STATE OF MICHIGAN

IN THE SUPREME COURT

WAYNE COUNTY EMPLOYEES RETIREMENT SYSTEM and WAYNE COUNTY RETIREMENT COMMISSION,

Plaintiffs-Counterdefendants-Appellees,

v

CHARTER COUNTY OF WAYNE,

Defendant-Counterplaintiff-Appellant,

and

WAYNE COUNTY BOARD OF COMMISSIONERS,

Defendant-Appellant.

Docket No. 147296

Court of Appeals No. 308096

Wayne County Circuit Court
LC No. 10-013013-AW
Hon. Michael F. Sapala

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DEFENDANTS-APPELLANTS WAYNE COUNTY AND WAYNE COUNTY BOARD OF COMMISSIONERS' *SUPPLEMENTAL* BRIEF IN SUPPORT OF THEIR APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. WAYNE COUNTY'S ANSWER TO QUESTION 1: THE COURT OF APPEALS ERRED IN HOLDING THAT THE 2010 ORDINANCE VIOLATES PERSIA BECAUSE RETIREMENT SYSTEM ASSETS NEVER LEFT THE SYSTEM AND ARE NOT USED FOR ANY PURPOSE OTHER THAN TO PAY BENEFITS TO RETIREMENT SYSTEM PARTICIPANTS AND THEIR BENEFICIARIES 3

A. The 2010 ordinance does not violate PERSIA's "exclusive benefit" rule 3

1. Retirement system assets never left the system and continue to be used for the exclusive benefit of participants and their beneficiaries. 3

2. The Court of Appeals' "exclusive benefit" analysis disregards MCL 38.1140m, which expressly permits transfers and offsets similar to that under the 2010 ordinance 7

3. The Court of Appeals' analysis contradicts persuasive authority from outside of Michigan, including the United States Supreme Court's interpretation of ERISA's "exclusive benefit" rule. 9

B. The transfer of assets from the discretionary IEF back into the defined benefit plans was not a "prohibited transaction." 15

1. The 2010 ordinance does not result in any of the three types of "transactions" described in MCL 38.1133(6)(c) 16

2. MCL 38.1133(6) makes clear that a "prohibited transaction" is a transaction involving a retirement system and another party, and not an intra-system transfer of assets like under the 2010 ordinance. 20

3. The Court of Appeals' "prohibited transaction" analysis once again disregards MCL 38.1140m, which expressly permits a "transaction" substantially similar to the credit and offset under the 2010 ordinance. 20

III. WAYNE COUNTY'S ANSWER TO QUESTION 2: ENROLLED ORDINANCE 2010-514 DOES NOT VIOLATE CONST 1963, ART 9, § 24 BECAUSE 13TH CHECKS ARE NOT ACCRUED FINANCIAL BENEFITS 21

A. An accrued financial benefit is a financial benefit that increases or grows over time and that arises on account of service rendered in each fiscal year, yet the discretionary decision whether to even issue a 13th check in a given year is not made until after retirement, and the amounts of those checks can vary from year to year. 22

B. The Court of Appeals' suggestion that there may be a group "entitlement" to 13th checks disregards both *Studier* and *In re Advisory Opinion*....26

C. A unilateral reliance on a discretionary bonus check does not transform it into an "accrued financial benefit." 28

IV. CONCLUSION....29

TABLE OF AUTHORITIES

Cases

Baizer v Comm'r of Internal Revenue, 204 F3d 1231 (CA 9, 2000) 19

Breighner v Mich High School Athletic Ass'n, 471 Mich 217; 683 NW2d 639 (2004) 4

Claypool v Wilson, 4 Cal App 4th 646; 6 Cal Rptr 2d 77 (1992) 13, 14, 15

Comm'r of Internal Revenue v Keystone Consol Indus, Inc, 508 US 152; 113 S Ct 2006; 124 L Ed 2d 71 (1993) 19

Duffy v Dep't of Natural Resources, 490 Mich 198; 805 NW2d 399 (2011) 8

Evening News Ass'n v City of Troy, 417 Mich 481; 339 NW2d 421 (1983) 9

Frame v Nehls, 452 Mich 171; 550 NW2d 739 (1996) 8

Hannan v Detroit City Council, unpublished opinion per curiam of the Court of Appeals, issued September 1, 2000; 2000 Mich App LEXIS 980 (Docket No. 211704) 25, 26

Hughes Aircraft Co v Jacobson, 525 US 432; 119 S Ct 755; 142 L Ed 2d 881 (1999) .... passim

In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38, 490 Mich 295; 806 NW2d683 (2011) .... passim

Peek v Comm'r of Internal Revenue, 140 TC 12, 2013 US Tax Ct LEXIS 12 (2013) 19

People v Hill, 267 Mich App 345; 705 NW2d 139 (2005) 29

Quinn v Police Officers Labor Council, 456 Mich 478; 572 NW2d 641 (1998) 9

Raymond B Yates, MD, PC Profit Sharing Plan v Hendon, 541 US 1; 124 S Ct 1330; 158 L Ed 2d 40 (2004) 10

Rollins v Comm'r of Internal Revenue, TC Memo 2004-260 (Memo Dec 2004) 19

Shelby Twp Police and Fire Retirement Bd v Shelby Twp, 438 Mich 247; 475 NW2d 249 (1991) 29

Studier v Mich Pub Sch Employees' Retirement Bd, 472 Mich 642; 698 NW2d 350 (2005) 2, 22, 24, 27

Sweatt v Dep't of Corrections, 468 Mich 172; 661 NW2d 201 (2003) 4

Tinsman v City of Southfield, unpublished opinion per curiam of the Court of Appeals, issued December 3, 1999; 1999 Mich App LEXIS 2112 (Docket Nos. 207035, 207056) 28

United Mine Workers of Am Health & Ret Funds v Robinson, 455 US 562; 102 S Ct 1226; 71 L Ed 2d 419 (1982) 12

World Book v Mich Dep't of Treasury, 459 Mich 403; 590 NW2d 293 (1999) 8

Statutes

29 USC 1103(c)(1) 9, 11

MCL 38.1133(6) .... passim

MCL 38.1133(6)(c) .... passim

MCL 38.1140m 7, 8, 21

Other Authorities

1 Official Record, Constitutional Convention 1961 27

Merriam-Webster Online Dictionary 17

Constitutional Provisions

Const 1963, art 9, § 24 .... passim

I. INTRODUCTION

This Court's November 27, 2013, order directing the Court Clerk to schedule oral argument on Defendants-Appellants Charter County of Wayne and Wayne County Board of Commissioners' ("Wayne County") application for leave to appeal posed the following questions:

> (1) Whether the Court of Appeals erred in holding that provisions of Wayne County Enrolled Ordinance 2010-514 [(the "2010 ordinance")] violate the Public Employee Retirement System Investment Act, MCL 38.1132 et seq. [("PERSIA")]; and
>
> (2) Whether the ordinance violates Const 1963, art 9, § 24.

Wayne County will address each issue in turn. The Court of Appeals' first error was in holding that the 2010 ordinance's credit and offset provision violates PERSIA's "exclusive benefit" rule, MCL 38.1133(6), a conclusion that was clearly premised upon the Court of Appeals' flawed belief that the assets of the *discretionary* IEF, which is used solely to issue discretionary 13th checks, must be treated as sacrosanct. This belief permeated the Court of Appeals' analysis of the exclusive benefit rule and its conclusion that Wayne County impermissibly "benefited" when IEF assets were moved back into the defined benefit plans as a partial offset to the County's annual required contribution ("ARC") for fiscal year 2010-2011. However, the Court of Appeals failed to consider that MCL 38.1133(6) only requires that the assets of the *retirement system as a whole* be used for the "exclusive benefit" of participants and beneficiaries, and simply does not prohibit an *intra-system transfer* of retirement system assets. Wayne County did not use retirement system "assets" for its own "benefit" within the meaning of MCL 38.1133(6) because those assets were never used for any purpose other than to pay benefits to retirement system participants and their beneficiaries.

The Court of Appeals further erred when it concluded that the intra-system transfer of retirement system assets from the IEF to the defined benefit plans constituted a "transaction" prohibited by MCL 38.1133(6)(c). MCL 38.1133(6)(c) only prohibits certain transactions that involve assets either being transferred outside of the retirement system, or used "by" or "for the benefit" of the system sponsor. The transferring of IEF assets back into the defined benefit plans as an offset to the County's 2010-2011 ARC did not involve a prohibited "transaction" because, once again, no assets left the retirement system or were otherwise "used" for anything other than the payment of retirement benefits.

The answer to the Court's second question is even more straightforward. By its express terms, Const 1963, art 9, § 24 only protects "accrued financial benefits" from being diminished or impaired. The Court made it clear in *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005), and again in *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295; 806 NW2d 683 (2011), that "accrued financial benefits" are financial benefits that both (1) increase or grow over time, and (2) can be funded "in the year that service was rendered." Yet 13th checks, by their very nature, do not meet either of these requirements because the discretionary decision whether to even make a 13th check distribution is not made until after the employee retires. Thus, 13th checks are nothing like regular retirement benefits that accumulate and grow during an employee's working years and that can be funded each year on account of the employee's services that year. Because 13th checks are not "accrued financial benefits," the 2010 ordinance does not violate art 9, § 24 even if the transfer of assets from the IEF to the defined benefit plans diminishes or impairs 13th check payments.

II. WAYNE COUNTY'S ANSWER TO QUESTION 1: THE COURT OF APPEALS ERRED IN HOLDING THAT THE 2010 ORDINANCE VIOLATES PERSIA BECAUSE RETIREMENT SYSTEM ASSETS NEVER LEFT THE SYSTEM AND ARE NOT USED FOR ANY PURPOSE OTHER THAN TO PAY BENEFITS TO RETIREMENT SYSTEM PARTICIPANTS AND THEIR BENEFICIARIES

The Court's first question is "whether the Court of Appeals erred in holding that provisions of Wayne County Enrolled Ordinance 2010-514 violate the Public Employee Retirement System Investment Act, MCL 38.1132 *et seq*." The answer is "yes." More specifically, the Court of Appeals erred in concluding (1) that the 2010 ordinance violates PERSIA's exclusive benefit rule, MCL 38.1133(6), and (2) that the 2010 ordinance violates PERSIA's prohibited transaction rule, MCL 38.1133(6)(c).[1]

A. The 2010 ordinance does not violate PERSIA's "exclusive benefit" rule.

1. Retirement system assets never left the system and continue to be used for the exclusive benefit of participants and their beneficiaries.

PERSIA's exclusive benefit rule provides, in relevant part, that "*[t]he system* shall be a separate and distinct trust fund and the assets *of the system* shall be for the exclusive benefit of the participants and their beneficiaries and of defraying reasonable expenses of investing the assets of the system." MCL 38.1133(6) (emphasis added).[2] The Court of Appeals held that the 2010 ordinance violated the exclusive benefit rule when it made an intra-system transfer of funds from the IEF back into the defined benefit plans because Wayne County received "an enormous cost savings benefit" in the form of a partial offset to the county's annual required contribution

[1] The Court of Appeals summarized its PERSIA holding as follows: "[W]e hold that, for the reasons stated . . . the 2010 ordinance violates PERSIA, particularly the exclusive benefit rule in MCL 38.1133(6) and the prohibited transaction rule in MCL 38.1133(6)(c)." *Wayne County*, 301 Mich App at 48-49.

[2] The statute was amended effective March 28, 2013. The exclusive benefit rule was moved to subsection (8) in the new statute.

("ARC"), which "freed up County funds for other uses." *Wayne County*, 301 Mich App at 32. In the Court of Appeals' view, this meant that the retirement system's assets were not being used for the "exclusive" benefit of the participants and their beneficiaries. *Id.* at 31-33.

The Court of Appeals' analysis misconstrues MCL 38.1133(6)'s plain text, and takes the term "exclusive benefit" out of context.[3] "Exclusive benefit" simply refers to the retirement system's "assets" and how they are used. When read in its entirety, it is apparent that MCL 38.1133(6) is not concerned with whether the employer's own interests are also advanced in some way so long as the system's actual "assets" (i.e., its "cash and investments") are not used for anything other than the "exclusive benefit" of the participants and their beneficiaries. Under the plain language of MCL 38.1133(6), the "exclusive benefit" rule can only be violated if a system's "assets" are "shared with others" (which is the Court of Appeals' own definition of "exclusive," see *Wayne County*, 301 Mich App at 31). Here, that indisputably did not happen. As the Court of Appeals conceded, the "assets" at issue, "once part of the IEF and now part of the defined benefit plan assets on the accounting records, *were still to be used for the benefit of participants and their beneficiaries in the form of regular pension payments.*" *Wayne County*, 301 Mich App at 32 (emphasis added). As a result, there was no violation of MCL 38.1133(6).

While there is no question that one of the "effects" of the transfer of IEF assets to the defined benefit plans was to reduce Wayne County's own contribution to the defined benefit plans, that is not the sort of "benefit" that MCL 38.1133(6) addresses in providing that "assets"

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[3] This Court has explained that a "statutory term cannot be viewed in isolation, but must be construed in accordance with the surrounding text and the statutory scheme." *Breighner v Mich High School Athletic Ass'n*, 471 Mich 217, 232; 683 NW2d 639 (2004). A statutory term like "exclusive benefit" "does not stand alone, and thus it cannot be read in a vacuum." *Sweatt v Dep't of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003). "[I]t exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense." *Id.* (citation omitted).

of a retirement system shall be for the "exclusive benefit" of participants and their beneficiaries. While the transfer certainly had an "impact" that was "beneficial to the County," the fact remains that Wayne County did not *use* Retirement System assets for its own "benefit" within the meaning of MCL 38.1133(6) because the system's "assets" were never used for any purpose other than to pay benefits to Retirement System participants and their beneficiaries, which is all that MCL 38.1133(6) is concerned with.

In holding that the 2010 ordinance nevertheless violates the exclusive benefit rule, the Court of Appeals asserted that the "Retirement System unquestionably lost $32 million." *Wayne County*, 301 Mich App at 33. But that mischaracterizes the effect of the ordinance. No "assets" were removed from the Retirement System. Instead, Wayne County simply transferred funds from the discretionary IEF to the defined benefit plans as a partial offset of its ARC for the 2010-2011 fiscal year. It is true that without the 2010 ordinance, the Retirement System's "assets" would have been *increased* by an additional $32 million, but whether funds should have been added to the system has nothing to do with how its *existing* "assets" were used, which is the focus of the statute's plain language.[4] Although the credit and offset provided under the 2010 ordinance reduced Wayne County's own contribution to the defined benefit plans, such a one-time *savings* does not constitute use of the system's "assets" for the County's benefit as contemplated by the statute. On the contrary, the "assets" in the retirement system have always been used – as even the Court of Appeals acknowledged – to pay benefits to retirement system participants and their beneficiaries.

[4] It is also important to note that because the 2010 ordinance resulted in the payment of the County's 2010-2011 ARC, the defined benefit plans were no less funded than they would have been without the 2010 ordinance. All that changed is that the discretionary IEF bonus fund was reduced.

Instead of carefully analyzing the language of MCL 38.1133(6), it is apparent that what really drove the Court of Appeals' exclusive benefit analysis was protection of *the IEF*, which the Court of Appeals characterized as a "reserve" that was "dedicated" to "13th check distributions":

> [O]nce a particular dollar amount, if any, was arrived at under the IEF formula, including the discretionary components controlled by the Retirement Commission, the IEF ordinance had always *compelled or mandated* the allocation or crediting of said amount to the IEF. And the assets in the IEF were dedicated for use by retirees and survivor beneficiaries in the form of a 13th check as a hedge against inflation. By September 30, 2010, the IEF had an accumulated balance of approximately $44 million that was intended and designated for 13th-check distributions; indeed, there had never been, for the most part, any other permitted use of IEF assets. The IEF, in and of itself, can be accurately characterized as a reserve belonging to and vested in the Retirement System's participants as a whole, outside the reach of defendants, to be used to assist retirees and survivor beneficiaries in fighting the devaluing of the dollar by inflation. [*Wayne County*, 301 Mich App at 34-35.]

The Court of Appeals noted that as a result of the 2010 ordinance, the IEF's balance was "decreased by $32 million down to $12 million," and variously asserted that the 2010 ordinance "improperly invaded the *assets of the IEF*" and "depleted and redirected *IEF assets* that had been designated for . . . payment of 13th checks." *Wayne County*, 301 Mich App at 34-38 (emphasis added). The Court of Appeals even went so far as to assert, in dicta, that *even if Wayne County had fully paid its ARC from its own funds*, MCL 38.1133(6) would still have precluded *any* "debiting of the $32 million from the IEF and crediting of that amount to the defined benefit assets" because it would have "ignored the prior controlling versions of the IEF ordinance and the intent manifested therein." *Wayne County*, 301 Mich App at 51 n 29.

The problem is that treating "the IEF" as inviolate ignores the fact that it is merely a fund *within the Wayne County Retirement System.* Nothing in MCL 38.1133(6)'s "exclusive benefit" rule prevents an employer from *reallocating the assets inside a retirement system*, which is all

that occurred here.[5] The plain and unambiguous language of MCL 38.1133(6) requires nothing more than that "*assets of the system* shall be for the exclusive benefit of the participants and their beneficiaries." (Emphasis added). Nothing in the plain language of the statute requires that assets in the IEF be used for purposes *specific to the IEF*, i.e., to pay discretionary bonuses. Thus, the fact that the $32 million transferred from the IEF back into the defined benefit plans was not used *to distribute 13th checks* does not mean that the "system's assets" were somehow used for purposes other than paying benefits to Retirement System participants and their beneficiaries. The Court of Appeals erred in concluding otherwise.

2. The Court of Appeals' "exclusive benefit" analysis disregards MCL 38.1140m, which expressly permits transfers and offsets similar to that under the 2010 ordinance.

The Court of Appeals' interpretation of MCL 38.1133(6) is also incompatible with MCL 38.1140m, which expressly permits transfers and offsets similar to that of the 2010 ordinance. MCL 38.1140m provides that "[i]n a plan year, any current service cost payment may be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability." Thus, as the Court of Appeals was forced to concede, MCL 38.1140m specifically *authorizes* the very sort of offset that the Court found MCL 38.1133(6) to *prohibit*. In fact, the Court of Appeals expressly recognized that an offset under MCL 38.1140m "could be viewed as being used for the benefit of the public employer by effectively diminishing the employer's ARC." *Wayne County*, 301 Mich App at 37. The only difference between MCL 38.1140m and the 2010

[5] This of course requires that the reallocation of assets does not diminish or impair an "accrued financial benefit" in violation of Const 1963, art 9, § 24, which even the Court of Appeals acknowledged did not happen here. See *Wayne County*, 301 Mich App at 34 ("[T]here is no vested or enforceable right to a 13th check given the discretionary distribution language that has always been part of the IEF ordinance, along with the lack of any CBA language requiring disbursement of a 13th check.").

ordinance is that MCL 38.1140m applies only to offsets using "accrued assets" held within a traditional defined benefit plan during a period of overfunding, whereas the offset under the 2010 ordinance applies only to assets held in the discretionary IEF.[6]

Instead of construing MCL 38.1133(6) in harmony with MCL 38.1140m, the Court of Appeals tersely and summarily dismissed MCL 38.1140m as an *exception* to MCL 38.1133(6) that is "not implicated with respect to the offset in the 2010 ordinance." *Id.* The Court of Appeals' analysis is flawed because it creates an unnecessary conflict between MCL 38.1133(6) and MCL 38.1140m.

Although the Court of Appeals cited the principle that "'where a statute contains a general provision and a specific provision, the specific provision controls,'" *Duffy v Dep't of Natural Resources*, 490 Mich 198, 215; 805 NW2d 399 (2011) (citation omitted), it failed to appreciate that the general/specific canon of interpretation only applies when statutory provisions "seemingly conflict." See *Frame v Nehls*, 452 Mich 171, 176 n 3; 550 NW2d 739 (1996). There is no "conflict" between MCL 38.1133(6) and MCL 38.1140m under Wayne County's and the trial court's construction. The rule of construction that the Court of Appeals *should have* applied is that courts must read provisions of a statute together "to produce an harmonious whole and to reconcile any inconsistencies wherever possible." *World Book v Mich Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999). Instead of viewing the offset permitted under MCL 38.1140m as an exception to the exclusive benefit rule, the Court of Appeals should have viewed

[6] Because IEF assets are not included in the Retirement Commission's calculation of the defined benefit plans' accrued assets or actuarially accrued liabilities, and are instead used solely for the purpose of making discretionary 13th check distributions, MCL 38.1140m is not implicated here, as the trial court correctly determined and as the Court of Appeals conceded. See *Wayne County*, 301 Mich App at 54 ("MCL 38.1140m appears to only address ARCs relative to defined benefit plans . . . .").

it as being consistent with the notion that so long as retirement "system" assets are ultimately used for the "exclusive" purpose of paying benefits, there is no violation of the "exclusive benefit" rule.

3. The Court of Appeals' analysis contradicts persuasive authority from outside of Michigan, including the United States Supreme Court's interpretation of ERISA's "exclusive benefit" rule.

The United States Supreme Court has long recognized this principle in the context of ERISA's own exclusive benefit rule, which similarly provides that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 USC 1103(c)(1). Although the Supreme Court's precedents construing ERISA are not binding here, they are highly persuasive because of the similarities between ERISA's exclusive benefit rule and MCL 38.1133(6).[7]

In *Hughes Aircraft Co v Jacobson*, 525 US 432; 119 S Ct 755; 142 L Ed 2d 881 (1999), the plaintiffs claimed that Hughes violated ERISA's exclusive benefit rule (a/k/a "anti-inurement" provision) by amending a company pension plan, which had a surplus of assets, to provide for an early retirement program that "provided significant additional retirement benefits to certain eligible active employees," as well as a new noncontributory benefit structure whereby "new participants could not contribute to the [p]lan, and would thereby receive fewer benefits. Existing members could continue to contribute or opt to be treated as new participants." *Id.* at

[7] See, e.g., *Quinn v Police Officers Labor Council*, 456 Mich 478, 482 n 1; 572 NW2d 641 (1998) ("Because our state labor statutes are patterned after the National Labor Relations Act, we examine federal construction of analogous provisions of the NLRA for guidance in construing our own labor statutes."); *Evening News Ass'n v City of Troy*, 417 Mich 481, 495; 339 NW2d 421 (1983) ("[T]he similarity between the [Michigan Freedom of Information Act] and the federal act invites analogy when deciphering the various sections.") (citations and internal quotation marks omitted).

436. These changes enabled Hughes to suspend its own continued contributions to the plan. *Id.* The plaintiffs claimed that Hughes violated ERISA's exclusive benefit rule by "benefiting itself at the expense of the Plan's surplus." *Id.* at 437, 441-442.

The Supreme Court, however, in a *unanimous opinion* held that because Hughes continued to use plan assets for the sole purpose of paying its obligations to the plan's beneficiaries, Hughes "could not have violated" the exclusive benefit rule. See *id.* at 442-443. This is because "the [exclusive benefit rule] focuses exclusively on whether fund assets were used to pay pension benefits to plan participants." *Id.* at 442. As *Hughes* recognized, the use of plan assets to pay obligations to plan beneficiaries is, by definition, a use of plan assets for the exclusive benefit of participants:

> Respondents do not dispute that Hughes used fund assets for the sole purpose of paying pension benefits to plan participants. . . . Because . . . respondents do not allege that Hughes used any of the assets for a purpose other than to pay its obligations to the Plan's beneficiaries, Hughes could not have violated the anti-inurement provision under ERISA § 403(c)(1). [*Id.* at 442-443.]

Since *Hughes*, the Supreme Court has confirmed that 28 USC 1103(c)(1) "demands only that plan assets be held for supplying benefits to plan participants." *Raymond B Yates, MD, PC Profit Sharing Plan v Hendon*, 541 US 1, 22; 124 S Ct 1330; 158 L Ed 2d 40 (2004).

Given the striking similarity between 29 USC 1103(c)(1) and MCL 38.1133(6), and the factual parallels between *Hughes* and the present case, the Court of Appeals should have followed its reasoning in construing MCL 381133(6). But the Court of Appeals instead casually dismissed *Hughes* and engaged in a tortured effort to distinguish it.

The Court of Appeals first observed that the plaintiffs in *Hughes* were found to have "no entitlement to share in a plan's surplus – even if it is partially attributable to the growth of their contributions," whereas "[h]ere, retirees and survivor beneficiaries *as a group* had an entitlement to share in the IEF assets at some juncture, as those assets had been specifically allocated and

were intended for distribution to retirees and survivor beneficiaries in the form of 13th checks." *Wayne County*, 301 Mich App at 40, citing *Hughes*, 525 US at 440. Wayne County will discuss in detail in its response to the Court's second question the plain error in the Court of Appeals' novel and unsupported "group" entitlement theory, but suffice it to say that whether or not the plaintiffs in *Hughes* were entitled to share in surplus plan assets had nothing whatsoever to do with the Supreme Court's analysis of 29 USC 1103(c)(1).

The Court of Appeals also cited the fact that *Hughes* involved use of "surplus assets" that were "never earmarked for anything but the future distribution of defined benefit plan payments to retirees in general," whereas "the $32 million in the IEF that was shifted to the defined benefit plan assets simply did not constitute true 'surplus' assets." *Wayne County*, 301 Mich App at 41. Instead, the Court of Appeals reasoned, the defined benefit plans were "severely underfunded," and while the assets in the defined benefit plans and IEF were "pooled together in a single trust fund," the IEF's assets were "segregated in terms of accounting records" and "primarily intended and designed for the payment of 13th checks." *Id.* But there are two problems with this superficial distinction. First, it disregards the thrust of the *Hughes* Court's analysis, which is that it cannot be said that the exclusive benefit rule has been violated so long as plan assets, "surplus" or not, are used for the exclusive purpose of paying benefits to the participants.[8]

Second, the Court of Appeals is, once again, treating the IEF as though it were its own independent retirement "system," when in fact the IEF is merely a "fund" residing *within* the

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[8] The Supreme Court did allude to the fact that "all times, Hughes satisfied its continuing obligation under the provisions of the Plan and ERISA to assure that the Plan was adequately funded," and that Hughes therefore "did not act impermissibly by using surplus assets from the contributory structure to add the noncontributory structure to the Plan." *Hughes*, 525 US at 442. But the same can be said here, as Wayne County has always met its defined benefit plan funding obligations. As with the pension plan changes in *Hughes*, the 2010 ordinance did not impact the defined benefit plans' funded status.

Retirement System from which assets were transferred to another part of the system. Federal courts have long held that such intra-system transfers do not violate the exclusive benefit rule, and there is nothing in the language of MCL 38.1133(6) compelling a different result. See *United Mine Workers of Am Health & Ret Funds v Robinson*, 455 US 562, 572; 102 S Ct 1226; 71 L Ed 2d 419 (1982) (construing the requirement under § 302(c)(5) of the Labor Management Relations Act that an employee benefit trust fund be used for the "sole and exclusive benefit of the employees . . . and their families and dependents" and holding that it does not preclude "allocation of the funds among the persons protected"); *Holliday v Xerox Corp*, 732 F2d 548, 549-552 (CA 6, 1984) (holding that ERISA's exclusive benefit rule was not violated by "the transfer of funds from one pension account to another *within the company's pension plan*, and the subsequent use of those funds as a setoff in calculating the retirement income owed to employees under [a] new guaranteed minimum retirement income plan") (emphasis added).

The Court of Appeals further found that, unlike the plan amendment in *Hughes*, the 2010 ordinance provided a benefit to Wayne County that was more than "incidental," which the Court defined as "happening or likely to happen in an unplanned or subordinate conjunction with something else," or "incurred casually and in addition to the regular or main amount." *Wayne County*, 301 Mich App at 43-44, citing *Random House Webster's College Dictionary* (2001)) (internal quotation marks omitted). According to the Court of Appeals, "[i]t cannot honestly and reasonably be disputed that the main purpose of the 2010 ordinance was to benefit the County by reducing the amount of money that the County had to directly pay to satisfy the ARC," and that this "benefit" was "certainly not unplanned or incurred casually." *Id.* But once again, the Court of Appeals' analysis misses the mark completely. Although *Hughes* alluded to certain "incidental benefits" to an employer being a permissible result of operating a pension plan,

Hughes' persuasive value does not depend on whether or not the $32 million ARC credit can be characterized as an "incidental benefit."[9] Under MCL 38.1133(6), and consistent with *Hughes*, the exclusive benefit rule is met so long as retirement system assets are not used "for a purpose other than to pay [the systems'] obligations to [its] beneficiaries." Nothing in *Hughes* suggests that the exclusive benefit rule depends on evaluating either the employer's purported motivation for amending a retirement plan or the monetary value of any effect of the amendment. Under *Hughes*, the question is simply "Were plan assets actually used for some purpose other than paying benefits?" If not, there is no violation of the exclusive benefit rule. By going beyond that, the Court of Appeals plainly erred.

In fact, it is apparent from the Court of Appeals' treatment of *Hughes* that it really does not understand *Hughes* at all. In concluding its discussion, the Court of Appeals summarized *Hughes* as standing for the "unremarkable proposition that an employer, for purposes of ERISA, can use surplus defined benefit plan assets as an offset against required contributions." *Id.* at 44. But nowhere did the *Hughes* Court suggest that its exclusive benefit rule analysis turned on whether "surplus defined benefit plan assets" were being used "as an offset against required contributions." The principle to be derived from *Hughes* is that there is no violation of the exclusive benefit rule so long as plan assets are used to pay retirement benefits. By straining to read any more than that into it, the Court of Appeals missed the point of *Hughes* entirely.

The Court of Appeals also misunderstood the significance of the California Court of Appeal's decision in *Claypool v Wilson*, 4 Cal App 4th 646; 6 Cal Rptr 2d 77 (1992). In *Claypool*, the court rejected a claim that the California legislature violated California's exclusive

[9] Indeed, the "incidental benefits" were never even quantified in *Hughes* because their monetary value was irrelevant. But needless to say, the employer's savings that were deemed "incidental" in *Hughes* would likely have been tens of millions of dollars.

benefit rule and otherwise "invaded" funds "held in trust for the benefit of [California Public Employees' Retirement System ("PERS")] members" when it repealed former supplemental cost-of-living (COLA) programs and "direct[ed] that the funds be used to offset contributions otherwise due from PERS employers." *Id.* at 652, 660-661. The *Claypool* court held that there was no violation of California's exclusive benefit rule, which provides that "[t]he assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system."[10] The court reasoned that using the former supplemental COLA funds to reduce the employer contributions otherwise necessary to keep the retirement system "in actuarial trim does not invade" the retirement system because the funds "continue to be 'held for the exclusive purposes of providing benefits to participants . . . .'" *Id.* at 674 (citation omitted).

In addition to dismissing *Claypool* as an "aberration," the Court of Appeals tried unpersuasively to distinguish it even though the credit and offset provided under the 2010 ordinance is functionally the same as that upheld in *Claypool*. Like the California legislature's action in *Claypool*, the 2010 ordinance in no way authorizes the use of Retirement System assets for *Wayne County's* benefit. On the contrary, the assets never left the Retirement System. They were merely transferred to the defined benefit plans for the direct benefit of the plans' participants, just as in *Claypool*.

Just as with its effort to avoid the plain import of *Hughes*, the reasons given by the Court of Appeals for distinguishing *Claypool* are unconvincing. While the Court of Appeals primarily relied on certain language used in the former COLA programs to alert participants to the

[10] See Cal Const, Art XVI, § 17. At the time of *Claypool*, this provision was worded a little differently, but is substantively the same.

possibility that their availability may be "limited," *Wayne County*, 301 Mich App at 46, an examination of *Claypool* reveals that this "limiting or restrictive language" had nothing whatsoever to do with the *Claypool* court's exclusive benefit rule analysis.

The other ground cited by the Court of Appeals for distinguishing *Claypool* is even weaker. The Court of Appeals reasoned that while the California legislature enacted a "new alternative COLA program," there were "no comparable new advantages to county retirees [under the 2010 ordinance]; the 13th check program was eviscerated absent mandatory reimbursement of the $32 million." *Id.* In support of this distinction, the Court of Appeals cited a single passage from *Claypool* where the court stated that "[t]he saving of public employer money is not an illicit purpose if changes in the pension program are accompanied by comparable new advantages to the employee." *Id.*, citing *Claypool*, 4 Cal App 4th at 665. The problem is that this comment from *Claypool* came from an entirely different part of the court's opinion addressing whether the California Legislature's modification of the supplemental COLA programs was "reasonable." It played no part in the *Claypool* court's discussion of the exclusive benefit rule.

Rather than straining to distinguish or otherwise avoid *Hughes* and *Claypool*, the Court of Appeals should have viewed those decisions as persuasive indicators that its proposed exclusive benefit rule analysis was unsound. Instead, the Court of Appeals adopted a distorted view of the exclusive benefit rule that, by all accounts, no other court has embraced.

B. The transfer of assets from the discretionary IEF back into the defined benefit plans was not a "prohibited transaction."

The Court of Appeals also erred when it concluded that the transfer of assets from the IEF to the defined benefit plans constituted a "transaction" in violation of MCL 38.1133(6)(c), which prohibits a fiduciary from causing the system "to engage in a transaction if he or she

knows that the transaction is . . . , either directly or indirectly[,] . . . [a] transfer to, or use by or for the benefit of, the political subdivision sponsoring the system of any assets of the system for less than adequate consideration."

1. The 2010 ordinance does not result in any of the three types of "transactions" described in MCL 38.1133(6)(c).

Although the Court of Appeals focused on subsection (c), MCL 38.1133(6) actually addresses several "transactions" in which a system is not permitted to engage:

> With respect to a system, an investment fiduciary shall not cause the system to engage in a transaction if he or she knows or should know that the transaction is any of the following, either directly or indirectly:
>
> (a) A sale or exchange or leasing of any property from the system to a party in interest for less than fair market value, or from a party in interest to the system for more than the fair market value.
>
> (b) A lending of money or other extension of credit from the system to a party in interest without the receipt of adequate security and a reasonable rate of interest, or from a party in interest to the system with the provision of excessive security or at an unreasonably high rate of interest.
>
> (c) A transfer to, or use by or for the benefit of, the political subdivision sponsoring the system of any assets of the system for less than adequate consideration.
>
> (d) The furnishing of goods, services, or facilities from the system to a party in interest for less than adequate consideration, or from a party in interest to the system for more than adequate consideration. [MCL 38.1133(6)(a)-(d).][11]

As the Court of Appeals observed, MCL 38.1133(6)(c) prohibits (1) a "transfer" of assets from a retirement system "to" the system sponsor, (2) the "use" of retirement system assets "by" the system sponsor, and (3) the "use" of retirement system assets "for the benefit of" the system

[11] As previously mentioned, the statute was amended effective March 28, 2013. Just like the exclusive benefit rule, the prohibited transaction rule was moved to subsection (8) in the new statute.

sponsor. Yet despite the Court of Appeals' conclusory assertions, none of these "transactions" occurred here.

With regard to the first type of prohibited transaction (i.e., a "transfer" of assets from a retirement system "to" the system sponsor), the Court of Appeals concluded, without analyzing any of the statutory language, that the 2010 ordinance involved, "*effectively*, an unlawful transfer of assets to the County for use to satisfy obligations relative to the ARC." *Wayne County*, 301 Mich App at 48 (emphasis in original and citation omitted). However, there is no basis for that assertion because, as discussed previously, the IEF assets *never left the Retirement System*, and they certainly were not transferred to Wayne County. Rather, the 2010 ordinance provides for an entirely *intra-system* transfer of assets – from the Retirement System's IEF to its defined benefit plans.

To the extent the Court of Appeals found the 2010 ordinance to have "effectively" transferred assets to Wayne County, such an assertion finds no support in the language of MCL 38.1133(6)(c). The term "effectively" simply means "in an indirect way." *Merriam-Webster Online Dictionary* <http://www.merriam-webster.com/dictionary/transfer> (accessed January 16, 2014). Although the statute prohibits any and all transfers to an interested party, whether done "directly or indirectly," it still requires a "transfer," which is defined as "to convey from one person, place, or situation to another." *Merriam-Webster Online Dictionary* <http://www.merriam-webster.com/dictionary/transfer> (accessed January 16, 2014).[12] By no

[12] An "indirect" transfer would be a transfer to a third party, followed by a transfer from the third party to the plan sponsor. The point of specifying that "indirect" transfers are prohibited along with "direct" transfers is simply to avoid the use of a third party as a go-between. Even an "indirect" transfer still requires "assets" to actually leave the retirement system.

stretch of the imagination did the 2010 ordinance cause retirement system assets to be "transferred" as that term is commonly understood and used in MCL 38.1133(6)(c).

As to the second type of prohibited transaction in MCL 38.1133(6)(c) (a "use" of retirement system assets "by" the system sponsor), the Court of Appeals concluded, again without analyzing any of the statute's actual language, that "the 2010 ordinance effectively . . . permitted or authorized the County to use . . . assets in the IEF." *Wayne County*, 301 Mich App at 47. On the contrary, the "assets" were simply transferred from the IEF to the Retirement System's own defined benefit plans, where they were used exclusively to pay benefits to participants. Because the assets never left the Retirement System, they cannot be said to have been put to the County's own "use" – whether "effectively" or otherwise.

Finally, the Court of Appeals concluded that the 2010 ordinance also violated the third type of "transaction" prohibited by MCL 38.1133(6)(c) (i.e., the "use" of retirement system assets "for the benefit of" the system sponsor), observing that "[w]e have already found, relative to our analysis of the exclusive benefit rule, that the County benefited greatly from the use of the excess IEF assets." *Wayne County*, 301 Mich App at 48. As discussed, however, it cannot be said that the system's "assets" were "use[d] . . . for the "benefit" of Wayne County because they never left the Retirement System and instead were "used" solely for the payment of benefits to Retirement System participants and their beneficiaries.[13]

Ironically, the Court of Appeals sought to support its "prohibited transaction" holding by citing *Hughes* – the same decision that the Court of Appeals rejected in analyzing the exclusive

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[13] It also worth noting, once again, that even without a credit against Wayne County's ARC, the Court of Appeals' interpretation of MCL 38.1133(6)(c) would still preclude any "debiting of the $32 million from the IEF and crediting of that amount to the defined benefit assets." *Wayne County*, 301 Mich App at 51 n 29. Such a conclusion cannot even remotely be squared with the statute.

benefit rule. In *Hughes*, the Supreme Court briefly alluded to the concept of a "sham transaction," which the Court defined as a transaction that is "meant to disguise an otherwise unlawful transfer of assets to a party in interest." *Hughes*, 525 US at 445. In contrast to the pension plan amendments in *Hughes*, which the Supreme Court found did not amount to a sham transaction, the Court of Appeals declared that the transfer of assets from the IEF to the defined benefit plans as an offset to the County's ARC *was* a "sham transaction" because, in the Court of Appeals' view, it involved "*effectively*, an unlawful transfer of assets to the County." *Wayne County*, 301 Mich App at 48 (emphasis in original). But despite the Court of Appeals' assertion, the credit and offset provided by the 2010 ordinance cannot be characterized as a "sham transaction" as *Hughes* defined it because *there was no transfer of assets to Wayne County.* While the Court of Appeals tried to buttress its conclusion by once again characterizing the credit and offset as resulting in an "effective" transfer, the fact of the matter is that regardless of the Court of Appeals' labeling, *there was no "transfer" of retirement system assets to the County*, either directly or indirectly, because the assets never left the system. As a result, there was no violation of the prohibited transaction rule.[14]

[14] For this same reason, Plaintiffs miss the point when they cite inapposite cases rejecting true "transactions" between plans and plan sponsors that are in stark contrast to this case. See Wayne County's reply brief at pp 8-9 (addressing Plaintiffs' reliance on *Comm'r of Internal Revenue v Keystone Consol Indus, Inc*, 508 US 152; 113 S Ct 2006; 124 L Ed 2d 71 (1993) (employer exchanged certain truck terminals and real property to its defined benefit plan in lieu of satisfying its funding obligation), *Baizer v Comm'r of Internal Revenue*, 204 F3d 1231 (CA 9, 2000) (plan fiduciary transferred accounts receivable to a defined benefit plan in lieu of satisfying the plan's funding obligation), *Peek v Comm'r of Internal Revenue*, 140 TC 12, 2013 US Tax Ct LEXIS 12 (2013) (holding that a loan or loan guarantee between a plan and a disqualified person, even if it goes through a third party proxy, constitutes a prohibited transaction), and *Rollins v Comm'r of Internal Revenue*, TC Memo 2004-260 (Memo Dec 2004) (involving loans from a plan to companies partially owned by a disqualified person)).

2. MCL 38.1133(6) makes clear that a "prohibited transaction" is a transaction involving a retirement system and another party, and not an intra-system transfer of assets like under the 2010 ordinance.

A critical flaw in the Court of Appeals' "prohibited transaction" analysis is its assumption that MCL 38.1133(6)(c) even applies to transfers of assets *within a Retirement System,* when MCL 38.1133(6) viewed in its entirety suggests that it only applies to "transactions" between a "system's investment fiduciary" and *another party.* Indeed, subsections (a), (b), and (d) explicitly refer to transactions between the system and a "party in interest." And subsection (c) refers to transactions either (1) between the system and the "political subdivision sponsoring the system" (i.e., a "transfer to" or "use by" the system sponsor), or (2) between the system and another party that benefits the system sponsor (i.e., a "use . . . for the benefit of" the system sponsor).

When read together, these four subsections indicate that *intra-system* transfers are not even contemplated by MCL 38.1133(6). This is further evidenced by subsection (c)'s prohibition against the transfer or use of system assets "for less than adequate consideration." This statutory reference to "adequate consideration" is clearly alluding to transactions between a "system" and another party, and not a wholly intra-system transfer of assets. As a result, there is no support in the statutory language for the Court of Appeals' erroneous assumption that the transfer of assets from the IEF to the defined benefit plans was a "transaction" within the meaning of the statute.

3. The Court of Appeals' "prohibited transaction" analysis once again disregards MCL 38.1140m, which expressly permits a "transaction" substantially similar to the credit and offset under the 2010 ordinance.

The Court of Appeals also failed to consider that PERSIA explicitly authorizes the very type of "transaction" that the Court of Appeals concluded is prohibited under MCL

38.1133(6)(c). As discussed previously, MCL 38.1140m provides that "[i]n a plan year, any current service cost payment may be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability." In short, MCL 38.1140m permits a system to credit system assets toward an employer's ARC to offset the amount that employer must contribute toward the ARC – just like the offset required by the 2010 ordinance.[15]

Before concluding that the 2010 ordinance's credit and offset provision resulted in a "prohibited transaction" under MCL 38.1133(6), the Court of Appeals should have considered that another provision of PERSIA, MCL 38.1140m, expressly permits a nearly identical offset and sought to harmonize the two provisions. Had it done so, the Court of Appeals should have seen that the reason the offset provided under MCL 38.1140m does not constitute a "prohibited transaction" under MCL 38.1133(6) is because the retirement system's "assets" remain at all times within the system for the purpose of paying benefits to system participants, just like the assets transferred from the IEF back into the defined benefit plans under the 2010 ordinance.

III. WAYNE COUNTY'S ANSWER TO QUESTION 2: ENROLLED ORDINANCE 2010-514 DOES NOT VIOLATE CONST 1963, ART 9, § 24 BECAUSE 13TH CHECKS ARE NOT ACCRUED FINANCIAL BENEFITS

The Court's second question is whether the 2010 ordinance "violates Const 1963, art 9, § 24." It plainly does not. Const 1963, art 9, § 24 provides:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

[15] To be clear, Wayne County is not suggesting that MCL 38.1140m authorizes the credit and offset. As already explained, MCL 38.1140m involves "excess" assets in an overfunded defined benefit plan, whereas the 2010 ordinance uses assets held in the separate IEF. However, such a distinction is irrelevant for purposes of harmonizing MCL 38.1140m with MCL 38.1133(6)(c).

As this Court has explained, "[t]hese two clauses unambiguously prohibit the state and its political subdivisions from diminishing or impairing 'accrued financial benefits,' and require them to fund 'accrued financial benefits' during the fiscal year for which corresponding services are rendered." *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005). Thus, the fundamental question in determining whether the 2010 ordinance violates art 9, § 24 is whether the receipt of discretionary 13th checks can be considered an "accrued financial benefit." Because the answer is a resounding "no," art 9, § 24 is not implicated here.

A. An accrued financial benefit is a financial benefit that increases or grows over time and that arises on account of service rendered in each fiscal year, yet the discretionary decision whether to even issue a 13th check in a given year is not made until after retirement, and the amounts of those checks can vary from year to year.

In *Studier*, this Court examined the term "accrued financial benefit" and explained that art 9, § 24 "only protects those financial benefits that increase or grow over time." *Id.* at 654. Applying that concept, the Court concluded that health care benefits paid to public school retirees did not constitute "accrued financial benefits" that were subject to protection from diminishment or impairment under art 9, § 24, because the health care benefits did not "increase or grow over time" and thus were not "accrued" benefits:

> The ratifiers of our Constitution would have commonly understood "accrued" benefits to be benefits of the type that increase or grow over time—such as a pension payment or retirement allowance that increases in amount along with the number of years of service a public school employee has completed. Health care benefits, however, are not benefits of this sort. Simply stated, they are not accrued. . . . [N]either the amount of health care benefits a public school employee receives nor the amount of the premium, subscription, or membership fee that MPSERS pays increases in relation to the number of years of service the retiree has performed. [*Id.* at 654.][16]

[16] The Court also found that such benefits "do not qualify as 'financial' benefits." *Id.* at 655.

The Court again considered what is an "accrued financial benefit" in *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38,* 490 Mich 295; 806 NW2d683 (2011). At issue in that case was a statute that, among other things, eliminated a longstanding tax exemption for public pensions. Finding no violation of art 9, § 24, the Court began its analysis by observing that the "obvious intent of § 24" was to "ensure that public pensions be treated as contractual obligations that, once earned, could not be diminished." *Id.* at 311. This is because "[b]efore § 24 was adopted, '[i]t had long been the general rule that pensions granted by public authorities were not contractual obligations but gratuitous allowances which could be revoked at will by the authority because the pensioner was not deemed to have had any vested right in their continuation.'" *Id.*

However, the Court explained, "Const 1963, art 9, § 24 . . . says nothing about whether these pension benefits can be taxed." *Id.* at 312. The Court thus examined whether a tax exemption could be considered an "'accrued financial benefit' of a pension plan." *Id.* at 313. The Court found that it could not, because a pension-tax exemption "does not 'grow over time'":

> During a state employee's working years, his or her pension-tax exemption, as opposed to the pension itself, cannot be said to be growing or accumulating because it does not even "come into existence" or "vest" until after the employee has retired and begins to collect his or her pension benefits. That is, one does not have a right to a tax exemption until one has received the funds that are subject to the exemption. Absent those funds, there is no tax exemption. And once a retiree has begun to receive his or her pension benefits, the tax exemption itself still does not "grow over time," but remains fixed. Therefore, a tax exemption is not an "accrued financial benefit." [*Id.* at 314-315.]

Like the pension-tax exemption in *In re Advisory Opinion,* 13th checks do not "increase or grow over time." What the Court said about pension-tax exemptions in *In re Advisory Opinion* applies equally here. During a county employee's "working years," the 13th check "cannot be said to be growing or accumulating because it does not even 'come into existence' . . . until after the employee has retired." *Id.* at 314. Nor does the 13th check "grow over time" in

retirement. In fact, as the Court of Appeals acknowledged, 13th check payments fluctuate from year to year, at times even decreasing. See *Wayne County*, 301 Mich App at 18-19.[17]

This Court further explained in *Studier* that the interaction of the first and second clauses in art 9, § 24 require that accrued financial benefits "consist only of those '[f]inancial benefits arising on account of service rendered in each fiscal year.'" *Studier*, 472 Mich 655, quoting Const 1963, art 9, § 24. Specifically:

> [T]he first clause contractually binds the state and its political subdivisions to pay for retired public employees' "accrued financial benefits . . . ." Thereafter, the second clause seeks to ensure that the state and its political subdivisions will be able to fulfill this contractual obligation by requiring them to set aside funding each year for those "financial benefits arising on account of service rendered in each fiscal year . . . ." Thus, because the second clause only requires the state and its political subdivision to set aside funding for "financial benefits arising on account of service rendered in each fiscal year" to fulfill their contractual obligation of paying for "accrued financial benefits," it reasonably follows that "accrued" financial benefits consist only of those "financial benefits arising on account of service rendered in each fiscal year . . . ." [*Studier*, 472 Mich at 654-655.]

Applying this concept, this Court in *In re Request for Advisory Opinion* concluded that a pension-tax exemption was not a benefit that arose "on account of service rendered in each fiscal year":

> [A] tax exemption is not an "accrued financial benefit" protected by § 24 because it would be impossible to fund a tax exemption, as opposed once again to the pension itself, in the year that the service was rendered in light of the fact that an exemption's value is entirely a function of the tax rate of the taxpayer at the time that the exemption is actually taken—something that obviously cannot be known at the time the services themselves are rendered. [*Id.* at 315.]

Finding its analysis to be consistent with the constitutional convention debates – in which the framers stressed that art 9, § 24's focus was on protecting "the deferred compensation in any

[17] As discussed in Wayne County's application at pages 9-12, Wayne County's retirement ordinance has, since its inception, always made the decision whether to even issue 13th checks entirely discretionary.

pension plan" – the Court explained that "[t]he 'deferred compensation' protected as a 'contractual obligation' by § 24 is the pension payments themselves earned by the retiree, while the tax exemption is something distinct and is not the subject of § 24. The tax exemption is simply a postdistribution effect of the accrued financial benefits that have otherwise been paid in full." *Id.* at 318 (citations and some internal quotation marks omitted).

As with the pension tax exemption in *In re Advisory Opinion,* 13th checks do not arise "on account of service rendered in each fiscal year," as required by the second paragraph of art 9, § 24. The *In re Advisory Opinion* Court explained that a benefit cannot be one that arises "on account of service rendered in each fiscal year" unless it can be "fund[ed] . . . in the year that the service was rendered." *In re Advisory Opinion,* 490 Mich at 315. The Court reasoned that pension-tax exemptions did not meet this requirement because they are a function of "the tax rate of the taxpayer at the time that the exemption is actually taken," as opposed to when the employee's services are actually rendered. *Id.* Thus, it is "impossible to fund a tax exemption, as opposed . . . to the pension itself, in the year that the service was rendered." *Id.* The same analysis applies to 13th checks. By their very nature, they cannot be funded in the year service was rendered because the discretionary decision whether to even make a 13th check distribution in a given year is not made until *after the employee retires*. This is in contrast to the employee's regular pension, which is calculated and funded during his or her working years.

Under *In re Advisory Opinion,* any "benefit" that is determined *after* an employee retires cannot, by definition, be one that arises "on account of service rendered in each fiscal year." The Court of Appeals made the same point in *Hannan v Detroit City Council,* unpublished opinion per curiam of the Court of Appeals, issued September 1, 2000; 2000 Mich App LEXIS 980 (Docket No. 211704) **(Tab A)**. In *Hannan,* the Court of Appeals addressed whether Const 1963

art 9, § 24, was violated when the Detroit City Council passed ordinances increasing the benefits of certain "qualified retirees." *Id.* at *1. The plaintiff argued that because the pension enhancement ordinances increased the pension system's current liabilities, they "must be funded immediately." *Id.* at *6. The Court of Appeal, however, found that art 9, § 24 *did not even apply* to the pension enhancement ordinances because they only affected "retirees and not those that are currently working and accruing financial benefits," i.e., they conferred a benefit "that was not earned during the year the benefit was given." *Id.* at *7.

The 13th checks are the same as the pension enhancements at issue in *Hannan* in that the decision whether to distribute 13th checks in a given year, including the amounts of those distributions, is made only *after* an employee retires. As a result, they "confer a benefit that was not earned during the year the benefit was given," and art 9, § 24, simply does not apply to them.

B. The Court of Appeals' suggestion that there may be a group "entitlement" to 13th checks disregards both *Studier* and *In re Advisory Opinion.*

Although the Court of Appeals did not find the 2010 ordinance to be in violation of Const 1963, art 9, § 24, it did suggest in dicta that "from a broad perspective, taking into consideration not individual retirees or survivor beneficiaries but all of them together as a group, the 13th-check program itself could arguably be viewed as an accrued financial benefit for purposes of the first clause contained in Const 1963, art 9, § 24, which benefit was diminished and impaired by the transfer of $32 million out of the IEF." *Wayne County*, 301 Mich App at 35 n 23; see also *id.* at 40 ("[R]etirees and survivor beneficiaries as a group had an entitlement to share in the IEF assets at some juncture, as those assets had been specifically allocated and were intended for distribution to retirees and survivor beneficiaries in the form of 13th checks.").

Inexplicably, the Court of Appeals raised the specter of Const 1963 art 9, § 24 despite having previously observed, and correctly so, that "payment of a 13th check cannot be viewed as

an accrued financial benefit, where there is no vested or enforceable right to a 13th check given the discretionary distribution language that has always been part of the IEF ordinance, along with the lack of any CBA language requiring disbursement of a 13th check." *Wayne County*, 301 Mich App at 34.

It is puzzling how the Court of Appeals could conclude, on the one hand, that the individual receipt of 13th checks is not an "accrued financial benefit," but then suggest, on the other hand, that the "13th check program" can somehow be considered a "group" entitlement. Neither *Studier* nor *In re Advisory Opinion* made any distinction between an "individual" and a "group" accrued financial benefit when examining the claimed "benefits" at issue in those cases, and the Court of Appeals cited no other authority for its novel proposition. Nor is there any support for it either in the language of art 9, § 24 or the constitutional convention debates, which confirm that the people ratifying art 9, § 24 would have understood an "accrued financial benefit" to be an *individual right belonging to the employee*. As delegate Van Dusen observed:

> MR. VAN DUSEN: . . . I would like to indicate that the words 'accrued financial benefits' were used designedly, so that *the contractual right of the employee* would be limited to the deferred compensation embodied in any pension plan, and that we hope to avoid thereby proliferation of litigation by individual participants in retirement systems talking about the general benefits structure, or something other than his *specific right to receive benefits*. It is not intended that an individual employee should, as a result of this language, be given the right to sue the employing unit to require the actuarial funding of past service benefits, or anything of that nature. What it is designed to do is to say that *when his benefits come due, he's got a contractual right to receive them.*
>
> . . . [H]e has the contractual right to sue for them. *So that he has no particular interest in the funding of somebody else's benefits so long as he has the contractual right to sue for his.* [1 Official Record, Constitutional Convention 1961, pp 773-774 (emphasis added).][18]

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[18] In *Studier*, this Court found it appropriate to rely on the statements of delegate Van Dusen "to shed light on why [the delegates] chose to employ the particular terms they used in drafting the provision to aid in discerning what the common understanding of those terms would have been when the provision was ratified by the people." *Studier*, 472 Mich at 656-657. See also *id.* at

Footnote continued on next page ...

In any event, it really is of no moment whether the receipt of 13th checks is viewed from the perspective of an individual employee, retiree, or beneficiary, or that of a "group." Either way, *Studier* and *In re Advisory Opinion* are controlling, and establish that there can be no "accrued financial benefit" unless the benefit in question increases or grows over time and can be funded "in the year that service was rendered." The "13th check program" at issue here simply does not meet those requirements.

C. A unilateral reliance on a discretionary bonus check does not transform it into an "accrued financial benefit."

Plaintiffs are sure to argue, as they did in their briefing in the Court of Appeals, that an employee's "reliance" on discretionary bonuses such as the 13th check makes them subject to art 9, § 24. In support of that assertion, Plaintiffs relied on *Tinsman v City of Southfield*, unpublished opinion per curiam of the Court of Appeals, issued December 3, 1999; 1999 Mich App LEXIS 2112 (Docket Nos. 207035, 207056) (See Ps' COA Br as Appellant, pp 42-43). *Tinsman*, however, provides no support for such a position. In *Tinsman*, the Court of Appeals affirmed the trial court's decision finding that the city of Southfield violated art 9, § 24 when it adopted a new formula for calculating the plaintiffs' pension benefits that was contrary to the formula used in the collective bargaining agreement in effect when the plaintiffs retired. *Id.* at *1-2. Because the plaintiffs' benefits derived from a collective bargaining agreement that *expressly set forth the conditions for their retirement*, the *Tinsman* Court rightly concluded that "the Constitution guaranteed them the right to rely upon those benefits." *Id.* at *9.

Footnote continued from previous page ...

657 (finding delegate Van Dusen's statements to be "directly relevant to discerning the common understanding of the words 'accrued' and 'financial' at the time of the constitutional convention").

Here, none of Wayne County's collective bargaining agreements contained language establishing a contractual right to receive 13th checks – a fact that even the Court of Appeals expressly acknowledged. *Wayne Co*, 301 Mich App at 34 ("[T]here is no vested or enforceable right to a 13th check, given the discretionary distribution language that has always been part of the IEF ordinance and the lack of any CBA language requiring disbursement of a 13th check."). Instead, all that the collective bargaining agreements did was to establish who may be *eligible* for 13th check distributions *if and when the Retirement Commission decided to make them.* See *People v Hill*, 267 Mich App 345, 351; 705 NW2d 139 (2005) (observing that parole "eligibility" does not mean that a defendant has a "right" to parole). Thus, while the plaintiffs in *Tinsman* relied upon *an express contract*, there was no such contract here. Nothing in the collective bargaining agreements changed the purely discretionary nature of the 13th checks. The mere expectation by retirees that they will continue to receive 13th checks – and that is all that it is, an expectation – does not render them "accrued financial benefits" for purposes of art 9, § 24.[19]

IV. CONCLUSION

For the foregoing reasons, as well as those stated in Wayne County's application for leave to appeal and reply brief, Wayne County respectfully requests that this Court either grant its application or peremptorily reverse the Court of Appeals' published decision and reinstate the

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[19] Citing *Shelby Twp Police and Fire Retirement Bd v Shelby Twp*, 438 Mich 247; 475 NW2d 249 (1991), Plaintiffs also claimed in their Court of Appeals briefing that Wayne County somehow violated art 9, § 24 by allegedly not paying its 2010-2011 ARC. But it is undisputed that the ARC *was* in fact paid. Plaintiffs simply take issue with *the manner* in which it was paid. Yet article 9, § 24 only requires that accrued financial benefits be funded every year, not that they be funded by a specific source. Indeed, the *Shelby Twp* Court expressly acknowledged that "the Michigan Constitution does not provide the specifics for meeting the funding obligations upon a retirement plan's unfunded accrued liabilities." *Id.* at 256.

Wayne County Circuit Court's decision granting summary disposition to Wayne County.

Respectfully submitted,

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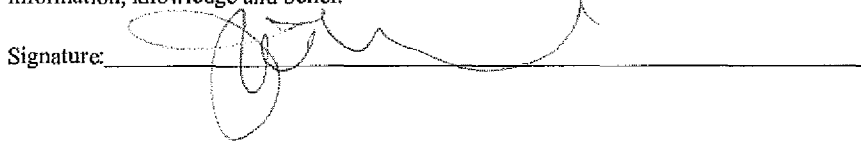
Dated: January 22, 2014

PROOF OF SERVICE

The undersigned certifies that the foregoing was caused to be served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses as disclosed on the pleadings on January 22, 2014.

BY:	x	U.S. Mail		FAX
		Hand Delivered		Overnight Carrier
		Express Mail		Other

I declare under penalty of perjury that the statement above is true to the best of my information, knowledge and belief.



Signature:______________________________