# 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 REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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### 1. *Ripeness:* Visteon does not persuasively refute the Township's ripeness analysis.

#### A. *Shortfall Certainty:* Visteon can say the shortfall is "hypothetical" as often as it wants, but that doesn't make it true.

A "shortfall" is a "deficit of something required or expected."[1] In business, it is the difference between what you have and what you need.[2]

The debt service—the principal and interest due—on the Township's Local Development Finance Authority's ("LDFA") Bonds is a fixed amount. To avoid a shortfall, the LDFA must raise at least that amount of money through taxes levied on property within the LDFA District. The Township's finance expert, Public Financial Management ("PFM"), originally determined that the shortfall would happen in 2018, unless: (*a*) the LDFA refinanced the current-interest bonds; and/or (*b*) there was an exponential surge in development within the LDFA District that would increase the District's taxable value and, therefore, yield greater tax revenue.[3]

The LDFA refinanced the current-interest bonds in 2015, which extended the shortfall date to 2019, but there has been no surge in development. Nor is there any prospect of such development. To avoid a shortfall, the LDFA would require the construction of a professional sports stadium before the end of the year.

The Township must prepare a balanced budget in advance of its forthcoming fiscal year under the Budgeting and Accounting Act of 1968,[4] and that planning frequently begins up to 9 months prior to the start of the new year. To meet its statutory obligation, the Township must identify and project its expenditures for 2019

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[1] Oxford Dictionaries, en.oxforddictionaries.com/definition/short-fall.

[2] Cambridge Dictionary, dictionary.cambridge.org/us/dictionary/ english/shortfall#dataset-business-english.

[3] The ability to refinance the current-interest bonds and the timing for doing so were determined in 2006 when the bonds were first issued, and were known by the parties in 2010 when they negotiated and executed the Settlement Agreement.

[4] M. C. L. §§ 141.421–141.440a.

now.[5] In fact, the Township's 2019 formal budget hearings are scheduled for August 13–14, 2018.[6] In this case, because of the great statistical certainty of the shortfall, the Township has tried to plan for this event for the past several years through discussions and attempted litigation with Visteon. In light of Visteon's delaying tactics and the circuit court's validation of Visteon's behavior, the Township has had no choice but to blindly make budgetary decisions over the past several years.

Visteon continues to delay the process by chanting that the shortfall is "hypothetical," as if intoning this word repeatedly makes it so. However, lawyer argument does not constitute evidence or a reasoned opinion. Visteon has not attempted to refute PFM's conclusion of an "imminent shortfall."

### B. *Judicial Power:* Our justiciability doctrines either constitutionally limit judicial power or they do not.

In *Lansing Schools*, this Court noted that "judicial power" is broadly defined in Michigan as the "power to hear and determine controversies between adverse parties and questions in litigation," and to "make binding orders and judgments respecting them."[7] In other words, judicial power is the power to definitively decide disputes between two or more parties—a broad grant of authority that ensures courthouse doors are open to litigants who need their claims adjudicated, the closure of which could result in financially catastrophic outcomes.

Visteon argues that *Lansing Schools* only addressed the standing doctrine, not all of the justiciability doctrine. While that case addressed the standing doctrine,

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[5] M. C. L. §§ 141.434–141.435.

[6] Township Bd. of Trustees Work Study & Regular Bd. Mtgs., https://vanburen-mi.org/meetings-agendas-and-minutes/board-of-trustees.

[7] *Lansing Schs. Educ. Ass'n* v. *Lansing Bd. of Educ.*, 487 Mich. 349, 360 n.6 (2010) (quoting *Daniels* v. *People*, 6 Mich. 381, 388 (1859), and *Risser* v. *Hoyt*, 53 Mich. 185, 193 (1884)) *See also Underwood* v. *McDuffee*, 15 Mich. 1867, 368 (1867) ("It is the inherent authority not only to decide, but to make binding orders or judgments, which constitutes judicial power ….")

Visteon's position ignores the value and relevance of the case to the ripeness issue before the Court in this case.

First, there were no ripeness or mootness challenges before the Court in *Lansing Schools*, so there was no occasion to reach the ripeness issue.

Second, Visteon's narrow view of *Lansing Schools* ignores the historical context behind the decision. The Court held that the justiciability doctrines are constitutional limits on judicial power, starting first with standing in *Lee*,[8] then with ripeness and mootness in *Michigan Chiropractic Council*.[9] In *Lansing Schools*, the Court repudiated these decisions, "overrul[ing] *Lee* and its progeny," including *Michigan Chiropractic Council*.[10]

Third, the overall thrust of *Lansing Schools* is that *any* self-imposed limitations on exercising the broad judicial power conferred under the State Constitution are *prudential* not constitutional.

Finally, our justiciability doctrines are too interrelated to take the à-la-carte approach Visteon champions. The Court made this point well in *Associated Builders*, when it defined standing to include a ripeness element: "To have standing, first, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (*a*) concrete and particularized, and (*b*) actual or imminent, not conjectural or hypothetical."[11] Of course, this is the very test that *Lansing Schools* erased when it overruled *Associated Builders* (a point Visteon omits when discussing *Associated Builders*), which underscores that the reasoning in *Lansing Schools* logically extends to all justiciability doctrines, not just standing.

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[8] *Lee* v. *Macomb County Bd. of Comm'rs*, 464 Mich. 726 (2001).

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

[10] *Lansing Schs.*, 487 Mich. at 352.

[11] *Associated Builders & Contractors* v. *Director of Consumer & Indus. Servs.*, 472 Mich. 117, 126 (2005) (cleaned up).

*People* v. *Carp* does not affect this analysis. Visteon correctly observes that the Court applied the ripeness doctrine in *Carp* to avoid reaching a constitutional challenge to a juvenile sentence of life without parole that might not be imposed.[12] But the Court's decision does not characterize ripeness as a constitutional requirement. The Township does not suggest that the Court has abandoned the ripeness doctrine and will never again apply it; only that use of the doctrine is an exercise in prudence, not a constitutional duty. In *Carp*, the Court prudently deferred addressing a constitutional question until presented with a juvenile who was actually sentenced to life without parole—a fairly routine act when non-constitutional grounds exist to resolve a case.[13]

It is often said that the term "actual controversy" in Rule 2.605(A)(1) is judicial shorthand for incorporating the justiciability doctrines.[14] If those doctrines are merely prudential after *Lansing Schools*, as the Township submits, then the rule simply incorporates prudential considerations into the exercise of jurisdiction in declaratory actions. The Court was clear in *Merkel* that those prudential considerations should yield in declaratory actions where there is a "useful purpose" in deciding the parties' dispute, even if the infringement of a legal interest is contingent upon some future event.[15]

Visteon's attempts to explain away *Merkel* and the other cases upon which the Township relies are unpersuasive.

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[12] *People* v. *Carp*, 496 Mich. 440 (2014).

[13] *Jett* v. *O'Hara*, 366 Mich. 281 (1962) ("[W]e must at this time decline to pass upon that phase of the case for the reason it is a settled policy of this Court to avoid determination upon [constitutional] ground[s] if the case presented can be disposed of upon any other ground.")

[14] *See*, *e.g.*, *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 ….")

[15] *Merkel* v. *Long*, 368 Mich. 1, 13 (1962) (quoting *Sigal* v. *Wise*, 114 Conn. 297 (1932)).

For example, Visteon emphasizes that *Merkel* cautions against taking up declaratory actions resting on too remote or speculative a contingency as to be hypothetical and abstract.[16] However much Visteon may want to call the shortfall "hypothetical," it is neither remote nor speculative. The PFM report utilized numerous scenarios (in which variables were adjusted conservatively and liberally) to reach the conclusion of an "imminent shortfall." Now, five years later, all of PFM's conclusions have proved correct and the shortfall will occur next year. Ironically, it is Visteon's hope for $400 million of investment in the LDFA District—its only counter-argument to the occurrence of a shortfall—which is the kind of wishful thinking that qualifies as a remote, speculative contingency.

Visteon dismisses *Muskegon Heights* as inapposite because "there was nothing contingent" about the claim at issue. The case involved a challenge to the legality of bonds authorized for the poor.[17] Because of the challenge, the bidder declined to take the bonds. There is no suggestion in the record that the same bidder—or any bidder—would take the bonds after resolution of the dispute. And, an intervening election might have caused a new city council to chart a different course for assisting the poor. Thus, the contingency was whether the bonds would ever actually be purchased. Here, in contrast, the bonds have already been issued, and the dispute relates to the timing and scope of Visteon's duties—a present dispute over questions of fact and law.

Visteon's argument that there was no contingency in *Breedsville*—the sole question was who had the legal duty to rebuild a collapsed bridge—is immaterial. In *Breedsville*, the Court was asked to decide a question of law that guided the village's future conduct to preserve its legal rights. Here, the Township has a present legal duty to budget for 2019, and it needs to know if it has the legal right to receive pay-

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[16] Visteon Supp. Br. at 8.

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

ments from Visteon to cover the forthcoming shortfall. Like *Breedsville*, this involves a question of law.

Visteon's attempt to distinguish *Haring Township* is not persuasive. The township sued the City of Cadillac because Cadillac officials told township officials that the city would discontinue wastewater treatment services 11 years in the future. Cadillac city council members are elected to four-year terms,[18] meaning that there would be at least two council elections before the end of the contract. Thus, a highly variable contingency existed: would a different council more than a decade in the future similarly decide to discontinue wastewater service? As the dissent noted, one city council cannot bind its successors.[19] Yet, even under these facts, the dispute was ripe because the township needed to plan for wastewater treatment if the city had no legal obligation to continue service beyond the contract date.[20] Forcing the township to experience a service shutdown to test the legal question would have been untenable, just as asking the Township's residents to risk a default and a judgment levy is untenable.

Another parallel between *Haring Township* and this case is the defendant's unequivocal denial of a legal duty. In *Haring Township*, the city denied any duty to provide services beyond the contract end date. Here, Visteon denies any duty to pay. Visteon argues otherwise in its briefing, but it told the circuit court a different story:

> COURT: Are you claiming that, if it is determined with certainty that there is a shortfall, that under the provisions of this contract, your position is, your obligation to assist could be zero?
>
> VISTEON: If—if—yes.[21]

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[18] CADILLAC CITY CHARTER art. 8, § 8.7(c).

[19] *Haring Twp.* v. *City of Cadillac*, 290 Mich. App. 728, 751 (2010) (Jansen, J., dissenting).

[20] *See id.* at 731–738.

[21] Motion Hr'g Tr. 46:25–47:4. (Township's Appx. at 259a–260a.) *See also* Motion Hr'g Tr. 49:20–50:23. (Township's Appx. at 262a–263a.)

But, if this is true, then Section 3 of the Settlement Agreement has no purpose. According to Visteon, the amount due under Section 3 would always be "zero." This is inconsistent with the parties' expectations in 2010 when they entered into the Settlement Agreement and Visteon informed the bankruptcy court that a shortfall would occur in 2015.[22]

Visteon's assessment of *U.S. Aviex* is also flawed. In *U.S. Aviex*, the State's threat of legal action implicated the company's right to insurance coverage.[23] Here, Visteon's denial of a duty to pay implicates statutory budgeting duties, and the shortfall will cause a default and acceleration of the debt if Visteon doesn't pay. In both cases, the defendant's position presents a live legal dispute that jeopardizes the plaintiff's legal interests.

Finally, Visteon's reliance on *Bank* is not a barrier to adjudicate this case in the Township's favor. *Bank* involved a question of *mootness*, not ripeness. After the Michigan legislature enacted a right-to-work law in 2012, a teacher resigned from the teacher's union, which did not accept her resignation for nearly a year. She sought a declaration in that interim period that she had a right to resign, but by the time the issue came before the court, the court found there was no reason to grant

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[22] Moreover, Visteon's reference to IRS definitions (Visteon's Supp. Br. at 3, n.6) is an irrelevant distraction. It is a substantive contract interpretation issue that has no bearing on the issue of ripeness (except insofar as the parties' clear dispute regarding the interpretation of the contract supports the Township's arguments of ripeness). Suffice it to say, the Township disagrees with Visteon as to the applicability of and interpretation of the IRS definition of PILOT as applied to this contract. First, neither the definition nor the code are mentioned in the Settlement Agreement. Second, it is not true that the Settlement Agreement and Visteon's payment therefrom would constitute a "deliberate action" of the LDFA, which is necessary to meet the "private activity tests" under I.R.C. § 141. Third, any tax consequences arising from a Visteon payment, should they arise, would undisputedly only impact the Township and the LDFA—*not Visteon*. Fourth, any issue regarding the impact of a Visteon payment to the LDFA on the Bonds' tax exempt status would fall outside of the jurisdiction of the state courts of Michigan.

[23] *U.S. Aviex Co.* v. *Travelers Ins. Co.*, 125 Mich. App. 579, 582–583 (1983).

relief: the resignation had already taken effect.[24] The court couldn't improve upon that outcome, so there was no reason to grant relief. Notably, this is consistent with a prudential application of the mootness doctrine.[25]

**C. *Anticipatory Breach:* Visteon's argument on anticipatory breach raises a fact question.**

Visteon's lawyers argues that Visteon has not repudiated the Settlement Agreement because Visteon now says it will honor the contract (notwithstanding its contradictory position that it owes nothing under its reading of the contract). But whether it repudiated the contract is a mixed question of law and fact that cannot be answered by attorney argument on motion practice. The Township should be permitted to prove that Visteon (either through its employees or lawyers) repudiated the contract in pre-suit communications to Township officials and their lawyers, which it believes it can do on remand. This would invoke the doctrine of accelerated ripeness, as noted in the Township's Supplemental Brief.[26]

**2. *Contract Interpretation:* Visteon's response to the Township's procedural and substantive arguments is unpersuasive.**

**A. Procedural Errors**

**(1) Rule 2.116(C)(10) does not apply.**

Visteon says that the Township somehow conceded Rule 2.116(C)(10) governs this issue by merely citing it in its brief on appeal. This is false.[27] On appeal, the Township acknowledged conflicting case law on which sub-rule applies to ripeness motions, and it did what any prudent party would do: it explained why it should

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[24] *Bank* v. *Michigan Educ. Ass'n*, 315 Mich. App. 496, 504–505 (2016).

[25] Further underscoring that mootness—like standing and ripeness—is a prudential doctrine is the "evading review" exception. If judicial power does not extend to moot cases, then there is no constitutional basis for this "exception." *Honig* v. *Doe*, 484 U.S. 305, 608 (Rehnquist, C.J., concurring). A moot case is a moot case, however important the elusive issue might be.

[26] *See* Township Supp. Br. at 29

[27] *See id.* at 31–32.

prevail under either sub-rule.[28] This is hardly a concession that Rule 2.116(C)(10) applies, as Visteon suggests.

**(2) Visteon effectively concedes that the Court of Appeals deprived the Township of a right to appeal.**

Although Visteon argues that the Court of Appeals properly interpreted the contract under Rule 2.116(C)(10), it also argues that it was not required to present evidence contradicting the PFM report because the circuit court dismissed the case "solely on ripeness grounds."[29] In other words, Visteon admits it offered no evidence to warrant (C)(10) relief, as required under Rule 2.116(G)(3)(b), and that the circuit court never interpreted the contract. It was improper for the Court of Appeals to do so for the first time on appeal.

Visteon says that the Court of Appeals could look to the Settlement Agreement to determine if the dispute was ripe. But that is putting the cart before the horse. Win or lose on the merits, the existence of a dispute makes the claim ripe. If the circuit court were to later agree with Visteon's interpretation of the Settlement Agreement after discovery, then it would simply deny declaratory relief (or grant declaratory relief in Visteon's favor) and grant summary disposition on the contract claim in Visteon's favor. It is not the function of our justiciability doctrines to "slam the courthouse door" by adjudicating the merits of a plaintiff's claims under the guise of assessing whether the case should be heard at all.[30]

**B. *Substantive Error:* Visteon still can't account for the word "timely" in the Settlement Agreement.**

Visteon's interpretation of the contract results in untimely bond payments (*i.e.*, payments being made *after* the occurrence of a shortfall). This reading ignores

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[28] *See* Township's Mich. App. Br. at 28–30, 31 n.18, 34. (Visteon's Appx. at 42b–45b, 48b.)

[29] Visteon's Supp. Br. at 18, n.20.

[30] *Lansing Schs.*, 487 Mich. at 370–371 and n.17.

the plain language of the contract and makes no sense.

When the LDFA lacks sufficient funds to pay, a shortfall occurs, triggering the Township's duty to pay. In order to make timely payments, the Township or LDFA must receive funds from Visteon pursuant to the Settlement Agreement before the payments are due. But Visteon and the Court of Appeals have written "timely" out of the Settlement Agreement and have turned it into a reimbursement model (with reimbursement fixed at "zero" in Visteon's view). That is not what the contract says. Nor is it consistent with the stated purpose of the Settlement Agreement.

Respectfully submitted,

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