STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Henry Saad, Hon. Patrick Meter and Hon. Cynthia Stephens

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VAN BUREN CHARTER TOWNSHIP,

Plaintiff-Appellant,

v.

VISTEON CORPORATION,

Defendant-Appellee.

Supreme Court Case No. 156018
Court of Appeals No. 331789
Trial Court Case No. 15-008778-CK
Trial Court Judge: Hon. Muriel Hughes

APPELLANT VAN BUREN CHARTER TOWNSHIP'S REPLY IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

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A. THE ONLY ISSUE PRESENTED TO THE TRIAL COURT AND THAT SHOULD HAVE BEEN REVIEWED ON APPEAL WAS WHETHER A CASE OR CONTROVERSY EXISTS AND THE TOWNSHIP'S CLAIMS ARE RIPE, NOT A MERITS ANALYSIS.

Visteon's Response highlights the Court of Appeals' error, as it failed to conduct a ripeness review and, rather, engaged in an analysis of the parties' substantive claims. The only issue in this appeal is whether the Township properly pled a ripe cause of action for a declaratory judgment or for anticipatory breach of the parties' contract sufficient to make it past the initial pleading stage. The Court of Appeals went beyond evaluating the ripeness of the Township's claims in response to defendant Visteon's initial responsive pleading and instead determined the parties' rights and liabilities under the contract. The existence of divergent interpretations of the parties' duties under Paragraph 3 of the Agreement, where the occurrence of a shortfall is described by the Townships expert to be "inevitable," creates a case or controversy that is ripe for adjudication. In its appeal, the Township asks this Court to reverse the Court of Appeals, determine that the Township's claims are ripe, and remand the case to the trial court so discovery can take place.

The exploration of the facts through discovery and evaluation of the merits of claims and defenses falls within the purview of the trial court. The Court of Appeals should not have sat as the trier of fact, particularly since the factual record was undeveloped here because discovery had not been done. *See e.g.*, *In re AMB*, 248 Mich App 144, 195; 640 NW2d 262, 290 (2001) ("addressing [appellant's] arguments . . . ***would be imprudent because it would require making original factual findings without the benefit of an adequate record, which is especially problematic because appellate courts do not sit as triers of fact***.") (emphasis added). By interpreting the parties' contract, evaluating the conclusions propounded by the Township's expert and weighing the parties' competing interpretations, the Court of Appeals went beyond

the scope of a ripeness analysis and, in fact, demonstrated the existence of a case or controversy. As set forth in the Township's Application, issues of justiciability—such as standing, mootness, ripeness—are supposed to be decided *without* reaching the merits.[1]

In its Response, Visteon argues that the substantive terms of the contract must necessarily be determined in order to make a ripeness determination (Response, p. 14-20). Visteon cites to no Michigan law in support of this proposition and erroneously relies on *Moynihan v West Coast Life Insurance Co*, 607 F Supp 2d 1336 (SD Fla, 2009) in support of this proposition. *Moynihan* is a federal case from Florida (and of no precedential value) that utilized a different ripeness standard than what is applicable in Michigan. *See Lansing,* 487 Mich at 363-364:

> Given that the text of the Michigan Constitution lacks an express basis for importing the federal case-or-controversy requirement into Michigan law, the justification for doing so, if one can be found, must lie elsewhere . . . as this Court long ago explained that Michigan courts' judicial power to decide controversies was broader than the United States Supreme Court's interpretation of the Article III case-or-controversy limits on the federal judicial power because a state sovereign possesses inherent powers that the federal government does not.

The more rigorous federal justiciability doctrines under Article III were criticized by the Michigan Supreme Court in *Lansing* because they had the ill-effect of "encouraging courts to decide the merits of a case under the guise of merely deciding that the plaintiff lacks standing, thus using standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits." *Lansing,* 487 Mich at 370-371. *Moynihan* is further distinguishable

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[1] *People v Richmond*, 486 Mich 29, 35; 782 NW2d 187, 190–91 (2010) ("Whether a case is moot is a threshold issue that a court addresses ***before it reaches the substantive issues of the case itself***."); *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 357, 370-371; 792 NW2d 686, 691 (2010) ("Standing ***does not address the ultimate merits of the substantive claims***"); *see also Hubbard v Bd of Trustees of Ret Sys*, 315 Mich 18, 22; 23 NW2d 186, 188 (1946) (where issue was whether an actual controversy existed under Declaratory Judgment Act, "[t]he circuit judge ***did not hear the case on the merits***, nor did the court attempt to decide the issues on which the bill of complaint was filed. The court ***very properly declined to pass upon the merits of the controversy***, on the hearing of the motion to dismiss.") (emphasis added in all).

as the defendant's anticipatory breach was unclear, as the insurer had not taken a position as to the plaintiff's claims. In this case, Visteon has unequivocally stated in many ways and many contexts that it will pay nothing toward the shortfall (*see* n.3 *infra*), thereby creating a controversy and a ripe claim. Lastly, in *Moynihan*, the court declined to hear the contract dispute because "any meaningful review by the Court ***on the merits*** of Plaintiff's claims ***would benefit from a full record***." *Id.* at 1339. The same is true here. Before any court – let alone, the Court of Appeals – adjudicates the merits of the Township's claims, that court should have the benefit of a fully-developed record.

B. CLEAR MICHIGAN DECLARATORY JUDGMENT CASE LAW EXPLICITLY PERMITS CASES TO PROCEED REGARDLESS OF POTENTIAL FUTURE CONTINGENT EVENTS.

Visteon's support of the Court of Appeals' decision rests on its erroneous assertion that the Township's claims will not be ripe until a shortfall occurs and it has failed to pay (*i.e.*, after the breach and injury have both occurred). This is a gross misunderstanding of well-settled Michigan law regarding declaratory judgments. Requiring a breach or harm as a precondition to a declaratory action would be antithetical to the very purpose behind declaratory judgments, which is "to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract[.]" *UAW v Cent Mich Univ Trustees*, 295 Mich App 486, 495-496, 815 NW2d 132, 138 (2012); *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978) ("a court is not precluded from reaching issues before actual injuries or losses have occurred")). If the Township had to wait until after Visteon breached the Agreement, the Township would be dispossessed of the opportunity to seek declaratory relief entirely and would only have the remedy of bringing an action for breach of contract.

Visteon claims that the Township's claim is not ripe because it rests upon a "contingent" future event (*i.e.,* the shortfall).[2] (Response, p. 14-20). But the Michigan Supreme Court has rejected that precise argument. *Merkel v Long*, 368 Mich 1; 117 NW2d 130 (1962). In *Merkel*, the court touted "[o]ne great purpose" of a declaratory action is to "parties to have their differences authoritatively settled ***in advance of*** any claimed invasion of rights" and to "carry out the purposes intended to be served by such judgments, it is sometimes necessary to determine rights ***which will arise or become complete only in the contingency of some future happening.***" *Merkel* at 11 (emphasis added, citation omitted). Thus, while the Township does not believe that the shortfall is uncertain or contingent, even if it was, such a contingent event would not preclude the Township's lawsuit because trial courts are permitted to adjudicate rights that may "become complete only in the contingency of some future happening."

This rule was applied in *US Aviex Co v Travelers Ins Co*, 125 Mich App 579, 585–86; 336 NW2d 838, 841 (1983) (emphasis added), where the court noted that a "declaratory judgment ***is appropriate even though future contingencies exist which will determine whether the 'controversy' actually becomes real***." In that case, the plaintiff was "faced with threats of legal action by the DNR" due to contamination from its chemical plant and the plaintiff wanted to know if its insurer, the defendant, would provide coverage under the plaintiff's insurance policy. *Id.* at 583-585. Notably, the DNR had not yet sued the plaintiff. *Id.* at 586. Nevertheless, the court held

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[2] Notably, this is not what Visteon represented to the bankruptcy court when the settlement agreement was submitted for approval. Visteon claims in its Response that it "did not know there would be a shortfall" at the time the parties entered into the Agreement, and claims "the Township … provides no support for that assertion." (Response at p. 8; n.8). This is patently false. At the time of the execution and approval of the Agreement, Visteon admitted to the bankruptcy court that it knew a shortfall would occur, predicting it to occur in 2015. *See* Ex. 5 to Application, Visteon's Motion for Entry of an Order Approving Settlement Agreement) ("although dependent on a number of factors, Visteon expects no shortfall with respect to the Township Bonds to arise until, at its earliest, 2015").

that it was proper to adjudicate whether there was coverage under the insurance policy, despite the fact that coverage was clearly contingent upon a future event (*i.e.*, the DNR lawsuit), because the plaintiff "needed to know whether defendant would be required to defend . . . should such a remedy be sought" by the DNR because determining whether there was insurance coverage would necessarily impact the plaintiff's decision "between voluntarily complying with the DNR's very real and repeated demands and opposing the DNR's actions." *Id.* The Township filed this action for the same purpose: to obtain the Court's declaration of the parties' obligation in anticipation of future events and to plan future conduct (such as seeking a millage, imposing budget cuts, etc.).

Visteon's own cited cases support reversal and remand. In the *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 616-17 (2008), the dispute was over whether a sale of Rackham Golf Course would breach certain restrictive covenants connected to the land. Under the arguments propounded by Visteon and the rationale of the Court of Appeals in this case, an actual sale of the land would have had to occur before a lawsuit over whether a sale would breach those restrictive covenants could ever be ripe. However, the *Huntington Woods* court rejected that notion. On the contrary, the court found:

> Defendant is correct in its assertion that, when this litigation was initiated, there had been no violation of the restrictive covenants contained in the Rackham deed and the property had not been sold. However, even though a sale had not been effectuated, it was obvious that defendant was not only seriously considering sale of the property but had begun, through the issuance of a formal RFP, to solicit bids. Hence, the primary issue asserted by plaintiffs regarding the right or authority of defendant to sell the property, and pursuant to what terms, comprised an issue that was not hypothetical . . . The trial court was not precluded from ruling whether the sale was authorized and under what conditions merely because a sale had not yet been effectuated. [*Id.* at 616-617]

The court further reasoned, "it is the purpose and intent behind the grant of declaratory relief to provide litigants with court access in order to '***preliminarily determine their rights***.'" *Id.* at 616 (citation omitted).

The same is true here. In *US Aviex*, the mere "threat" of a lawsuit by the DNR was enough to support a coverage determination under an insurance policy even though the lawsuit might never be filed. In *Huntington Woods*, the mere fact that the City of Detroit was "considering sale of the property" was enough to support an adjudication of "whether that sale was authorized and under what conditions" even though the sale might never come to fruition. In this case, the Township's expert – unrefuted by any evidence or support by Visteon – has opined that a shortfall is "inevitable". Furthermore, Visteon has unequivocally stated its intent to pay nothing when the shortfall arrives:

- "Visteon . . . has consistently denied that it is obligated to pay whatever shortfall may occur." (Ex. 8 to Application, May 7, 2014 Letter from Visteon at 2).
- "[T]here is simply no amount left to be paid which could be accurately characterized as a PILOT." (Ex. 9 to Application, Visteon's Motion to Dismiss at p. 5).
- "the Township quotes one letter in which Visteon estimated the maximum amount of any outstanding PILOT payment, if any, totals $6,125.06 at most. This was corrected by Visteon in later correspondence to reflect that *no amount is due.*" *Id.* at p. 5, n.3 (emphasis added).
- "Visteon admits that it disputes the Township's claim that Visteon has an obligation to pay in full the Shortfall [.]" (Exhibit 7 to Application, Visteon Discovery Responses at RTA No. 4.)
- "There is no payment due pursuant to Paragraph 3 of the 2010 Agreement. . . nothing more is owed under the 2010 Agreement[.]" *Id.* at Int. Nos. 8-9.

At oral argument before the Trial Court, Visteon's counsel once again confirmed its position:

> THE COURT: Counsel for defendant, is it your position that, *even if a shortfall does occur . . . that the defendant is not obligated to pay any of that shortfall?*
>
> MR. HAMMER (Visteon's counsel): *That would be the conclusion if you reviewed the defenses we have in this matter . . .*
>
> THE COURT: That's not an answer to the question. Are you claiming that, *if it is determined with certainty that there is a shortfall*, *that under the provisions of the contract, your position is, your obligation could be zero*?

MR. HAMMER: *If – if – yes.* [Ex. 6 to Application, 2/2/2016 Hrg. Tr., p. 45-47 (emphasis added)].

These statements by Visteon constitute an unequivocal repudiation of the Agreement and present far greater certainty than the future circumstances in *US Aviex* and *Huntington Woods* where the declaratory judgment claims were ripe. Michigan law clearly allows a declaratory action to proceed despite the fact that there may be some aspect of the case that is contingent on some future event, and the Court of Appeals' opinion grossly misapplied the law.

C. VISTEON – LIKE THE COURT OF APPEALS – CONTINUES TO IGNORE THE AGREEMENT'S MANDATE FOR "TIMELY" PAYMENTS.

If, as Visteon argues, the terms of the Agreement must necessarily be consulted in order to determine ripeness, then the court must consider the express language in Paragraph 3 that requires Visteon to make the payments it owes to the Township in enough time to allow the Township to make *timely* payments on the bonds. Paragraph 3 states:

> Visteon hereby agrees to negotiate with the Township in good faith to determine the amount of the shortfall. . . .and make a non-tax payment. . . to assist the Township in making ***timely*** payments on the bonds.

(Ex. 4(A) to Application, Agreement, ¶ 3 (emphasis added)). Neither the Court of Appeals nor Visteon have explained or reconciled their conclusion that that the shortfall must occur before the Township's claim is ripe with the fact that the Agreement explicitly requires Visteon's payment to be "timely." Under the plain meaning of "timely," the only possible interpretation of the Agreement is that the parties' negotiation and Visteon's payment must be made *in advance* of the shortfall (*i.e.,* the bond payment due date).

D. VISTEON ADMITS THE COURT OF APPEALS ERRONEOUSLY EVALUATED THE MERITS OF THE PFM REPORT.

The Court of Appeals' premature and procedurally improper evaluation of the Township's expert's opinions and methodologies is emblematic of its error and the necessity of

reversal. This is especially true given that the Township's expert's findings and conclusions remain unchallenged: no motions had been filed relating to the PFM Report and no counter-expert analysis had ever been put into the record in the trial court; the case was at the initial pleading stage. In its Response, Visteon acknowledges that the merits of the PFM Report were not at issue in the trial court, because "the Township's lawsuit was dismissed solely on ripeness grounds in response to Visteon's first responsive pleading," so the "merits of PFM's 'projected shortfall[s]' were never put at issue." (Response, p. 6, n.5). The "merits" of PFM's shortfall analysis were "never put at issue" because this case was disposed of so early that *none* of the merits (*e.g.,* contract interpretation, liability, damages, experts) were at issue or given a fair opportunity for evaluation by the trial court. No expert discovery had been done, and the credibility of the Township's expert's conclusions were not in front of the Court (and to the extent any expert conclusions *were* in front of either of the lower courts, no basis to challenge those conclusions was given, as Visteon conducted no expert analysis of its own). Therefore, it was improper for the Court of Appeals to make an unprompted factual finding that the PFM Report was insufficient on its face when the merits of that report were simply not an issue for the Court of Appeals to decide.[3] *See In re AMB, supra; see also Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998) ("Critically, the court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition."); *Surman v Surman*, 277 Mich App 287, 309; 745 NW2d 802, 815 (2007) (noting a court's "doubts pertaining to credibility, or an opposing party's disagreement with an expert's opinion or interpretation of

[3] For example, a factfinder could just as easily have reviewed the PFM Report and concluded that running fifteen different scenarios, ***all*** of which produced a shortfall date within a few months of each other, was evidence that, under any of the possible scenarios, a shortfall was *bound* to happen no matter what.

facts, present issues regarding the weight to be given the testimony, and not its admissibility."). This is a microcosm of the Court of Appeals' error: while claiming on the one hand that it was too early to adjudicate the parties' competing interpretations of the Agreement, the Court of Appeals implicitly demonstrated the existence of a controversy and went on to do just that.

E. THE TRIAL COURT CAN CLEARLY GRANT RELIEF UNDER THESE CIRCUMSTANCES.

Visteon erroneously argues that the trial court cannot make a ruling at this juncture. (Response, p. 14-21). This question was addressed when the trial court asked the Township what type of remedy it sought by filing the complaint. The Township responded by explaining that it can seek equitable relief under the declaratory judgment rule, as well as monetary damages arising from Visteon's anticipatory breach. (Ex. 6 to Application, 2/2/16 Hrg. Tr., p. 40-42). Moreover, as explained in the *Huntington Woods* case, the court can issue an order to "preliminarily determine" the parties rights and issue a ruling that may become complete only upon the occurrence of a future event. Hence, in the instant case, a declaratory ruling could entail a provision simply stating that when the shortfall occurs, Visteon must pay the amount of the shortfall, as set forth in Paragraph 3 of the Agreement.[4] Lastly, disputes over the relief that the Court can provide in these circumstances is a red herring, as the case law is clear that declaratory judgments are intended to be a "flexible" remedy.

RELIEF REQUESTED

For the reasons set forth above, the Township respectfully seeks an order: (1) granting its application for leave to appeal or an order or per curiam opinion peremptorily reversing the

[4] In Visteon's Response (*see e.g.,* p. 5 n.4 and p. 7 n.6), as it did in its motion for summary disposition and its brief on appeal, Visteon expounds on its substantive defenses to the Township's claims and interpretation of the Agreement. The Township has several compelling counter-arguments, and those substantive arguments are what should be presented by the parties at the Trial Court after this Court's remand.

opinion of the Court of Appeals (and the order of the Trial Court) which dismissed the Township's complaint on ripeness grounds, and (2) remanding the case to the Trial Court to proceed on the merits.

Respectfully submitted,

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By: /s/ Kaveh Kashef

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PROOF OF SERVICE

I hereby certify that on August 15, 2017, I filed with foregoing document with the clerk of the Michigan Supreme Court using the TrueFiling E-File and Serve Program, which will send notification to all registered counsel of record as disclosed in the pleadings.

Respectfully submitted,

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