enter summary judgment on the denied counts “would be proper.” Here, by contrast, it is evident that a direction to the trial court to enter summary judgment on Count XVI would be proper because the trial court’s judgment already concluded that there was no genuine issue of material fact that Embarq committed the actions that establish a material breach of contract. Therefore, the trial court’s failure to enter summary judgment on Count XVI (which was the only portion of the trial court’s order

that was not explained) was an error or oversight, and a judgment reversing that error is entirely proper. LF p. 1677. Embarq also inaccurately cites four cases for the proposition that courts “frequently decline denials of summary judgment...on the grounds that the merits are not sufficiently ‘intertwined’ to warrant making an exception from the general rule.” App. Rep. Br. p. 99; *Manner v. Schiermeier*, No. ED96143, 2011 WL6776153, at *4 n.1 (Mo. App. Dec. 27, 2011) (transferred to the Missouri Supreme Court, *Manner v. Schiermeier*, 393 S.W.3d 58 (Mo. 2013)); *Merlyn Vandervort Investments, LLC v. Essex Ins. Co. Inc.*, 309 S.W.3d 333, 335 n.1 (Mo. App. 2010); *Grable v. Atlantic Cas. Ins. Co.*, 280 S.W.3d 104, 106 n.1 (Mo. App. 2009); *Leiser v. City of Wildwood*, 59 S.W.3d 597, 605 (Mo. App. 2001). However, those cases are inapplicable as they do not even *mention* the exception, let alone delve into a discussion of whether the issues are “sufficiently intertwined.” *See id*; App. Rep. Br. p. 99. Here, it was the very fact of the grant of summary judgment on Counts I-V that leads to the conclusion that summary judgment should have been granted on Count XVI. Accordingly, the issues in the Cities’ cross-appeal are sufficiently intertwined with Embarq’s appeal and can be “addressed as a matter of judicial efficiency and economy.” *James*, 49 S.W.3d at 682.

b. The Harrisonville Contract is not an illegal franchise

Upon entering into the Harrisonville Contract, Embarq expressly admitted “that this Agreement is a lawful contract...” LF p. 592. The Harrisonville Contract is legal, and the record does not support the denial of summary judgment on this count for that reason. Embarq asserts for the first time on appeal that the Harrisonville Contract is an

“illegal mandatory franchise” for the same reasons that it asserts the Cameron and Wentzville Rights-of-Way Agreements are illegal franchises, despite having *admitted* that rights-of-way agreements are “lawful.” *See* App. Rep. Br. p. 101; LF pp. 592, 1340, 1395. Embarq acknowledges that it did not raise this argument in the trial court, but reasons that the trial court’s judgment “may be affirmed on any basis supported by the record.” App. Rep. Br. p. 101 n.9. While it is true that a trial court’s summary judgment decision may be affirmed on any basis supported by the record, this basis is not supported by the record. The trial court rejected Embarq’s arguments that the Rights-of-Way Agreements were illegal franchises and held that they were legal agreements and CenturyLink was required to enter into them. LF pp. 1679-80. Therefore, Embarq’s argument that the Harrisonville Contract is an illegal franchise for the same reasons is definitively unsupported by the record, in that the judgment held the opposite.

Embarq argues the Harrisonville Contract violates § 67.1842.1(4) RSMo. App. Rep. Br. p. 101. Section 67.1842.1(4) RSMo. provides that cities may not “require a telecommunications company to obtain a franchise....” Embarq points to the Harrisonville Code in support of this argument, and argues that code section 530.025, providing that “no ROW user may construct, maintain, own, control or use facilities in the public rights-of-way without a franchise or ROW agreement,” establishes that the code requires and the contract is an illegal franchise. App. Rep. Br. p. 101. This argument ignores that code section 530.025 distinguishes between a Rights-of-Way agreement and a franchise and *expressly* provides that rights-of-way agreements like the Harrisonville Contract “shall not be subject to procedures applicable to franchises.” LF

pp. 968-69; Appendix A1-A4 (Code § 530.025(A)(1)(a) (“Franchise”); Code § 530.025(A)(1)(b) (“ROW agreement”)). Under the clear terms of the code, the Harrisonville Contract, a “Rights-of-Way Use Agreement,” is not an illegal mandatory franchise. LF p. 586. Additionally, the code only requires a franchise from rights-of-way users “seeking to use the public rights-of-way for purposes of providing cable television service or distribution of electricity, gas, water, steam, lighting or sewer public utility service in the City.” LF p. 968; Appendix p. A1. It does not require a telephone company to obtain a franchise. LF p. 968; Appendix p. A1.

The Harrisonville Contract is a “contract or [] other agreement” providing for the use, occupancy, and access to the public right-of-way. Section 67.1842.1(5) RSMo. The only limitation on such contracts or agreements is that they cannot be exclusive or discriminatory. *Id.* The Harrisonville Contract specifies that it “shall grant *nonexclusive* privileges to use the Rights-of-Way,” contemplates Embarq’s non-interference with “other users of the Rights-of-Way,” and therefore, it is not in violation of Chapter 67 RSMo. LF pp. 587, 588.

Embarq argues that the City’s interpretation of the statute is incorrect, that more is prohibited under the statute than simply exclusive or discriminatory contracts and agreements, and that the statute does not contemplate a distinction between a “franchise” and a contract, license, or other agreement. App. Rep. Br. pp. 34-35, 101. However, § 67.1846.1 RSMo., specifically distinguishes between these documents, stating that “[n]othing in sections 67.1830 to 67.1846 shall be deemed to relieve a public utility right-of-way user of the provisions of an existing franchise, franchise fees, license or other

agreement or permit in effect on May 1, 2001.” If “franchise” and “license or other agreements or permit” were the same thing, then the General Assembly’s listing of these items separately in the same sentence would be redundant and meaningless. This is a prohibited construction of the statute. *See State ex rel. Union Electric Co. v. Goldberg*, 578 S.W.2d 921, 923 (Mo. 1979) (courts “should not assume the legislature intended these words to have no meaning”). The Harrisonville Contract is available to all on a non-discriminatory basis, and it provides for non-exclusive use. LF p. 587. Therefore it is legal under Chapter 67.

In contrast to a franchise, the Harrisonville Contract does not provide authorization to do business or authorize the sale of services. Instead, it is in the nature of a lease of the City’s public rights-of-way. LF pp. 586-93. In 2004, the Missouri Court of Appeals defined a “franchise” as “a statute or ordinance that specifically authorizes a company...to sell...services to the residents of a particular area.” *Ogg v. Mediacom, L.L.C.*, 142 S.W.3d 801, 805 n.4 (Mo. App. 2004). Embarq attempts to distinguish and avoid *Ogg*, but does not provide a more recent definition of the term from Missouri courts. App. Rep. Br. pp. 31-38, 101. Embarq argues that the court was describing federal law and that the federal statute cited by the *Ogg* Court actually has a different definition of “franchise,” and therefore, the court’s definition of franchise should be ignored. App. Rep. Br. p. 37, 101. However, the *Ogg* Court did not cite the provision of that federal statute defining the term, and instead took it upon itself to explain the term as it is applicable in Missouri. *Ogg*, 142 S.W.3d at 805 n.4. That distinction does not provide a basis to ignore this clear definition. Nor does the fact that the rights-of-way at

issue in *Ogg* was owned by a private person provide a basis to ignore the Court's examination of the term "franchise." *See* App. Rep. Br. pp. 36-37. The court clearly defined a franchise as opposed to a mere license to use or be present in the rights-of-way, and Embarq has not identified a more recent or applicable definition.

Embarq points to older Missouri cases that define a franchise generally as "a special privilege conferred by the sovereign upon a citizen or citizens, which privilege is not common to the citizens generally." App. Rep. Br. pp. 31-34, 101; *see e.g., City of Poplar Bluff v. Poplar Bluff Loan & Bldg. Assoc.*, 369 S.W.2d 764, 766 (Mo. App. 1963); *State ex inf. McKittrick v. Murphy*, 148 S.W.2d 527, 530 (Mo. 1941). *City of Poplar Bluff* recognizes that there are many definitions of the term, and that one such definition is a tax upon the "privilege of doing certain things." In the context of § 67.1842 RSMo., a franchise grants authority to provide and sell telecommunications services, not a mere license to use the rights-of-way. However, *City of Poplar Bluff* simply did not analyze a franchise in the same context as this case, it looked at whether an occupational license *tax* was a "franchise *tax*." *Poplar Bluff*, 369 S.W.2d at 766 (emphasis added). *Murphy* also defined a franchise in this general way. *Murphy*, 148 S.W.2d at 530. Beyond that definition, though, *Murphy* recognized that a franchise grants distinct "powers" to an entity or person. *Id.* Therefore, even if we apply *Murphy* to this case, it is clear the Harrisonville Contract is not a franchise; it did not grant any distinct "powers" on Embarq, and it did not serve as the legal authority for Embarq to provide telephone services. It simply granted Embarq permission to be in the City's rights-of-way.

Section 67.1842 RSMo. seeks to prohibit a city from requiring a telecommunications company to enter into a franchise *to provide or sell its services*, as is clear from its permission of contracts, licenses, or other agreements. A franchise under Section 67.1842 is not, as Embarq contends, an agreement “under which public utilities *arrange* to provide services.” App. Rep. Br. pp. 32, 101. A franchise is the agreement that *grants* authority to provide services. This is clear even from the cases that Embarq points to. See App. Rep. Br. p. 101; *Empire Dist. Elec. Co. v. Southwest Elec. Co-op.*, 863 S.W.2d 892, 893 (Mo. App. 1993) (franchise allowed company “to *provide* electric service”) (emphasis added); *Murphy*, 148 S.W.2d at 530 (recognizing that a franchise grants distinct “powers”); *State ex rel. Hagerman v. St. Louis & E. St. L. Electric ry. Co.*, 216 S.W. 763, 765 (Mo. 1919) (explaining that a franchise is an agreement under which a company is granted its “right to operate”). The Harrisonville Contract does not grant Embarq authority to provide and sell services to citizens. As *Ogg* recognized, a franchise typically contains “not only [a] grant [of] the right to sell programming and other services, but also contain[s] regulations to ensure that it operates in the interest of local citizens.” *Ogg*, 142 S.W.3d at 805 n.5. The Harrisonville Contract contains no provisions that would regulate Embarq’s provision or sale of services. It does not purport to authorize or require the provision of any services in the City, it does not regulate Embarq’s conduct of business, the rates it charges customers, or any other technical requirements. LF pp. 586-94; *State ex inf. Peach, ex rel. City of St. Louis v. Melhar Corp.*, 650 S.W.2d 633, 637 (Mo. App. 1983) (franchise *required* franchisee to provide

services and ouster was proper where the franchisee never “provided the service *for which it was issued*” (emphasis added).

The Harrisonville Contract grants Embarq, as one potential lessee or licensee, “authority to use the Rights-of-Way.” LF pp. 587. The Contract is limited in the scope of rights granted to Embarq and specifies that the “Nature of Rights Granted by this Agreement,” includes “*only* the right to *occupy* Rights-of-Way....” LF p. 587 (emphasis added). It further states that it “does not provide Licensee the right to install antennae or antennae support structures in the rights-of-way, *nor provide services* not authorized herein.” LF p. 587 (emphasis added). Given the limited rights granted and that there are no terms within the Contract authorizing or granting Embarq the right to sell its services, it simply cannot be construed as a franchise under § 67.1842 RSMo.

c. The trial court found that Embarq failed to pay license taxes and therefore Embarq materially breached the Harrisonville Contract

Nowhere in the trial court record did Embarq put forth evidence that it “fully paid” its tax liability. This is clear from Embarq’s failure to cite any portion of the legal file in support of this allegation. App. Rep. Br. p. 102. Embarq’s assertion that it has “fully paid its tax liability to Harrisonville,” has no basis in the record and provides no opportunity for this Court to affirm the trial court’s denial on Count XVI.

It is undisputed and Embarq admitted that it does not pay license taxes on the required categories of revenue. LF pp. 1308-12. As a result of these admissions and the trial court’s judgment that Embarq failed to pay the required license tax, as a matter of law, Embarq materially breached the Harrisonville Contract. LF p. 588 (Section 4 of the

Harrisonville Contract, stating that “Licensee agrees to pay all applicable taxes including license taxes, business taxes and other applicable taxes of the City and failure to pay such taxes shall be considered a material breach of this Agreement.”). Therefore, it was error for the trial court to deny summary judgment on Count XVI, the breach of contract claim.¹

d. There is consideration for the Harrisonville Contract

Embarq argues that the Harrisonville Contract is unenforceable because the promise to pay licenses taxes “is not valid consideration,” in that it constitutes a pre-existing legal duty. App. Rep. Br. pp. 103-104. The problem with Embarq’s argument is that each separate promise within a contract need not be supported by consideration, and the Harrisonville Contract was supported by valid consideration overall. LF pp. 586-94. It is a fundamental principle of contract law that separate consideration is not needed for each distinct portion of a contract. *Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc.*, 59 S.W.3d 505, 509 (Mo. 2001) (rejecting the argument that each term in a contract have separate, bargained-for consideration); *Empire Gas Corp. v. Small’s LP Gas Co.*, 637 S.W.2d 239, 246 (Mo. App. 1982) (“[I]t is only when consideration for the contract wholly fails that the contract becomes unenforceable. In other words, even if there be partial failure of consideration, yet if there is a substantial consideration left it will be

¹ Embarq refers the Court to Part III of its Reply Brief, which sets forth its legal arguments that the four categories of revenue are not subject to the license tax. App. Rep. Br. p. 102. The City therefore refers the Court to pages 66-98 of its Initial Brief.

sufficient to sustain the contract.”). Here, there is no evidence of failure of consideration, let alone total failure of consideration. Harrisonville and Embarq made “mutual promises and covenants” in exchange for the use of Harrisonville’s rights-of-way. LF p. 586. In order to use and be present in Harrisonville’s rights-of-way, Embarq was required to execute a rights-of-way agreement and make promises above and beyond the license taxes. LF pp. 586-94.

Embarq relies on *Wise v. Crump* and *Holcomb v. United States*, which the Cities properly distinguished in their initial brief, and which arguments Embarq does not address. Cities’ Initial Brief, pp. 121-23; App. Rep. Br. pp. 102-103. Again, those cases are inapplicable because they involved a *total* failure of consideration for the implied or alleged contracts, and did not involve additional promises and obligations made by the parties. *See Wise v. Crump*, 978 S.W.2d 1, 3 (Mo. App. 1998) (total failure of consideration for breach of constructive contract claim where the *only* consideration offered was the defendant’s implied promise under state law to insure his vehicle); *Holcomb v. United States*, 622 F.2d 937, 941 (7th Cir. 1980) (total failure of consideration for breach of a contract where the *only* consideration offered was the defendant’s promise to make tax payments). Here, there was valid consideration for the overall contract. LF p. 586 (“[I]n consideration of the mutual promises and covenants in this Agreement...”). Embarq made promises that it was not already legally obligated to make, and therefore, the pre-existing duty rule is inapplicable. The pre-existing duty rule concerns itself only with whether the sole consideration in a contract was based on an obligation already required by law, and whether a party failed to “ever agreed to do anything beyond what

he initially promised to do....” *Wages v. Young*, 261 S.W.3d 711, 717 (Mo. App. 2008) (holding that because the contracting party never “agreed to do anything beyond what he initially promised to do,” the contract failed under the pre-existing duty rule); *Gross v. Diehl Specialties Intern., Inc.*, 776 S.W.2d 879, 883 (Mo. App. 1989) (citing the pre-existing duty rule and recognizing that “[d]efendant undertook no greater obligations than it already had”). As the court explained in *City of Bellefontaine Neighbors*, while “a promise to do that which one is already legally obligated to do cannot serve as consideration for a contract,” that prohibition only applies “if in fact the [contracting party] has *only* promised to do that which it was legally obligated to do.” *City of Bellefontaine Neighbors v. J.J. Kelley Realty Bldg. Co.*, 460 S.W.2d 298 (Mo. App. 1970) (emphasis added). Here, Embarq’s agreements in the Harrisonville Contract well exceed the provision on license tax payments. For the pre-existing duty rule to bar enforcement of this contract, the *sole* consideration for the contract would have to be its obligation to pay license taxes. Essentially, the agreement would have to be identical and limited to the actual taxes themselves. The Harrisonville Contract is not limited in that way.

Where a contract imposes additional, new, or different obligations from those that are already legally required, it is supported by consideration and the courts have enforced *the entirety* of the contract. See *Eiman Brothers Roofing Systems, Inc. v. CNS Intern. Ministries, Inc.*, 158 S.W.3d 920, 922 (Mo. App. 2005); *Ashland Oil, Inc. v. Tucker*, 768 S.W.2d 595, 601 (Mo. App. 1989); *Harris v. A.G. Edwards Sons, Inc.*, 273 S.W.3d 540, 544-45 (Mo. App. 2008). Embarq inadequately distinguishes *Eiman Brothers*, *Ashland*

Oil, and *Harris* on the sole basis that those cases involved “a subsequent alleged bargain to modify or update the contract,” and as cases of modification, they should be ignored. App. Rep. Br. p. 106. However, only *Eiman Brothers* truly involved a modification. *Ashland Oil* and *Harris* both involved entirely separate agreements. See *Ashland Oil*, 768 S.W.2d at 601; *Harris*, 273 S.W.3d at 544-45. That those cases involved “updates” or modifications is irrelevant, because a modification is analyzed as an entirely new contract. See *Eiman Brothers Roofing Systems, Inc.*, 158 S.W.3d at 922; *Gross*, 776 S.W.2d at 883 (“A modification of a contract constitutes the making of a new contract....”). Further, the holdings of those cases - that additional and different obligations suffice as consideration where there is also a pre-existing legal duty - were not limited to circumstances of modifications. Rather, the courts broadly held that the pre-existing duty rule was inapplicable, and the court enforced the entirety of the new contracts. See *Eiman Brothers Roofing Systems, Inc.*, 158 S.W.3d at 922 (characterizing the modification as an entirely new contract supported by consideration); *Ashland Oil, Inc.*, 768 S.W.2d at 601 (holding that the later noncompetition agreement was supported by consideration and enforceable as a contract); *Harris*, 273 S.W.3d at 545 (recognizing that the later arbitration agreement was valid and enforceable as a contract).

Embarq’s discussion of conditions is a red herring. Embarq contends that the specific additional obligations the City identified in its brief were conditions, not promises, and therefore they cannot provide consideration for the Contract. App. Rep. Br. p. 107-108. Again, Embarq ignores the fundamental principle that each portion of a contract need not contain independent consideration. *Purcell Tire & Rubber Co.*, 59

S.W.3d at 509. The City pointed to examples of the different and additional obligations Embarq agreed to, above and beyond the agreement to comply with the City's ordinances, "among other consideration and mutual promises." Cities' Initial Brief, p. 117. This demonstrated that the Contract was not identical to the taxing ordinance. The City did not purport to list every promise made by the parties. Embarq, however, contends that after eliminating the pre-existing obligations in the Contract, "Embarq's remaining obligations are not 'bargained-for' consideration, because they would not have induced Harrisonville to offer use of its rights-of-way." App. Rep. Br. p. 107. This is incorrect. Removing Section 4 ("Taxes") from the Harrisonville Contract does not remove the bargained-for consideration from this Contract, it just removes one promise made on behalf of Embarq. LF p. 588. Harrisonville did not enter into the Contract in order to ensure Embarq would pay its taxes, it simply required that if Embarq will be present in the City's rights-of-way, it shall not break the laws of the City while it is there. For this reason, *Carlisle*, the sole case Embarq cites in support of its argument that the Contract is supported only by conditions, is inapplicable. App. Rep. Br. p. 108. In *Carlisle*, a husband and wife agreed that the husband would help the wife build a preschool if she would reimburse him for materials used. *Carlisle v. T & R Excavating, Inc.*, 704 N.E.2d 39, 42 (Ohio App. 1997). The promise to reimburse her husband for materials encompassed the entirety of the wife's obligations under that agreement. *Id.* The court determined that the promise of reimbursement was not "beneficial enough to induce" the husband's promise to build a preschool, that it was a "gratuitous promise" on his behalf, and that the relationship between a husband and wife cannot serve as

consideration for a contract. *Id.* at 43-44. The Harrisonville Contract was not a gratuitous promise, and was not limited to a single conditional obligation. *Carlisle* has no application here. The Harrisonville Contract is supported by consideration and it is enforceable.

As such, there is no genuine dispute of law or fact that the Harrisonville Contract is enforceable and Embarq materially breached its terms. The City demonstrated a right to judgment as a matter of law, and the trial court erred in denying summary judgment on Count XVI.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of December, 2014 the foregoing brief and accompanying appendix were filed electronically via Missouri CaseNet and served electronically to:

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 4,950 words, exclusive of sections exempted by Rule 84.06(b), based on the word count function of the Microsoft Word 2010 word processing software.

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