In the Supreme Court
For the State of Michigan

VAN BUREN
CHARTER TOWNSHIP,

Plaintiff–Appellant,

v.

VISTEON CORPORATION,

Defendant–Appellee.

Supreme Court No. 156018

Court of Appeals No. 331789
HON. CYNTHIA D. STEPHENS
HON. HENRY W. SAAD
HON. PATRICK M. METER

Third Circuit No. 15-008778-CK
HON. MURIEL HUGHES

VAN BUREN CHARTER TOWNSHIP'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED ON MOAA GRANTED

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Van Buren Township: No
Visteon: Yes

QUESTION NO. 2: Did the Court of Appeals properly interpret the parties' settlement agreement when it held that Visteon is not obligated to perform until: (1) a shortfall occurs; and (2) Visteon's property taxes are inadequate for the Township to pay the portion of the bonds used to fund Visteon Village?

Van Buren Township: No
Visteon: Yes

COURT RULE INVOLVED

Rule 2.605 Declaratory Judgments

(A) Power to Enter a Declaratory Judgment

(1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

(2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

RELEVANT SETTLEMENT PROVISIONS

The following provisions are from the parties' Agreement and Mutual Release ("Settlement Agreement"), which they reached during Visteon's bankruptcy proceedings in the U.S. Bankruptcy Court for the District of Delaware. The bankruptcy court approved the settlement.1 The entire Settlement Agreement is reproduced in the Appendix at 38a–47a.

Section 1. *Resolution of Property Tax Valuation*

1.1 The Township hereby agrees that the true cash value of Visteon Village for real estate property tax purposes as of December 31, 2009, is sixty million dollars ($60,000,000.00), with a taxable value and assessed value of thirty million dollars ($30,000,000.00). This valuation shall be final and conclusive as between the Parties hereto for the assessment date at issue, and shall be subject to adjustment hereafter and in future years only as permitted by Michigan law.

1.2 Pursuant to authorization previously received from the bankruptcy court for the District of Delaware, Visteon now has paid to the Township the principal amount of any remaining unpaid tax bills that were due (but had not been paid) on or after May 29, 2009, *i.e.*, the summer taxes, and also the 2009 winter taxes that are not due until February 2010. The interest and penalties due with respect to those payments shall be paid by Visteon pursuant to (and as required by) the final terms of Visteon's Confirmed Plan of Reorganization.

Section 2. *Tax Abatement Agreements*

2.1 Visteon acknowledges that, for economic reasons relating to the condition and state of the automotive industry, Visteon has been unable to meet certain of the commitments made by Visteon in the Tax Abatement Agreements. The Parties agree that the Township shall be entitled to file a general unsecured claim in Visteon's bankruptcy case resulting from the failure to meet these commitments for the period commencing with the issue date of the tax abatement agreements through December 31, 2009, as provided for in the tax abatement agreements. Visteon hereby agrees that the

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[1] *In re Visteon Corp.*, No. 09-11786, R. 2244 (Bankr. D Del. Feb. 18, 2010).

amount of such claim shall be $9,831,427.66, and Visteon shall not object to such claim.

2.2. The Parties realize this Agreement creates valuable economic benefits for Visteon. As an inducement to effect this Settlement, Visteon agrees to pay to the Township the amount of $2,200,000 on or before the Effective Date of Visteon's Plan of Reorganization. Visteon shall, however, be permitted to reduce on a dollar-for-dollar basis the distribution of property, if any, pursuant to the unsecured claim described in Section 2.1 up to the amount of $2.2 million.

2.3 The Parties hereby agree that Visteon's inability to meet the commitments in the Tax Abatement Agreements shall not be the basis for the Township to void or otherwise cancel the Tax Abatement Agreements and that the Township shall honor those agreements in the future notwithstanding Visteon's good faith inability to meet those commitments.

Section 3. *Bond Payments*

Visteon acknowledges that the Township assisted Visteon in the construction of the Village through the issuance by the Township of certain bonds supported by the full faith and credit of the Township, the proceeds of which were used to help construct the Village. To the extent that the property tax payments made by Visteon to the Township, including payments made by Visteon to the Township pursuant to Section 2.2, are inadequate to permit the Township to meet its payment obligations with respect to that portion of the bonds that were used to help fund the Village, Visteon hereby agrees to negotiate with the Township in good faith to determine the amount of the shortfall with respect to those bonds and make a non-tax payment, payment in-lieu-of tax, (PILOT) to the Township to assist the Township in making timely payments on the bonds.

THE PARTIES

Van Buren Charter Township ("Township") is a small community of about 10,000 households in western Wayne County.[1] Its annual budget is roughly $15 million.

Visteon Corporation ("Visteon") is a global auto-parts supplier with 10,000 employees worldwide, operating 55 offices, centers, and manufacturing and assembly facilities in at least 11 countries.[2] Its headquarters is located in the Township. Visteon reported $3.146 billion in sales and $176 million in net income in 2017.[3]

INTRODUCTION

The Township seeks a declaration of its rights and Visteon's responsibilities under an Agreement and Mutual Release the parties reached in 2010 (the "Settlement Agreement") that helped Visteon emerge from bankruptcy and become a Fortune 500 juggernaut in the global automotive supply chain.

Fifteen years ago, the Township, through its Local Development Finance Authority ("LDFA"), issued $28 million worth of municipal bonds to help Visteon construct its world headquarters. The Township planned to use future property-tax revenue captured within the LDFA District to pay off the bonds.

Visteon filed for bankruptcy in 2009. To help it emerge from bankruptcy, the Township and Visteon entered into the Settlement Agreement that granted $105 million in immediate concessions on the taxable value of

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[1] Complaint at 2, ¶ 1. (Appx. at 22a.)

[2] Visteon Form 10-K, Note 1 and Item 2. (Feb. 22, 2018) (accessible at http://bit.ly/Visteon-2018-SEC-Form-10K (last visited Jun. 15, 2018).

[3] *Id.* at Item 7 (Feb. 22, 2018).

the Village. In exchange, Visteon agreed to cover the inevitable and fully expected shortfall in property-tax revenue needed to pay off the bonds.

The time has come for Visteon to uphold its end of the bargain. But Visteon claims to owe the Township nothing—*not one cent*—to avoid the shortfall that will occur in October 2019. Without the promised financial assistance, the shortfall would ultimately lead to a default on the bonds, which in turn will cause the full balance owed on the bonds to accelerate and become due. By statute, local homeowners would be taxed to pay the bondholders.[4] Homeowners should not be forced to shoulder a financial responsibility that rightfully belongs to Visteon.

The circuit court ruled that this case is not ripe for adjudication. Given the stakes, one would expect a well-reasoned decision. Instead, the circuit court offered only this:

> [T]his case epitomizes why the ripeness doctrine exists, mainly to prevent courts from becoming prematurely embroiled in complex disputes involving hypothetical and contingent facts when, especially when the projected [shortfall] is estimated [to occur] three years from now.
>
> So for the reasons in Visteon's motion and supplemental pleadings, th[e Court] is granting the motion and dismissing the complaint without prejudice.[5]

The Court of Appeals affirmed this ruling in a published decision. Based on its interpretation of the Settlement Agreement and review of the Township's expert report, the court held that the shortfall date was too speculative because: (1) the Township's expert used multiple scenarios to conclude that the

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[4] M.C.L. § 600.6093(1).

[5] Motion Hr'g Tr. 5:9–17 (Feb. 11, 2016). (Appx. at 218a.)

shortfall was inevitable; and (2) the Township might generate additional tax revenue before the shortfall date.

The Court of Appeals applied the wrong standard for ripeness. It also improperly reached the merits of the Township's claims to assess ripeness, which should be assessed on the pleadings. Finally, the court's substantive analysis is flawed. The expert's use of multiple scenarios did not render the shortfall date speculative; it established that the shortfall is inevitable under any conceivable scenario, unless the Township could theoretically generate additional tax revenue. But the Court of Appeals ignored that the Township cannot *realistically* generate enough new tax revenue to avoid the shortfall. This would have required over $180 million in new taxable development—the equivalent of building a professional sports stadium—inside the LDFA's one-square-mile district within the next nine months.

The Court of Appeals' ripeness decision creates serious consequences for all municipalities, not just the Township. The Michigan Budgeting and Accounting Act imposes upon all local governments a duty to prepare and approve a budget, and to appropriate funds to implement the budget.[6] This requires local governments to forecast future revenues and responsibilities for paying municipal debts. The Court of Appeals' decision impairs effective planning and budgeting by requiring municipalities to actually suffer losses—even though those losses are foreseeable, certain, and avoidable through declaratory relief—before the judiciary can act. In other words, the Court of Appeals interprets the ripeness doctrine to prevent public officials from pro-

[6] M.C.L. §§ 141.434–141.435.

actively protecting the public. This cannot be right.

The Court is well-versed on the subject of emergency management. In recent years, the State has been forced to appoint EMs for municipalities that failed to prudently plan for and avoid financial disasters. Now, even if municipalities make sound fiscal plans, courts won't grant declaratory relief to protect taxpayers from disasters under the Court of Appeals' standard. This will only increase the use of emergency management in our State. Applying the ripeness doctrine in a manner that increases financial emergencies is irresponsible judicial policy. The Court should overrule this shortsighted decision to protect the declaratory judgment rule and to permit early judicial intervention in matters of real substance, like this one.

In addition to the flawed ripeness decision, the Court of Appeals committed procedural and substantive error when it construed the parties' Settlement Agreement.

Procedurally, this case remains at the pleading stage. Visteon moved for summary disposition under Rule 2.116(C)(4) or (C)(8) for lack of ripeness.[7] It did not seek summary disposition on the merits. Even so, the Court of Appeals reached the merits of the Township's claims under the guise of assessing whether it is justiciable,[8] which this Court warned judges not to do in *Lansing Schools Education Association* v. *Lansing Board of Education*.[9] In doing so, the Court of Appeals wrongly exercised *de facto* original jurisdiction

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[7] Visteon's Mot. Summ. Dispo. at 1. (Appx. at 148a.)

[8] *Van Buren Twp.* v. *Visteon Corp.*, 319 Mich. App. 538, 553–556 (2017).

[9] *Lansing Schs. Educ. Ass'n* v. *Lansing Bd. of Educ.*, 487 Mich. 349, 370–371 (2010).

over this declaratory action. This deprived the Township of an appeal of right, since appeals to this Court are only by leave.

Substantively, the Court of Appeals misinterpreted the contract. The Settlement Agreement says that Visteon will "assist the Township in making *timely* payments on the bonds."[10] But, under the Court of Appeals' view, Visteon's duties to negotiate and pay the amount due do not arise until after the shortfall—*i.e.*, until the payment deadline has passed. This, however, describes a duty to reimburse the Township, not a duty to assist with making timely payments. The Court of Appeals says that no reasonable person could construe the contract to require Visteon to assist the Township before a shortfall occurs, but it studiously avoids explaining how these two things can logically be true: (1) Visteon must help the Township make a timely payment; but (2) not until after the time for making payment has passed. Simply put, the Court of Appeals failed to give meaning to the word "timely."

The Court should vacate the decision, hold that the Township's claims are ripe, and grant peremptory relief under Rule 7.316(A)(7). Specifically, the Court should hold that the Settlement Agreement requires Visteon to negotiate and make payment to the Township before the shortfall occurs. Further, given the urgency of this issue, the Court should order the parties to negotiate the shortfall within 30 days with the assistance of a mediator appointed under Rule 7.316(A)(9). The Court should retain jurisdiction to take further action if the negotiations fail.

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[10] Agreement & Mut. Release ("SETTLEMENT AGMT.") at 3, § 3 (Jan. 25, 2010) (emphasis added). (Appx. at 40a.)

Alternatively, the Court should remand the case to the circuit court with instructions to: (1) enter judgment for the Township that Visteon is contractually obligated to make payment to the Township before the shortfall occurs; and (2) hold expedited proceedings to establish the amount of the shortfall.

STATEMENT OF THE CASE

Public Financing for Visteon Village

In 2002, the Township created the LDFA to encourage economic development within a roughly one-square-mile area near I-275 and I-94, known as the LDFA District.[11] At the same time, Visteon and the Township discussed the possibility of Visteon constructing its world headquarters—to be known as Visteon Village—in the District.[12]

In 2003, Visteon and the LDFA agreed that Visteon would build the Village in the District, at a cost of $270 million, in exchange for tax abatements and assistance with financing "public facilities." Those facilities included parking, open spaces, utilities, roads, and storm-water management.[13] To uphold its end of the bargain, the LDFA issued over $28 million in 30-year bonds secured by future property-tax revenues from the Village.[14]

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[11] Complaint at 3, ¶ 8. (Appx. at 23a.) *See also* Michigan Local Development Financing Act of 1986, M.C.L. §§ 125.2151–125.2174.

[12] *Id.* at 3, ¶ 8. (Appx. at 23a.)

[13] *Id.* at 3–4, ¶ 11. (Appx. at 23a–24a.)

[14] *Id.* at 4, ¶¶ 12–13. (Appx. at 24a.) Municipal bonds are like car loans. Banks provide money for people to buy cars, and they expect to be repaid with interest by a set date, called the "maturity date." Bondholders are like the bank. By purchasing a bond, they essentially loan money to the bond issuer (here, the LDFA). Investors expect to recoup the purchase price of the bond plus interest by the maturity date. Instead of buying a car, the LDFA used the money raised from selling the bonds to help Visteon construct the Village.

There were two types of bonds, "current interest" bonds and "capital appreciation" bonds. For current-interest bonds, principal and interest are paid to the investor on a regular schedule of payments. They can be refinanced after a certain amount of time has passed. For capital-appreciation bonds, the principal accrues compound interest. The investor receives a lump sum of principal and interest when the bond matures. Because of how these

The LDFA must repay the bonds using the summer and winter taxes assessed within the District.[15] Before the LDFA issued the bonds, the Township projected future property-tax revenue to assure investors and ratings agencies that the LDFA could pay the bonds.[16] And, as is common, the Township pledged its full faith and credit to make the bonds more marketable.[17]

With bond financing in place, construction of Visteon's lakeside company town proceeded. The Village opened for business in mid-2004:

bonds are structured, capital-appreciation bonds cannot be refinanced. Of the original $28 million worth of bonds, $21.6 million were current-interest bonds that could be refinanced. The remainder were capital-appreciation bonds that cannot be refinanced.

[15] Complaint at 4, ¶ 14. (Appx. at 24a.)

[16] *Id.* at 4, ¶ 15. (Appx. at 24a.)

[17] *Id.* at 4, ¶ 13. (Appx. at 24a.)

In 2006—three years after the LDFA issued the bonds—tax revenues from the Village fell short of original projections.[18] To solve this problem, the LDFA and the Township refinanced a portion of those bonds by issuing new bonds. The LDFA used the revenue from the new bonds to prepay the interest on the old bonds. This gave it more time to pay the principal on the old bonds (while, of course, becoming responsible for paying the new bonds, as well).[19] This temporarily alleviated the projected shortfall.[20] As before, the new bonds were secured by future property-tax payments from the Village, and the Township backed them with its full faith and credit.[21]

Helping Visteon Emerge from Bankruptcy

In 2009, Visteon declared bankruptcy. The Township filed an unsecured claim because Visteon had breached the tax abatement agreements.[22] Before the bankruptcy, the Township and Visteon had also been negotiating the Village's assessed property value. Those negotiations continued during the bankruptcy proceedings.

In 2010, the Township and Visteon entered into a Settlement Agreement that resolved tax issues in a way that protected the Township's interests

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[18] Complaint at 5, ¶ 18. (Appx. at 25a.)

[19] *Id.* at 5, ¶ 15. (App'x at 25a.) This is akin to the process of obtaining a new loan to pay off an old loan on more favorable terms (*e.g.*, a longer payment window, smaller monthly payments, lower interest rates, etc.). College students and their parents are familiar with the real-world benefits of this process if they have refinanced or consolidated school loans.

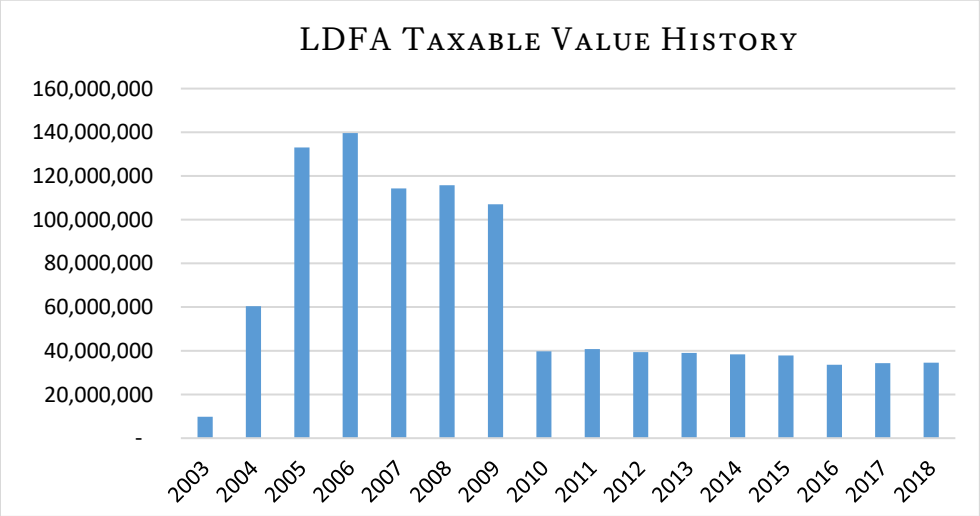
[20] *Ibid.*

[21] *Id.* at 5, ¶ 19. (Appx. at 25a.)

[22] *Id.* at 5, ¶¶ 18–19. (Appx. at 25a.)

while helping Visteon emerge from bankruptcy.[23] The agreement: (1) adjusted the Village's assessed value; (2) settled Visteon's breach of the tax abatement agreements; and (3) accounted for the impact those agreements would have on the LDFA paying off the bonds.[24]

Regarding the Village's taxable value, the Township agreed to reduce the assessed value from about $165 million to $60 million.[25] In turn, this reduced the Village's taxable value to $30 million.[26] Because of Proposal A, annual increases in taxable value are constitutionally limited to the lower of inflation or 5%.[27] This lowered the Village's taxable value to a level that would never have allowed for repayment of the bonds:



Since future bond payments were secured by future revenue from property taxes, this 63.4% reduction in future taxable value had to be made up

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[23] Settlement Agmt. (Appx. at 38a–47a.)

[24] *Id.* at 2–3, §§ 1–3. (App'x at 39a–40a.)

[25] *Id.* at 2, § 1.1. (Appx. at 39a.)

[26] *Ibid.*

[27] Mich. Const. Art. IX, § 3.

somehow to avoid a default on the bonds. Recognizing this, the balance of the Settlement Agreement addresses the two ways by which the gap will be filled.

First, for its breach of the tax abatements, Visteon agreed to pay $2.2 million and leave unchallenged Visteon's unsecured claim for $9.8 million, on the condition that the $2.2 million be credited toward the claim.[28] The Township later sold the unsecured claim, netting $5.7 million in cash.[29] The Township has dedicated the combined $7.9 million to repaying the bonds.[30] This payment could not possibly cover the annual loss in property-tax revenue from the $105 million reduction in the Village's assessed value, thereby resulting in the October 2019 shortfall.

Second, Visteon agreed to help the Township repay the bonds when the shortfall caused by the Township's concessions inevitably occurred.[31]

The parties knew *when they entered into the Settlement Agreement* that a shortfall would occur. Visteon admitted this when it asked the bankruptcy court to approve the settlement: "Although dependent on a number of factors, Visteon expects no shortfall with respect to the Township bonds to arise until, at earliest, 2015."[32] In other words, Visteon believed it had at least five years before it would have a duty to assist under the Settlement Agreement. But Visteon did not account for the $7.9 million that the Township dedicated

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[28] Settlement Agmt. at 2, §§ 2.1–2.2. (Appx. at 39a.)

[29] Complaint at 7, ¶ 29. (Appx. at 27a.)

[30] *Ibid.*

[31] Settlement Agmt. at 3, § 3. (Appx. at 40a.)

[32] Visteon's Mot. Approve Settlement Agmt. at 5, n.4 (Jan. 27, 2010). (Appx. at 13a.)

to pay the bonds. Applying those additional funds, the Township was able to extend the shortfall date into 2018.

Post-Bankruptcy Developments

In 2013, the Township gave Visteon formal notice that the shortfall was projected to occur in 2018 and asked Visteon to begin negotiating the shortfall amount, so that the shortfall could be avoided.[33]

To open negotiations, the Township supplied Visteon with a report from Public Financial Management, Inc. ("PFM"), which explained why the shortfall was most likely to occur in 2018.[34] PFM noted that, "[w]hile it may be difficult to project future [taxable values and revenues], given the existing legal restrictions [under Proposal A] on valuation growth, it is likely to be within certain ranges."[35] To validate its opinion, PFM ran a series of alternative scenarios that assumed more favorable and less favorable facts.[36] Except for two of those scenarios, all of them showed that the shortfall would occur in 2018.[37] Under the two outlier scenarios, the shortfall would occur a year earlier in 2017.[38] No matter how PFM adjusted the variables, under no scenario could the Township avoid a shortfall before the bonds matured in 2032. And all of the scenarios put the shortfall date in 2018 *at the latest*.[39]

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[33] Complaint at 10, ¶ 42. (Appx. at 30a.)

[34] *Ibid. See also* PFM Rpt. at 14–15 (Appx. at 30, 67a–68a).

[35] PFM Rpt. at 14. (Appx. at 67a.)

[36] *Id.* at 15, Cash Flow Scenarios. (Appx. at 68a.)

[37] *Id.* at 15, Cash Flow Scenarios A2, A4–A12, A14–A15. (Appx. at 68a.)

[38] *Id.* at 15, Cash Flow Scenarios A3 and A13. (Appx. at 68a.)

[39] *Id.* at 20. (Appx. at 73a.)

Despite having the PFM report for over a year, Visteon never disputed PFM's calculations. Instead, Visteon claimed it had no duty to negotiate or pay anything under the Settlement Agreement.

This Litigation

When it became clear that the parties had reached an impasse, the Township sued for declaratory relief and breach of contract. For declaratory relief, the Township asked for a declaration that, under the terms of the Settlement Agreement, Visteon had: (1) a duty to negotiate the shortfall before the shortfall occurred; and (2) a duty to pay the negotiated amount before the shortfall occurred, so that the Township could make a timely payment.[40] For the contract claim, the Township alleged that Visteon's refusal to negotiate, and its claim that it had no obligations under the Settlement Agreement, was an anticipatory repudiation of the parties' Settlement Agreement.[41]

In early 2015, while this lawsuit was underway, the Township mitigated its damages by refinancing the current-interest bonds a second time, taking advantage of favorable interest rates when the new bonds became eligible for refinancing.[42] This extended the shortfall date by one year into 2019. The current-interest bonds cannot be refinanced again. There is nothing more the Township can do to delay the shortfall beyond October 2019.

Visteon moved to dismiss the case as unripe. It convinced the circuit court that the Township's recent refinancing of the bonds, coupled with the

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[40] Complaint at 14–15, ¶¶ 65–71. (Appx. at 34a–35a.)

[41] *Id.* at 13–14, ¶¶ 56–64. (Appx. at 33a–34a.)

[42] *See id.* at 12, ¶ 53. (Appx. at 32a.)

multiple shortfall scenarios PFM used to validate the projected shortfall date, proved that the shortfall date was speculative. The court dismissed the case as unripe, relying on nothing more than Visteon's brief.

The Township appealed, and the Court of Appeals affirmed. In this supplemental brief, the Township addresses why the lower courts' ripeness rulings were wrong. It also addresses how the Court of Appeals deprived the Township of an appeal of right by improperly construing the contract, and how it compounded that error by misconstruing the contract.

SUMMARY OF ARGUMENT

The Court of Appeals is struggling with the prudential nature of the ripeness doctrine. It has failed to resolve the conflict between: (1) *Lansing Schools*, which changed justiciability doctrines from constitutional requirements to prudential considerations; and (2) a line of Court of Appeals' cases holding that these doctrines are prerequisites to exercising subject-matter jurisdiction over declaratory actions. This Court should resolve the conflict.

The declaratory-judgment rule does not enlarge or reduce the courts' *power* to decide cases.[43] It is merely a procedural tool for declaring rights before damages have occurred.[44] If standing, ripeness, and mootness are not jurisdictional prerequisites to the exercise of judicial power, but merely prudential considerations, then this is true for declaratory actions as well. Rather than recognize this, the Court of Appeals continues to treat standing and ripeness as jurisdictional barriers to declaratory relief, while treating them as prudential considerations in every other case.[45] The Court should abrogate that false distinction and hold that ripeness is not a prerequisite to exercising subject-matter jurisdiction over a declaratory action.

This case is ripe. The prudential considerations for ripeness are: (1) fitness of the dispute for a judicial decision; and (2) the hardship that the parties will suffer if a decision is withheld.[46] The Township seeks a declaration of rights and responsibilities under a contract, a quintessential question of law

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[43] *Allstate Ins. Co.* v. *Hayes*, 442 Mich. 56, 65, n.9 (1993)

[44] *Ibid.*

[45] *See* Part 1.A, *infra*.

[46] *Michigan Chiropractic Council* v. *Commissioner of the Office of Fin. & Ins. Servs.*, 475 Mich. 363, 381, n.47 (2006).

fit for judicial decision. Withholding a decision would cause the Township substantial hardship, forcing it to increase taxes or cut essential services to pay the shortfall without assistance from Visteon. If the Township has a contractual right to pre-shortfall assistance under the Settlement Agreement, then taxpayers can avoid these hardships. Asking them to shoulder such burdens out of a misguided notion of "prudence" is inconsistent with the text and purpose of the declaratory-judgment rule.

On the merits, the Court of Appeals robbed the Township of an appeal of right by deciding the claims instead of deciding whether the complaint stated a claim for relief. Visteon challenged ripeness under Rules 2.116(C)(4) and (C)(8).[47] In fairness to Visteon, it had to bring the motion under both rules because the Court of Appeals has published inconsistent opinions as to which rule governs a ripeness challenge. Despite acknowledging this conflict, the Court of Appeals refused to give future litigants definitive guidance on which rule governs, claiming it doesn't matter.[48] Except it does. Motions under Rule 2.116(C)(4) can be supported and opposed on evidence outside the pleadings; motions under Rule 2.116(C)(8) must be decided only on the pleadings.[49] Because ripeness is a prudential consideration, not a jurisdictional one, ripeness challenges should be decided solely on the pleadings.

Ripeness is evident on the face of the Complaint. A request to declare the parties' contractual rights and responsibilities is fit for judicial decision. The Complaint alleges that the shortfall will damage the Township by as

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[47] Visteon's Mot. Summ. Disp. at 1. (Appx. at 148a.)

[48] *Van Buren Twp.*, 319 Mich. App. at 542–543.

[49] Rule 2.116(G)(2).

much as $36.4 million.[50] On a Rule 2.116(C)(8) motion, this well-pleaded fact must be accepted as true. And, on its face, this fact adequately establishes that the Township will suffer a substantial hardship if the courts withhold a decision at this time.

Finally, the Court of Appeals interpreted the contract incorrectly. The court ignored the context for the settlement, which is recited in the agreement. It also ignored Visteon's contractual duty to help the Township make "timely" payments to avoid the shortfall. On its face, the contract specifies pre-shortfall assistance, not post-shortfall reimbursement. The Court should overrule the Court of Appeals' interpretation as inconsistent with the plain language of the Settlement Agreement.

[50] Complaint at 13, ¶ 62. (Appx. at 33a.)

ARGUMENT

1. *Prudentially Ripe:* The Township's need to plan for the shortfall, and the hardship that will befall the Township if a shortfall occurs, renders this case prudentially ripe for adjudication.

Standard of Review: *Plenary*[51]

In the federal system, justiciability doctrines are constitutional limitations that cabin the limited powers given to an unelected, unrepresentative judiciary.[52] We, in contrast, elect our judges. In *Lansing Schools*, this Court held that we have also granted our courts greater judicial powers than the federal courts enjoy.[53] It therefore also held that our justiciability doctrines are prudential, not jurisdictional.[54] They *guide* the responsible exercise of judicial power, but they do not *limit* it.

The prudential purpose behind the ripeness doctrine is to allocate scarce judicial resources. In most cases, we want judges spending their time on disputes with concrete facts and injuries. It is not the best use of a judge's time to decide disputes premised on contingent facts because the facts might change (and thus require repeated judicial intervention as the facts unfold).[55]

By their very nature, declaratory actions show that the rule of ripeness is neither absolute nor capable of strict application. As the Court noted in

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[51] *LaFontaine Saline, Inc.* v. *Chrysler Group, LLC*, 298 Mich. App. 576, 589 (2012), *overruled on other grounds* 496 Mich. 26 (2014).

[52] *Michigan Chiropractic Council*, 475 Mich. at 370 and n.12, *overruled on other grounds Lansing Schs.*, 487 Mich. at 362–363).

[53] *Lansing Schs.*, 487 Mich. at 361–366.

[54] *Id.* at 487 Mich. at 355–366.

[55] *Id.* at 380–381, n.47.

Merkel v. *Long*, "one great purpose of declaratory judgments" is to allow courts to authoritatively settle disputes *before* legal interests are infringed or impaired, so that the parties may comport themselves accordingly.[56] To accomplish this purpose and others, "it is sometimes necessary to determine rights which will arise or become complete only in the contingency of some future happening" if there is "a tangible present interest in [the] determination [of the parties' legal relations] and a useful purpose is thereby served."[57]

Yet the Court of Appeals held in this case that courts lack subject-matter jurisdiction over declaratory actions absent an "actual controversy,"[58] which is judicial shorthand for standing, ripeness, and mootness.[59] This is not an isolated departure from the Court's holdings.

A. *Conflicting Law*: The Court should formally overrule intermediate appellate opinions that treat justiciability doctrines as constitutional rules instead of prudential considerations.

In *Citizens for Common Sense in Government* v. *Michigan Attorney General*, a group of citizens opposed a ballot measure supported by the Michigan Municipal League, which contributed funds to the sponsors of the ballot

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[56] *Merkel* v. *Long*, 368 Mich. 1, 13 (quoting *Sigal* v. *Wise*, 114 Conn. 297 (1932)).

[57] *Ibid.* (quoting *Sigal* and E. Borchard, Declaratory Judgments 422–424 (2d ed. 1941)).

[58] *Van Buren Twp.*, 319 Mich. App. at 545.

[59] *U.A.W.* v. *Central Mich. Univ.*, 295 Mich. App. 486, 495 (2012) (Rule 2.605 "does not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates [justiciability] doctrines ….") *See also Allstate Ins. Co.* v. *Hayes*, 442 Mich. 56, 66 (1993) ("Properly understood, … the actual controversy requirement is simply a summary of justiciability as the necessary condition for judicial relief.)

measure.[60] The group tried to block the measure by seeking a declaration that the MML was legally prohibited from indirectly funding ballot measures generally. Years earlier, the Attorney General had opined that the MML could do so. The group argued it needed declaratory relief because, without it, the Secretary of State would follow that opinion as required by State law and allow MML to indirectly fund the proposal. A panel of the Court of Appeals—which included Judges Saad and Meter, who also served on the panel in this case—held that the court lacked subject-matter jurisdiction because the group could only speculate that the Secretary of State would adhere to the Attorney General's opinion (as required by law).[61] In other words, the court said it lacked jurisdiction because the claim was not yet ripe.

Also, in *McGill* v. *Automobile Association of Michigan*, the Court of Appeals affirmed the dismissal of a class-action challenging insurance companies' failure to fully reimburse medical providers for the cost of medical services.[62] The class feared that their medical providers would try to recover the unpaid costs from them, so they sought a declaratory judgment that their insurance companies were required to pay the full cost. The class had not yet suffered this feared injury. Nor had the medical providers threatened to collect the unpaid costs from them. The court found that this dispute was unripe. Whatever the merits of its ripeness determination, the court went one step further and held that the circuit court therefore lacked subject-matter

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[60] *Citizens for Common Sense in Gov't* v. *Michigan Att'y Gen.*, 243 Mich. App. 43 (2000).

[61] *Id.* at 54–56.

[62] *McGill* v. *Automobile Ass'n of Mich.*, 207 Mich. App. 402 (1994).

jurisdiction to enter a declaratory judgment.[63]

Similarly, in *Recall Blanchard Committee* v. *Michigan Secretary of State*, the Court of Appeals refused to declare aspects of Michigan election law on recall campaigns unconstitutional, finding that the case was not ripe because the recall committee had not gathered the requisite number of voter signatures to hold a recall election.[64] The court held that trial courts lack subject-matter jurisdiction over unripe requests for declaratory relief.[65]

A particularly troubling development in *Recall Blanchard* was the Court of Appeals' erroneous reformulation of the ripeness doctrine for declaratory actions. It acknowledged that declaratory relief can be appropriate in cases where actual injuries or losses have not occurred, but "in such cases, an actual controversy will be found to exist *only* where a declaratory judgment is necessary to guide a litigant's future conduct in order to preserve the litigant's legal rights."[66] This cramped definition of ripeness in declaratory actions conflicts with several of this Court's decisions.

In *City of Flint* v. *Consumers Powers*, the Court discussed the conditions under which declaratory judgment could be sought: "*At least one of the tests* of right to resort to declaratory proceedings is the necessity for present declaratory judgment as a guide to plaintiff's future conduct in order to preserve its legal rights."[67] The Court of Appeals changed this test in *Recall Blanchard*

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[63] *McGill*, 207 Mich. App. at 407.

[64] *Recall Blanchard Comm.* v. *Michigan Sec'y of State*, 146 Mich. App. 117, 119–123 (1985).

[65] *Id.* at 121–123.

[66] *Id.* at 121 (emphasis added).

[67] *City of Flint* v. *Consumers Power Co.*, 290 Mich. 305, 310 (1939).

from "at least one" of many tests to the "only" test, wrongfully restricting the circumstances in which declaratory relief is proper. Indeed, *Flint* identified at least two other permissible situations in which declaratory relief was proper, even if not ripe: (1) courts will decide future rights before the happening of an event if "special considerations" require;[68] and (2) declaratory relief may be obtained when "circumstances render it 'useful and necessary'; where it will 'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.'"[69]

Similarly, in *City of Muskegon Heights* v. *Danigelis*, this Court was asked to declare whether it was lawful for a city to raise revenue for "the relief of destitute inhabitants" by issuing municipal bonds.[70] Mr. Danigelis argued that this was an improper use of declaratory judgments. In a pithy one-liner, the Court held that "under the Declaratory Judgment Act [the forerunner to our Rule 2.605], there is presented issuable questions of fact and law of great public moment and, if the act is to serve at all, it must be permitted to serve in this instance."[71]

And, in *Village of Breedsville* v. *Columbia Township*, there was a dispute among two municipalities and a county over which of them was responsible for rebuilding a collapsed bridge.[72] In explaining why this was a proper action

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[68] *City of Flint*, 290 Mich. at 310 (quoting *Washington-Detroit Theatre Co.* v. *Moore*, 249 Mich. 673, 677 (1930)).

[69] *City of Flint*, 290 Mich. at 310 (quoting *James* v. *Alderton Dock Yards*, 256 N.Y. 298, 305 (1931)).

[70] *City of Muskegon Hgts.* v. *Danigelis*, 253 Mich. 260 (1931).

[71] *Id.* at 261.

[72] *Village of Breedsville* v. *Columbia Twp.*, 312 Mich. 47 (1945).

for declaratory relief, the Court explained it was being asked to do nothing more than interpret statutes.[73] The situation here is no different. The resolution of this dispute requires nothing more than interpreting a contract. This case is just as justiciable and ripe as *Breedsville*.

None of this is to say that the Court of Appeals never gets it right. For example in *U.S. Aviex Co.* v. *Travelers Insurance Co.*, the Court of Appeals recognized that a declaratory judgment is "appropriate [in some instances] even though future contingencies . . . will determine whether the 'controversy' actually becomes real."[74] In that case, a chemical plant had caught on fire. The water used to put out the fire mixed with chemicals at the plant before seeping into the groundwater. The Michigan Department of Natural Resources threatened to sue the chemical company if it did not remediate the contaminated groundwater. The company turned to its insurer, which refused to cover the costs of remediation at the plant site. The company sought a declaration that the policy covered the cost of remediation. The insurer claimed the case was not ripe because DNR might seek a remedy not covered by the policy. The court held that this contingency did not render the case unripe. At a minimum, the chemical company needed to know the scope of coverage to make an informed choice between voluntarily complying with DNR's demands and opposing DNR's actions.[75]

Likewise, in *U.A.W.* v. *Central Michigan University*—one of the first cases to review a ripeness challenge after *Lansing Schools*—the court held that

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[73] *Village of Breedsville*, 312 Mich. at 54.

[74] *U.S. Aviex Co.* v. *Travelers Ins. Co.*, 125 Mich. App. 579, 586 (1983).

[75] *Id.* at 582–586.

declaratory relief was appropriate when the UAW challenged a university policy burdening employees who ran for political office.[76] The court recognized that standing was prudential after *Lansing Schools*, and that the "actual controversy" requirement in Rule 2.605 is merely shorthand for prudential justiciability doctrines.[77] It held that adverse interests necessitating the sharpening of the issues is sufficient to warrant declaratory relief "before [a case] ripens into a violation of law or a breach of contract."[78]

Similarly, in *Haring Township* v. *City of Cadillac*, the panel adjudicated a dispute between two municipalities over the scope and meaning of a wastewater treatment contract.[79] The city of Cadillac notified Haring Township that it would not continue to provide wastewater treatment services when the contract expired in 11 years.[80] Even though the dispute centered on a contingent event *over a decade in the future*, the Court of Appeals reached the merits.[81] The dispute was so obviously ripe that the majority never addressed the dissent's belief that the case was unripe.[82]

Finally, in *Citizens Protecting Michigan's Constitution* v. *Michigan Secretary of State*, the Court of Appeals properly rejected a ripeness challenge framed in terms of jurisdiction.[83] Although it reached the right result, it still

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[76] *U.A.W.*, 295 Mich. App. at 489–492.

[77] *Id.* at 494–495.

[78] *Id.* at 496.

[79] *Haring Twp.* v. *City of Cadillac*, 290 Mich. App. 728 (2010).

[80] *Id.* at 736–737.

[81] *Id.* at 738–750.

[82] *Id.* at 750–751.

[83] *Citizens Protecting Mich.'s Const.* v. *Michigan Sec'y of State*, 280 Mich.

misstated the ripeness doctrine, holding that a claim is unripe if "it rests upon contingent future events that may not occur as anticipated, or may not occur at all."[84] This formulation of the rule conflicts with *Muskegon Heights* and *Breedsville*.

The foregoing highlights jurisprudential conflicts that must be resolved to bring clarity and consistency to the ripeness doctrine. The Court should overrule the decisions of those panels treating ripeness as a function of subject-matter jurisdiction instead of the prudential doctrine that it is. It should also provide a clearer definition of the ripeness doctrine in the context of declaratory actions to avoid the erosion of declaratory relief.

B. *Applying Ripeness Properly*: The Township's need to plan for the shortfall, and the hardship that it will suffer if a shortfall occurs, renders this case prudentially ripe.

A declaratory judgment in this case would serve a useful purpose by answering a pure question of law. Withholding a decision would impose hardship on the Township, which would otherwise be forced to increase taxes or cut essential services to pay the shortfall without assistance from Visteon. If the Township has a contractual right to pre-shortfall assistance under the parties' Settlement Agreement, then taxpayers can avoid these hardships.

A theme running through *Muskegon Heights*, *Breedsville*, *Haring Township*, and *U.S. Aviex Co.* is that disputes are ripe if they interfere with a public

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App. 273 (2008). Judge Meter served on this panel. He joined a unanimous panel, which held: "Although RMGN phrases the argument in terms of jurisdiction, *we do not consider this a jurisdictional issue, but a ripeness issue.*" Judge Meter does not explain why he inconsistently treats ripeness as a jurisdictional question.

[84] *Citizens Protecting Mich.'s Const.*, 280 Mich. App. at 282.

or private plaintiff's ability to plan for the future, particularly as it relates to government affairs. In *Muskegon Heights*, the case was ripe because the city needed to know if it could lawfully issue bonds to provide for the poor. In *Breedsville*, the case was ripe because local governments needed to know which of them had financial responsibility for rebuilding a bridge. In *Haring Township*, the case was ripe because municipalities needed to know whether their current wastewater treatment provider would be legally required to continue providing them service after the contract ended, or whether they would be required to make alternative arrangements. And, in *U.S. Aviex Co.*, the case was ripe because the chemical company needed to know if its insurer was obligated to pay for certain cleanup expenses so that it could decide whether to challenge DNR's demands or capitulate to them.

Under this need-to-plan test, the case is ripe because the Township is legally required to develop a budget (*i.e.*, a plan) for servicing the debt owed on the bonds. The Township believes that it already planned for the future through the Settlement Agreement, through which it secured Visteon's promise to "assist the township in making timely payments on the bonds." Visteon disputes this. If the Township is right, no further planning is required. If the Township is wrong, then it needs to develop alternative plans, ranging from tax increases to reductions in essential services to emergency management or bankruptcy. Thus, the present duty to plan and avoid the expense necessary to develop and implement alternatives makes this dispute ripe for decision.

C. *Abuse of Discretion:* The circuit court abused its discretion by misapplying the ripeness doctrine.

The Court of Appeals alternatively affirmed the circuit court under the abuse-of-discretion standard, noting that declaratory relief is permissive, not mandatory.[85] Although it is true that declaratory relief is discretionary, that is not the issue here. A court abuses its discretion when it misapprehends or misapplies the law.[86] The circuit court dismissed this action as unripe without engaging in any analysis. Under this Court's precedent, the case is ripe or falls within an exception to the ripeness doctrine. It was therefore legally incorrect for the circuit court to dismiss the action on ripeness grounds, and thus an abuse of discretion.

* * *

In conclusion, the Court should restate the ripeness doctrine to resolve confusion and conflicts among panels of the Court of Appeals. It should also hold that this case is ripe because it asks the courts to decide a question of law that serves a useful purpose: the Township's need to develop a budget as required by law. Taxpayers would suffer an undue hardship if a decision is withheld. Alternatively, if the Court decides that the case is unripe, it should prudentially decline to apply the ripeness doctrine to reach a question of public importance, particularly since all of the material facts are before the Court.

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[85] *Van Buren Twp.*, 319 Mich. App. at 550.

[86] *Bynum* v. *ESAB Group, Inc.*, 467 Mich. 280, 283 (2002).

2. *Constitutional Ripeness:* The Township's claims are ripe even if the Court decides to deviate from *Lansing Schools*.

Standard of Review: *Plenary*[87]

The Court's decision in *Lansing Schools* is not without criticism. The dissent traced the history of Michigan's Declaratory Judgment Act from *Anway* v. *Grand Rapids Railway Co.* forward.[88] Assuming *arguendo* that the Court is inclined to deviate from *Lansing Schools*, then it would presumably apply *Michigan Chiropractic Council* v. *Commissioner of the Office of Financial & Insurance Services*, which defined ripeness as both a constitutional and prudential doctrine.[89] Even under the *Michigan Chiropractic Council* analysis, reversal would still be warranted.

In *Michigan Chiropractic Council*, the Court held that "a claim lacks ripeness, and there is no justiciable controversy, where the harm asserted has not matured sufficiently to warrant judicial intervention," adopting the federal constitutional standard for ripeness.[90] A declaratory action meets the federal constitutional ripeness requirement—and would therefore meet any ripeness requirement in the Michigan Constitution—when "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant … declaratory judgment."[91]

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[87] *Bonner* v. *City of Brighton*, 495 Mich. 209, 221 (2014) (questions of constitutional law are reviewed *de novo*).

[88] *Anway* v. *Grand Rapids Ry. Co.*, 211 Mich. 592 (1920). *See also Lansing Schs.*, 487 Mich. at 418–422 (Corrigan, J., dissenting).

[89] *Michigan Chiropractic Council*, 475 Mich. at 370–374, 379–382.

[90] *Id.* at 381 (cleaned up).

[91] *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 506 (1972).

This is such a case. There is a substantial controversy: the Township claims that Visteon owes it upwards of $30 million to cover the shortfall on the bond, and Visteon claims it owes nothing. The parties' legal interests are *per se* adverse. On the "reality" of the dispute, the PFM report and the Township's inability to further refinance the bonds or develop a large tax base within the LDFA District constitute *prima facie* evidence that the shortfall will occur in October 2019 on any realistic view of the facts.

Thus, the analysis turns on whether the dispute is of sufficient immediacy. When the circuit court dismissed this case as unripe, there was already a dispute between the parties as to whether Visteon even had an obligation to negotiate in good faith or prepay the shortfall. The Complaint alleges an ongoing failure to negotiate—an immediate breach of the Settlement Agreement. It also alleges that Visteon repudiated the Settlement Agreement when it disclaimed a duty to pay any amount of the shortfall. An anticipatory breach is a "doctrine of accelerated ripeness" because it treats a promise to breach as a present, actionable breach of contract.[92] Thus, the Complaint sufficiently pleaded an immediate dispute to survive a ripeness challenge under Rule 2.116(C)(8).

Moreover, in *Blanchette* v. *Connecticut General Insurance Corps.*—a case cited in *Michigan Chiropractic Council*—the U. S. Supreme Court held that this timing element is reassessed at each stage of the proceedings:

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[92] *Perry Cap., LLC* v. *Mnuchin*, 864 F. 3d 591, 632–633 (CADC 2017) (quoting *Homeland Training Ctr., LLC* v. *Summit Point Auto Research Ctr.*, 594 F. 3d 285, 294 (CA4 2010), and *Franconia Assocs.* v. *United States*, 536 U. S. 129, 143 (2002).

"[S]ince ripeness is peculiarly a question of timing, it is the situation now, rather than the situation at the time of the [trial court's] decision that must govern."[93] The Township is legally obligated to prepare a balanced budget a year in advance under the Uniform Budgeting and Accounting Act of 1968.[94] In order to meet that statutory obligation, it must identify and project its expenditures for 2019 this year—as in *right now*.[95] It cannot accurately do so without a declaration as to who will be required to shoulder the shortfall: Visteon or the taxpayers.

Accordingly, this case satisfies the constitutional requirements for ripeness, if the Court decides to depart from *Lansing Schools*.

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[93] *Blanchette* v. *Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 140 (1974).

[94] M.C.L. §§ 141.421–141.440a.

[95] M.C.L. §§ 141.434–141.435

3. *The Contract:* The Court of Appeals improperly and incorrectly construed the parties' Settlement Agreement.

Standard of Review: *Plenary*[96]

The Court of Appeals committed two additional errors, both concerning the interpretation of the parties' Settlement Agreement. First, it committed a procedural error by interpreting the agreement. The sole task before the Court of Appeals was to decide if the Township's claim was ripe, not to decide the merits of the case. Second, the court misinterpreted the agreement.

A. *Procedural Error:* The Court of Appeals improperly interpreted the merits of the Township's claims on a motion for summary disposition under Rule 2.116(C)(8).

The Court of Appeals acknowledged that it has issued inconsistent decisions as to whether ripeness challenges should be brought under Rule 2.116(C)(4) as jurisdictional challenges, or under Rule 2.116(C)(8) as a challenge to the sufficiency of the pleadings.[97] Rather than resolve the conflict, it stated (erroneously) that it need not do so because: (*a*) the parties had conceded that ripeness is properly considered under Rule 2.116(C)(10); and (*b)* the circuit court considered evidence beyond the pleadings.

The Court of Appeals is wrong on both points, regardless of whether the Court follows or departs from *Lansing Schools*.

First, the Township did *not* concede that ripeness is properly considered under Rule 2.116(C)(10). In fact, it emphasized that this was *not* a motion

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[96] *Rory* v. *Continental Ins. Co.*, 473 Mich. 457, 464 (2005) (summary disposition and the interpretation of a contract are both questions of law reviewed *de novo*).

[97] *Van Buren Twp.*, 319 Mich. App. at 543.

for summary disposition under that rule: "It's important to note that this motion is being brought under C4 and C8 under ripeness. It is not a summary disposition on C10."[98]

Second, the circuit court did *not* consider evidence beyond the pleadings. It considered the PFM report, which was attached to the pleadings. As the Court of Appeals has previously held, "[a]n exhibit attached to or referred to in a pleading becomes a part of the pleadings for all purposes."[99]

Third, even assuming *arguendo* that the PFM report was evidence outside of the pleadings, the circuit court did not make a ruling under Rule 2.116(C)(10). The Court of Appeals said it must treat a trial court ruling under Rule 2.116(C)(8) as through it were made under Rule 2.116(C)(10) whenever it considers evidence beyond the pleadings, citing *Sharp* v. *City of Lansing*.[100] But *Sharp* was in a different procedural posture. The employer in an employment-discrimination suit moved for summary disposition based on an approved affirmative action plan it used for hiring decisions. This plan was not contained within the pleadings, but the trial court considered it nonetheless when granting summary disposition under Rule 2.116(C)(8). The Court of Appeals noted the error and reviewed the trial court's decision under Rule 2.116(C)(10). Here, in contrast, Visteon argued that the circuit court lacked the power to adjudicate the case. Visteon did not argue that it was entitled to

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[98] Motion Hr'g Tr. 14:21–25. (Appx. at 227a.) *See also id.* at 15:16–20. (Appx. at 228a.)

[99] *Slater* v. *Ann Arbor Pub. Schs. Bd. of Educ.*, 250 Mich. App. 419, 427 (2002).

[100] *Van Buren Twp.*, 319 Mich. App. at 544(citing *Sharp* v. *City of Lansing*, 238 Mich. App. 515, 518 (1999)).

prevail on the merits as a matter of law. Indeed, Visteon never supported its motion with any kind of documentary evidence, which it would have been required to under Rule 2.116(G)(3)(b), if this had been a motion under Rule 2.116(C)(10).[101]

By reaching the merits—something the circuit court did not do—the Court of Appeals essentially exercised original jurisdiction to enter summary declaratory relief in favor of Visteon without affording the Township the opportunity to build a proper record in support of its claims. But the Court of Appeals does not have original jurisdiction to grant declaratory relief in this action.[102] This erroneous exercise of power has deprived the Township of an appeal of right on the merits of its claims because there is no appeal of right to this Court.

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[101] If the Court is inclined to follow the dissent in *Lansing Schools* by concluding that ripeness is a constitutional issue, then it should be assessed under Rule 2.116(C)(4) for lack of subject-matter jurisdiction. This would allow (and in some cases require) movants to offer evidentiary support for their challenge under Rule 2.116(G)(2)–(3).

In this case, the Court should recall that Visteon moved under Rule 2.116(C)(4) and (C)(8). Accordingly, it could have offered evidence beyond the pleadings to establish the alleged lack of ripeness in support of its (C)(4) relief. It chose not to do so.

[102] *Compare* Rule 2.605(A)(2) ("For purposes of [the rule empowering courts to issue declaratory judgment], an action is considered within the jurisdiction of a court *if the court would have jurisdiction of an action of the same claim or claims* in which the plaintiff sought relief other than a declaratory judgment." (emphasis added)) *with* Rule 7.203(C) (establishing the original jurisdiction over the Court of Appeals) *and* Mich. Const. art. VI, § 10, *and* MCL 600.310 (both delegating the creation of the Court of Appeals' original jurisdiction to the Supreme Court). *See also Musselman* v. *Governor*, 200 Mich. App. 656 (1993).

B. *Substantive Error:* The Court of Appeals incorrectly construed the Settlement Agreement by failing to consider the full context for the agreement and by failing to give effect to all of the words in the agreement.

The Court of Appeals' fatal interpretive flaw was ignoring the context for the Settlement Agreement. This is not an exercise of looking to extrinsic evidence. The Settlement Agreement tells us the context:

> Visteon acknowledges that the Township assisted Visteon in the construction of the Village through the issuance by Township of certain bonds supported by the full faith and credit of the Township, the proceeds of which were used to help construct the Village.[103]

This is a lawyerly way of saying the Township helped Visteon build the Village by issuing bonds that the Township is legally obligated to repay. With that context in mind, Visteon made the following promise:

> To the extent that the property tax payments made by Visteon to the Township, including payments made by Visteon to the Township pursuant to Section 2.2, are inadequate to permit the Township to meet its payment obligations with respect to that portion of the bonds that were used to help fund the Village, Visteon hereby agrees to negotiation with the Township in good faith to determine the amount of the shortfall with respect to those bonds and make a non-tax payment, payment in-lieu-of tax, (PILOT) to the Township to assist in making timely payments on the bonds.[104]

Cutting through the legalese and the needless use of the passive voice, what the Settlement Agreement says is:

> If Visteon's property tax payments to the Township, including the $2.2 million paid under Section 2.2 of this Agreement, are

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[103] Settlement Agmt. at 3, § 3. (Appx. at 40a.)

[104] *Ibid.*

> not enough to pay the bonds issued to help build the Village, then Visteon will negotiate with the Township in good faith to estimate how much more the Township needs to pay those bonds, and Visteon will give that amount to the Township so it can make timely payments on the bonds.

This interpretation is consistent with the context for the agreement. The Township helped Visteon build the Village. The Township also helped Visteon emerge from bankruptcy by agreeing to reduce the Village's assessed value from $165 million to $60 million,[105] and its taxable value to $30 million.[106] Visteon also knew that, because of Proposal A, these reductions would be essentially permanent since annual increases in taxable value are constitutionally limited to the lower of inflation or 5%.[107] In return for these benefits, Visteon agreed it would not leave taxpayers holding the bag on the bonds.

Working backwards, the critical clause in this agreement is that Visteon would help the Township make timely payments on the bonds. The only way the Township can make timely payments is to receive Visteon's financial assistance before the shortfall payments are due—*i.e.*, the date when the LDFA lacks sufficient tax revenue to pay the bonds, triggering the Township's full-faith-and-credit obligations. This necessarily requires the parties to estimate (or, in the language of the agreement, to "negotiate" and "determine") what the shortfall will be. Consistent with its statutory budgeting obligations, the Township has secured a projection that the shortfall will occur in October 2019. Visteon has not proposed an alternative projection. Nor has it disputed the accuracy of this projection. It has only theorized that the

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105 Settlement Agmt. at 2, § 1.1. (Appx. at 39a.)

106 *Ibid.*

107 Mich. Const. art. IX, § 3.

LDFA might miraculously expand its tax base by over $180 million overnight. Playing ostrich cannot save Visteon from its duty to negotiate in good faith and commit to paying the estimated shortfall.

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In conclusion, the Court of Appeals committed procedural error by reaching the merits of the Township's claim on a motion under Rule 2.116(C)(8). In so doing, it exercised original jurisdiction over a claim it had no power to adjudicate, it did so without a complete record, and deprived the Township of an appeal of right over the interpretation of the contract. The Court of Appeals committed substantive error by misinterpreting the parties' Settlement Agreement. It effectively rendered the operative section of the agreement at issue in this lawsuit surplusage by adopting Visteon's interpretation.

PRAYER FOR RELIEF

For these reasons, the Court should vacate the published decision of the Court of Appeals, hold that this action is ripe, and either:

(1) Grant peremptory relief under Rule 7.316(A)(7) by:

(*a*) Holding that the Settlement Agreement requires Visteon to negotiate and make payment to the Township before the shortfall occurs;

(*b*) Ordering the parties to negotiate the shortfall within 30 days with the assistance of a mediator appointed under Rule 7.316(A)(9); and

(*c*) Retaining jurisdiction to take further action if the negotiation fails; or

(2) Remand the case to the circuit court with instructions to:

(*a*) Enter judgment for the Township that Visteon is contractually obligated to make payment to the Township before the shortfall occurs; and

(*b*) Hold expedited proceedings to establish the amount of the shortfall.

Respectfully submitted,

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JUNE 22, 2018