STATE OF MICHIGAN

IN THE COURT SUPREME COURT

RITA KENDZIERSKI, BONNIE HAINES, GREG DENNIS, LOUISE BERTOLINI, JOHN BARKER, JAMES COWAN, VINCENT POWIERSKI, ROBERT STANLEY, ALAN MOROSCHAN, and GAER GUERBER, on behalf of themselves and those who are similarly situated,

Plaintiffs-Appellees

v

COUNTY OF MACOMB,

Defendant-Appellant.

_____/

Supreme Court No. 156086

Court of Appeals
No. 329576

Macomb County Circuit Court
No. 10-001380-CK

REPLY TO PLAINTIFF'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL BY DEFENDANT-APPELLANT COUNTY OF MACOMB

CERTIFICATE OF SERVICE

KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK

SUSAN HEALY ZITTERMAN (P33392)
KAREN B. BERKERY (P38608)
Attorneys for Defendant-Appellant
County of Macomb
One Woodward Avenue, Suite 2400
Detroit, MI 48226
(313) 965-7905

KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK
ATTORNEYS & COUNSELORS AT LAW
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MI 48226-5485
(313) 965-7900

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KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK
ATTORNEYS & COUNSELORS AT LAW
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MI 48226-5485
(313) 965-7900

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KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK
ATTORNEYS & COUNSELORS AT LAW
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MI 48226-5485
(313) 965-7900

ARGUMENT

I The Court Of Appeals Clearly Erred In Holding That Retiree Healthcare Benefits Under Macomb County Collective Bargaining Agreements Are Vested, And Unalterable For The Retirees' Lifetimes, Except With The Retirees' Consent, Where The Agreements Are Silent, And Unambiguous, As To Vesting; Resort To Extrinsic Evidence To Find Vesting Is Thus Improper.

Plaintiffs' argument that the collective bargaining agreements "promise lifetime retiree benefits," is necessarily premised on resort to extrinsic evidence. As held by the Court of Appeals, the CBAs are "silent" as to vesting. Resort to extrinsic evidence is not appropriate, however, unless the CBAs were ambiguous as to vesting--whether there was language within the four corners of the contract that could be construed as excepting retiree healthcare benefits from the general 3 year durational clause.

Silence does not create ambiguity, or allow for an inference of vesting, particularly in the presence of a 3 year durational clause. See *Gallo v Moen Inc*, 813 F3d 265, 272 (CA 6, 2016), applying the same fundamental principles of contract interpretation that guide Michigan courts. As set forth in defendant's application, because the 3 provisions cited by the Court of Appeals that describe events that affect a new retiree's continued eligibility to benefits can all occur within the three year contract period in which the retiree becomes eligible for those benefits, these provisions do not create ambiguity as to duration of benefits beyond the contract period.

Plaintiffs' re-characterization of these eligibility-altering events in their response to inject language suggestive of entitlement to benefits beyond the contract period graphically highlights the vesting or ambiguity-creating language that could have been, but was not, used. For example, there is nothing in the CBAs that entitles a spouse to healthcare beyond the contract term, or "for the surviving spouse's life." (Response, p 11, emphasis added) Plaintiffs are forced to add language to the contract terms to suggest vesting.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

Plaintiffs also argue that there is a tying of the duration of healthcare benefits to the duration of pensions beyond the 3 year contract period because eligibility for healthcare is triggered by eligibility for and receipt of a pension. (Response, pp 11-14) As the Sixth Circuit Court of Appeals noted in *Gallo v Moen Inc*, 813 F3d 265, 272 (CA 6, 2016), "But [the Supreme Court in *M&G Polymers USA, LLC v Tackett*, 574 US__; 135 S Ct 926; 190 L Ed 2d 809 (2015)] rejected this kind of 'tying' analysis as a relic of a misdirected frame of reference, calling it one of the many *Yard-Man* inferences that was 'inconsistent with ordinary principles of contract law.'"

Again, plaintiffs seek to rewrite the terms of the CBAs to create vesting, asserting that they "promise retirees and spouses healthcare as long as they receive County pensions--i.e., for life." (Response, p 11, emphasis added) There is no such "as long as they receive" language. The CBAs tie only initial eligibility for healthcare benefits to three conditions occurring within the context of the three year term of the contract: coverage will be provided "for the Employee [1] who leaves employment because of retirement and [2] is eligible for and [3] receives [pension benefits], based upon the following conditions and provisions…." (CBA, Article 19(B)(2), emphasis added) The current tense of these three occurrences/conditions clearly ties eligibility to events all occurring during that current 3 year contract term--retirement, pension eligibility by years of service, and receipt of benefits.

This provision does not suggest that the retired employee will continue to receive healthcare benefits beyond the duration of the contract under which the employee "leaves employment because of retirement," or for as "as long as" the employee is receiving pension benefits, as plaintiffs would have the contracts say. (Response, p 11) The CBAs do not, as plaintiffs assert, "state[] that retiree healthcare continues so long as the retirees and surviving

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

spouse receive a County pension,--that is, for their lifetime." (Response, p 14) Indeed, that plaintiffs must rely on such language that appears nowhere in the CBAs graphically confirms that there is no vesting of healthcare benefits in the actual contract language. To paraphrase the Court in *Gallo, supra*, 269, "not only do the CBAs fail to say that [the County] committed to provide unalterable healthcare benefits for life to retirees, everything they say about the topic was contained in a three-year agreement."

Also without merit is plaintiffs' argument that limited duration of retiree benefits could be accomplished only by adding express language that benefits would end upon expiration of the CBS, and advocation of the principle of construction that "when one or more things of a class are expressly mentioned others of the same class are excluded." (Response, p 16) This reasoning ignores the express 3 year durational clause of the CBAs to the contrary. This reasoning also impermissibly requires an inference of vesting from contractual silence. Such a "*Yard-Man*" inference is fundamentality inconsistent with basic contract principles that govern under both Michigan and federal law. See *Arbuckle v Gen Motors, LLC,* 449 Mich 21; 885 NW2d 232 (2016), and *M&G Polymers USA, LLC v Tackett, supra.*

Plaintiffs incorrectly argue that the "substantial equivalence" provisions in the CBAs, that apply to both current employees and retirees, create ambiguity as to, or a right to vesting of benefits to which this language applies, beyond the 3 year contract period. The CBAs provide that the employer will provide to <u>both</u> employees and retirees "Blue Cross Blue Shield Preferred Provider Organization (PPO) coverage. . . or its substantial equivalence." Determination of substantial equivalency is subject to review and agreement by the parties to the agreement, prior to implementation of the same. (See CBA Article 19 (B)(1) (employees) and (2) (retirees), and (H)

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485

(313) 965-7900

The obvious intent of the substantial equivalence provision is to allow the employer to change a contract-specified healthcare coverage during the 3 year course of the contract, upon conferring with the Union. This provision does not entitle either active employees or new retirees to "substantially equivalent" coverage ad infinitum, after the expiration of the contract. Within the 4 corners of the CBAs, these provisions govern only changes to agreed-upon benefits to be implemented during the 3 year lifetime of the CBAs; they do not suggest an intent to extend benefits, or contract provisions, or limit changes, beyond the 3 year life of the contract.

Also without merit is plaintiffs' assertion that the fact that the Union and County agreed, in the 2014-2016 CBAs, to exclude post-January 1, 2016 hires from retiree healthcare, proves vesting under the terms of the prior CBAs. First, such extrinsic evidence is relevant only if there is an ambiguity in the earlier CBAs that are at issue here. There is not. Further, as reasoned by the Sixth Circuit in *Cole v Meritor, Inc*, 855 F3d 695, 701 (CA 6, 2017), rehearing en banc denied, 2017 US App. LEXIS 13616 (CA 6, June 23, 2017)[1], in following *Gallo, supra*, and addressing a similar argument about a provision addressing retiree benefits in the future:

> Because the caps were future-oriented, the district court determined that "[t]he only reasonable conclusion is that the agreements intend[ed] that both pension and retiree health benefits [were] to continue for the lifetimes of retirees, eligible dependents, and surviving spouses." *Id*.
>
> We respectfully disagree. To be sure, the caps section of the 2000 CBA indicates that the parties contemplated that retiree healthcare benefits would continue. But the continuation of retiree healthcare would have been consistent with every CBA renewal since 1968. Both parties understandably anticipated that these caps would come into play based on this history of renewal. But the fact that they anticipated, or even hoped, that these benefits would continue does not mean that Meritor is bound to provide these benefits for the life of the retirees.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

[1] At this time, motions for rehearing en banc are still pending in the two Sixth Circuit decisions decided on the same day as, and in many respects at odds with, *Cole* and *Gallo*, *Int'l Union, UAW v Kelsey-Hayes Co*, 854 F3d 862 (CA 6, 2017), and *Reese v CNH Indus NV*, 854 F3d 877 (CA 6 2017).

So too here, the fact that the parties in 2014 hoped that retiree benefits for pre-2016 retirees would continue, does not mean that the County is contractually bound to provide such benefits for the life of retirees.

Accordingly, plaintiffs' argument seeking to recharacterize the terms of the CBAs to provide for a vesting of benefits lacks merit. The Court of Appeals clearly erred in going beyond the CBAs' silence as to the specific duration of healthcare benefits, and disregarding the general 3 year durational clause to find ambiguity because of triggers to modification of benefits that could occur either before or after the contracts' expiration.

II Alternatively, Even Assuming Arguendo, That The Collective Bargaining Agreements Were Ambiguous With Respect To Whether Retiree Healthcare Benefits Were Vested, The Court Of Appeals Clearly Erred In Holding That, As A Matter Of Law, Extrinsic Evidence Established An Agreement That The Benefits As Described In The CBAs Were Vested And Unalterable Without Consent; At A Minimum A Question Of Fact Remains For The Trier of Fact.

As set forth in defendant's application, even if the CBAs were ambiguous, the extrinsic evidence created, at a minimum, an issue of fact as to what benefits were promised, and whether they were alterable after each three year contract period. Plaintiffs' argument in response does nothing to negate the existence of an issue of fact, and goes only to the weight of the evidence.

III Regardless Of Whether Retiree Healthcare Benefits Vested, The Court Of Appeals Erred In Ordering That Plaintiffs' Motion For Summary Disposition Be Granted, Where Plaintiffs Failed To Demonstrate A Genuine Issue Of Material Fact As To A Breach Of The CBAs By Virtue Of The Changes To Healthcare Insurance (Except As To Prescription Drug Coverage For Non-Medicare Eligible Retirees), Implemented By The County In 2009 And 2010.

Plaintiffs' argument that the changes to healthcare coverage in 2009 and 2010 were in breach of the CBA because defendant was required to negotiate "substantial equivalence" as to any and all changes to coverage is specious. The CBAs provided that the employer will provide to retirees non-Medicare eligible retirees with "Blue Cross Blue Shield Preferred Provider Organization (PPO) coverage. . . or its substantial equivalence." (Emphasis added) "Substantial

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

equivalence" thus only comes into play if the County wished to provide something other than "Blue Cross Blue Shield Preferred Provider Organization (PPO) coverage".

The contract did not specify any particular plan or type of "Blue Cross Blue Shield Preferred Provider Organization (PPO) coverage." The changes in 2009 and 2010 maintained "Blue Cross Blue Shield Preferred Provider Organization (PPO) coverage" for non-Medicare eligible retirees. The changes in 2009 and 2010 did not change or affect any aspect of healthcare coverage that was specified or governed by the contract. Therefore, the "substantial equivalence" alternative, and need to consult with the Union with respect to ensuring coverage was "substantially equivalent" to Blue Cross Blue Shield Preferred Provider Organization (PPO)," was not triggered. There was, therefore no breach of contract as to those changes.

Plaintiffs' argument that it was a breach of contract for the County to make changes to aspects of benefits that were not agreed to in, or covered by, the CBAs is without support in logic or fundamental principles of contract law.

Plaintiffs' argument that the 2010 changes "increased the retirees' healthcare costs" is irrelevant. There is no provision in the CBAs regarding or limiting cost to retirees of healthcare benefits, or setting forth specific copays, deductibles, or coinsurance, *except* solely with respect to prescription drug coverage for non-Medicare eligible retirees. Defendant in its application is not challenging the allegations of breach with respect to changes to prescription drug copays, set forth in the CBAs, for non-Medicare eligible retirees.

All other changes, however, as to copays, coinsurance, and deductibles for healthcare coverage, and prescription drug copays for Medicare eligible retirees, did not did not affect any term set by the CBAs.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

Also without merit is plaintiffs' argument that there is an issue of fact as to whether the 2009 and 2010 changes affecting deductibles, co-insurance or co-pays violated the CBAs requirement that the healthcare insurance be "fully paid." Plaintiffs so assert in their response because the County relied only on an expert's affidavit, and presented no "case law" or testimony of anyone who negotiated the CBAs. (Response, pp 33-34) Plaintiffs misperceive the parties' respective burdens in moving for, and opposing summary disposition. When the moving party can show either that an essential element of the nonmoving party's case is missing, or that the nonmoving party's evidence is insufficient to establish an element of its claim, summary disposition for the absence of a genuine issue of material fact under MCR 2.116(C)(10) is properly granted. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7-8; 890 NW2d 344 (2016). Plaintiffs have come forth with no law or testimony or other evidence to contradict the affidavit of defendant's expert regarding the meaning of the term "fully paid." The protest of plaintiffs' counsel is insufficient to create an issue of fact as to the meaning of "fully paid," and to avoid summary disposition.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485

(313) 965-7900

RELIEF REQUESTED

WHEREFORE, defendant-appellant County of Macomb respectfully requests that this Honorable Court grant leave to appeal or peremptorily reverse the Court of Appeals and hold that that plaintiffs and other retirees do not have a vested right to lifetime, unalterable healthcare benefits, and affirm the trial court's judgment dismissing this class action breach of contract lawsuit.

Alternatively, defendant asks that this Court hold that summary disposition should not be granted to plaintiffs, as there remains an issue of fact as to whether and what retiree benefits vested, and that summary disposition should be granted to the County as set forth in Argument III, as the changes in benefits in 2009 and 2010 did not violate the terms of the collective bargaining agreements.

Respectfully submitted,

KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK

By: /s/ Susan Healy Zitterman
SUSAN HEALY ZITTERMAN (P33392)
KAREN B. BERKERY (P38608)
Attorneys for Defendant-Appellant
County of Macomb
One Woodward Avenue, Suite 2400
Detroit, MI 48226
(313) 965-7905
sue.zitterman@kitch.com

Dated: August 25, 2017

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

STATE OF MICHIGAN

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RITA KENDZIERSKI, BONNIE HAINES, GREG DENNIS, LOUISE BERTOLINI, JOHN BARKER, JAMES COWAN, VINCENT POWIERSKI, ROBERT STANLEY, ALAN MOROSCHAN, and GAER GUERBER, on behalf of themselves and those who are similarly situated,	Supreme Court No. 156086 Court of Appeals No. 329576 Macomb County Circuit Court No. 10-001380-CK

Plaintiffs-Appellees

v

COUNTY OF MACOMB,

Defendant-Appellant.

_____/

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2017, I electronically filed **REPLY TO PLAINTIFF'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL BY DEFENDANT-APPELLANT COUNTY OF MACOMB AND CERTIFICATE OF SERVICE** with the Clerk of the Court using the ECF system, which will send notification of same to:

CHRISTOPHER P. LEGGHIO (P27378)
Legghio & Israel, P.C.
Attorney for Plaintiff-Appellee
306 South Washington Avenue
Suite 600
Royal Oak, MI 48067
(248) 398-5900

/s/ Doris G. Jones_____
Doris G. Jones, Secretary to Susan Healy Zitterman

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485

(313) 965-7900