STATE OF MICHIGAN
IN THE SUPREME COURT

RITA KENDZIERSKI, BONNIE HAINES, GREG DENNIS, LOUISE BERTOLINI, JOHN BARKER, JAMES COWAN, VINCENT POWIERSKI, ROBERT STANLEY, ALAN MOROSCHAN, and GAER GRUERBER, for themselves and others similarly situated,

Plaintiff-Appellees,

v.

COUNTY OF MACOMB,

Defendant-Appellant.

_____/

Supreme Court no. 156086

Court of Appeals no. 329576

Macomb Cty Cir Ct
no. 2010-001380 CK

Class Action

PLAINTIFF-APPELLEE RETIREES' SUPPLEMENTAL OPPOSITION TO LEAVE

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Pursuant to this Court's order (76A), the County electronically filed an appendix, paginated 1-506A.

We cite to that appendix and to our own electronically-filed appendix, adding record material not in the County's appendix. We continue the County's pagination, beginning with 507b, using the lower case "b" in accordance with MCR 7.312(D)(4).

The Court of Appeals decision, in the appendix at 69-75A, is reported as *Kendzierski v County of Macomb*, 319 Mich App 278 (2017), *reh denied*.

STATEMENT OF THE CASE

A.

Pursuant to this Court's order (76A), the retirees submit this supplemental brief in opposition to the County's application for leave to appeal from *Kendzierski v Macomb County*, 319 Mich App 278 (2017), *reh denied* (69-75A).

The Court of Appeals remanded to the trial court for **(1)** judgment in favor of the class of about 1,600 Macomb County retirees and **(2)** a permanent injunction preserving the retirees' collectively-bargained vested lifetime family healthcare, earned by each retiree with decades of public service. (74A).

In this brief, we highlight why the Court of Appeals is right on the facts and the law—and the County is wrong.

B.

The Court of Appeals applied Michigan contract principles **(1)** to the specific CBA promises and **(2)** to the County's MRE 801(d)(2) admissions to its lifetime retiree healthcare obligations. The vested obligations are unalterable absent retiree consent, which the County does not have. (73-74A).

This is a fact-specific case—unique in its details. It presents no unsettled legal questions of "significant public interest," raises no questions of "major significance" to Michigan jurisprudence, involves no "material injustice" to the faithless County, and presents no justification for review under MCR 7.305(B)(2), (3), or (5)(a) standards.

C.

This case is about the public trust, the rule of law, and Macomb County's failed effort to betray 1,600 retirees. Here is the case in a nutshell.

For decades, Macomb County collective bargaining agreements ("CBAs") promised that the County "will provide fully paid healthcare" for retirees who "receive" County pension. When a retiree turns age 65, his or her County healthcare becomes "supplemental" to Medicare. The CBAs promise family healthcare for each retiree, continued for the retiree's spouse "following the death of the retiree."

In 1993, the County created the Macomb County Retiree Health Care Fund, a VEBA trust, to help fund the promised healthcare. The County paid $65 million into the trust between 1993 and 2003, but later the County actuaries advised that the County must increase funding in a "regular, orderly manner" so the "benefits promises do not become empty promises."

In 2014, Macomb County Executive Mark A. Hackel proposed a County bond issue to cover the County's $270 million unfunded "liability" for the healthcare promised to 1,980 "vested" County retirees "for their lifetimes." (272 and 299A).

Before 2014 and after, Hackel and other County officials said the CBAs promised "health benefits when you retire," lasting for each retiree's and spouse's "lifetime." County officials said retiree healthcare was a "contractual obligation." They said the bond issue was needed to "fulfill" the County's "promise of healthcare for retirees" and the County's "retiree healthcare obligations."

The County issued the bonds in 2015, calculating that they would help fund the vested retiree healthcare for "the next 50 years."

Now, however, the County lawyers, seizing on their distorted view of recent federal decisions as a *deus ex machina,* ignore Michigan law and County history to argue that retiree healthcare may be reduced or eliminated as the County chooses, unfettered by CBA obligations and decades of "lifetime" promises to vested retirees.

The County is betraying its retirees and destroying public faith in the integrity of County officials and the rule of law.

D.

We ask the Court to deny leave, or peremptorily affirm the Court of Appeals, and return the case to the trial court for judgment for the retirees and a permanent injunction directing the County to keep its promises and end the retirees' healthcare anxieties, their financial injuries, and their betrayal by their former employer.

SUMMARY OF FACTS

We summarize the facts, focusing on the CBA promises and the County's MRE 801(d)(2) admissions that it promised healthcare for the retirees' lifetimes.

A.

Each of the 1,600 Macomb County retirees in the certified class retired since the 1980s under one of the CBAs between the County and the various unions that represent County employees.[1]

The CBAs vary, but all promise that the County "will provide fully paid healthcare" to retirees who "receive" County pension. The CBAs promise family healthcare for each retiree and for the retiree's spouse "following the death of the retiree." The CBAs require retirees and spouses to "participate" in Medicare at age 65 and, when that occurs, limit the County obligation to "over 65 supplemental hospital-medical benefit coverage." A retiree's failure to enroll in Medicare is "cause for termination" of County "hospital-medical benefits." County healthcare is temporarily suspended during any period that a retiree has post-retirement "gainful employment" elsewhere which "provides hospital-medical coverage." These CBA terms come from the exemplar chosen by the County at 3-6 of the County's March 6, 2018 brief.

[1] The CBAs govern County retirees from collective bargaining units represented by AFSCME, UAW, the Michigan Nurses Association, the Police Officers Association of Michigan, the Police Offcers Labor Council, the Teamsters, the Administrative and Technical Employees Association, the Building Trades Council, the Environmental Health Association, the Michigan Professional Deputy Sheriffs' Association, the Road Technicians Association, the Technical, Professional and Office Workers Association of Michigan, and other unions. The class, almost 2,000 early on, now totals about 1,600, and is diminishing with time.

B.

The County's MRE 801(d)(2) admissions prove that the CBA terms mean what the Court of Appeals held—that the retirees and their surviving spouses are entitled to lifetime County healthcare. (69-75A). For example:

1. County actuaries reported in 1993 and later, *e.g.*, in 2006, 2008, and 2010—under the heading "*Benefit Promises Made Which Must Be Paid For*"—that the County "handed an IOU" to employees, promising "retiree health benefit commencing when you retire." The actuaries reported that this obligation must be funded in a "regular, orderly manner" so these "benefits promises will not be empty promises." (567b, 569b, 572b, and 574b, emphasis added).

2. Following the actuarial reminder that County retiree healthcare commitments are "benefit promises made which must be paid for," the County created the Macomb County Retiree Health Care Fund—a VEBA trust. From 1993 through 2003 the County put over $65 million in the Fund. (278A).

3. During 1999 and 2000 labor negotiations with AFSCME Local 411, which represents the County's largest collective bargaining unit, County negotiator Ted Cwiek said the County provided "lifetime" retiree healthcare. (116A, ¶2).

4. The County assured retiring employees that each would have the family health "insurance" he or she had at "retirement until the day [the retiree] died." These assurances were made to James Cowan and his wife by County Human Resources official Wendy Fisher in Fisher's office before Cowan retired. (336-337A).

5. Fisher told retiree John Barker that his and his wife's "medical benefits" would "remain the same" after Barker's retirement "for our lifetime" (346-347A) and Fisher told retiree Robert Stanley and his wife that after Stanley's retirement their "medical coverage" would "stay the same." (357A).

6. County Finance Director David Diegel testified under oath at a 2007 labor arbitration that the County had the "obligation" to provide retiree healthcare and the obligation to "fund that liability" at "100 percent." Diegel testified: "an obligation is an obligation." (579-580b).

7. County Corporation Counsel George Brumbaugh told the County Commission Finance Committee in 2012 that retiree healthcare "benefit levels" are "a contractual obligation" set by the CBAs. (581b).

8. Macomb County Executive Mark A. Hackel presented a "funding proposal" to the County Board of Commissioners on June 5, 2014. Hackel recommended issuing bonds "to fund retiree healthcare," a "first priority" to address the "recent actuarial study" which estimated the County's "unfunded retiree healthcare liability at $270 million" even though "the plan will be closed to new participants in January 2016." Hackel's proposal—involving trusts and "bonding for the unfunded liability"—would "pre-fund future retiree healthcare contributions for the next 50 years" to cover all who retired before January 2016. (269-270A).

9. Hackel's proposal began: "Historically, Macomb County has offered retiree healthcare to *vested* employees as part of their benefit package." The bond revenue and other revenue sources would "fully fund" healthcare to cover the "unfunded liability" for current retirees and others who would retire before the plan was closed to "new participants" in January 2016. The proposed "bonding" was allowed by Michigan law, Hackel said, and would raise $270 million to help fund retiree healthcare "for the next 50 years." (272A, emphasis added).

   The 50-year span was calculated to fund healthcare for vested retirees' lifetimes. For example, a County employee who retired early at age 55 in 2015 before the plan closed to new participants would be 105 in 50 years, *if* he or she beat the actuarial mortality rate. (See 293 and 312A).

10. Hackel's bond presentation to the Commissioners addressed "retiree healthcare for County employees" for whom the County "*must* fund retiree healthcare." It provided a "retiree healthcare funding analysis" of the cash flow from the

expected $270 million in "bond proceeds" plus $70 million in other County revenue—projected from 2014 to 2062. (275-293A, emphasis added).

11. Hackel presented a 2012 "supplemental actuarial evaluation" which stated: "The County provides retiree health benefits to eligible County retirees (and their eligible beneficiaries) *for their lifetimes*." (299A, emphasis added).

12. The actuarial report presented by Hackel showed "accrued liability" for existing "retirees and beneficiaries," and for additional "vested terminated" and "active" employees expected to retire before the plan closed to new retirees in 2016, as only 32.6% funded. It showed that retiree healthcare was underfunded by $269,458,405, called "unfunded liability," the basis for the $270 million bond proposal. (301A). The actuarial report said that as of 2012 there were 1,760 "current benefit recipients"—retirees and their spouses—and 220 "vested" and other "future benefit recipients"—future retirees and their spouses—a total of 1,980 "retiree health plan members" entitled to County healthcare into the future. (308A).

13. The actuarial report summarized retiree healthcare start dates. For example, coverage for "regular" retirees "begins the first month following retirement date," coverage for "deferred" retirees "begins the first month the age requirement is met," and so on. (321A). Once a retiree or spouse turns age 65, the report explained, County coverages were reduced, and would only "supplement Medicare." (322A). The actuarial report also made a 50-year projection of "liability" for the "Macomb County Retiree Health Care Plan." (328A). The report set a "preliminary timetable" for the "Retiree Health Care Bonds," including needed (and later obtained) approval from the Michigan Department of Treasury. (329A).

14. County Finance Director Peter Provenzano reported to the County Commission Finance Committee on June 18, 2014 about Hackel's proposal to "issue municipal securities to defray costs of unfunded accrued health care liability." Provenzano said "another option would be *to break contracts* with existing retirees and current employees, which he felt was not realistic." Following Provenzano's talk, the

> Committee voted to recommend Hackel's bond proposal to the full Board of Commissioners. (584b, emphasis added).

15. Board of Commissioners Chair David Flynn said the bonds were "expected to raise $263,765,000." Flynn said the bonds were the "best option on the table if we wanted to keep our obligation to our employees and retirees" and would "allow annual retiree healthcare premiums to be paid for the next 50 years." Flynn said that considering the "large unfunded portion of our retiree obligation," the bond sale "made the most sense," allowing the County to "shore up its retiree health care liabilities before they get out of control." Flynn said: "We still have promises that we made to employees under our old pension system, and we need to keep them." (585b).

16. In March 2015, the County issued $270 million in bonds approved by the Michigan Department of Treasury to fund retiree healthcare obligations.

17. Then-retired County Corporation Counsel George Brumbaugh wrote to retirees in May 2015 that the bond issue would help "fulfill the promise of healthcare for retirees" and ensure the County's ability to meet its "future obligations" to retirees "as they come due." Brumbaugh quoted County Executive Hackel as saying that the County's "promises made to retirees will be kept" to meet the County's "retiree healthcare obligations."

    Brumbaugh wrote: "Yes, the promise made to retirees concerning healthcare will be a promise kept!" Brumbaugh concluded: "For all retirees, this is great news. We now enjoy additional security that other retirees do not have. Please feel free to express your thanks to the Executive and the Commissioners for their efforts in securing our future benefits." (586b).

This and other "unrefuted evidence"—the Court of Appeals held—"established the intent of the parties to provide lifetime healthcare benefits to retirees" and that the CBA-promised benefits are "vested." (73A). In addition, the Court of Appeals held, the

vested healthcare may not be altered without the retirees' consent and the County "failed to provide *any* evidence" of consent. (74A, italics in original).

ARGUMENT—THE COURT OF APPEALS IS RIGHT THAT MACOMB COUNTY PROMISED ITS RETIREES HEALTHCARE "FOR THEIR LIFETIMES"

I. THE COUNTY'S DISREGARD FOR MICHIGAN LAW AND MISTAKEN RELIANCE ON *TACKETT*'S SIXTH CIRCUIT PROGENY

The County pays uncritical obeisance to *M&G Polymers USA LLC v Tackett*, 135 SCt 926 (2015) and *Tackett*'s Sixth Circuit progeny, and asks this Court to do the same. But this Court should not cede Michigan contract jurisprudence to inapposite and distinguishable federal law. Indeed, many post-*Tackett* Sixth Circuit retiree healthcare decisions rest on analysis that is incomplete, internally inconsistent, untenable under Michigan law, and unworthy of emulation.

At the end, however, *Tackett* and its progeny are consistent with two fundamental Michigan contract principles: **(1)** that each collectively-bargained retiree healthcare case is fact-specific and **(2)** in each "the parties' intentions control." See *Tackett*, 135 SCt at 933. Here, the "unrefuted evidence" proves the parties' intentions to vest lifetime retiree healthcare. As the Court of Appeals held, this "intent" is crystal clear, proved, *inter alia*, by the words of Macomb County Executive Hackel (73A, emphasis by the court):

> The County provides retiree health benefits to eligible County retirees (and their eligible beneficiaries) *for their lifetimes*.

Ahead, we address *Tackett* (**Section A**) and show why this Court should not mar Michigan contract jurisprudence with federal flaws (**Sections B and C**).

A. *Tackett* is Consistent with Michigan Contract Jurisprudence; the County's Distortion of *Tackett* is Not

In January 2015—*before* Macomb County sold $270 million in bonds to fund its lifetime retiree healthcare obligations—the U.S. Supreme Court decided *Tackett*. *Tackett* abrogated the Sixth Circuit's 32-year old "*Yard-Man* inference" derived from *UAW v Yard-Man Inc*, 716 F2d 1476 (CA6 1983), *cert denied*, 465 US 1007 (1984).

Tackett has no retroactive bearing on the County obligations to provide—in County Executive Hackel's 2014 words—"retiree healthcare to vested employees as part of their benefit package" for the retirees' and their spouses' "lifetimes." Still, the core holding in *Tackett*—that "the parties' intentions control" (135 SCt at 933)—is entirely consistent with Michigan contract jurisprudence. What is not consistent, as we show ahead, is Macomb County's self-interested distortion of *Tackett* and its progeny.

1.

Tackett scolded the Sixth Circuit. The "*Yard-Man* inference," Justice Thomas wrote, "violate[d] ordinary contract principles," was "too speculative" and "too far removed from the context of any particular contract," had "a shaky factual foundation," and derived from judicial "suppositions" about "likely behavior" in collective bargaining. 135 SCt at 929, 935-936 and *passim*. After *Tackett*, CBA promises are assessed by the "ordinary principles of contract law," without a "thumb" on either side of the scale, based on "record evidence." After *Tackett*, a federal court "may look to known customs or usages in a particular industry to determine the meaning" of a CBA, "using affirmative evidentiary support in a given case." 135 SCt at 935.

Contrary to the County's distorted reading of *Tackett* and its progeny, *Tackett* does not require explicit "magic words" to prove vesting. Rather, each case is fact-specific. See *CNH Industrial NV v Reese*, 138 SCt 761, 765 (2018) (CBA vesting intentions may be proved by "explicit terms, implied terms, or industry practice") and *Tackett v M&G Polymers USA LLC*, 811 F3d 204, 209 (CA6 2016) ("*Tackett* III") ("No rule requires 'clear and express' language in order to show that parties intended health-care benefits to vest"). As *Tackett* instructed, "the parties' intentions control." 135 SCt at 933.

2.

While it seems the Sixth Circuit needed *Tackett* to remind it of the centrality of the contracting parties' intentions, Michigan contract jurisprudence has long-recognized this fundamental principle. See *e.g.*, *McIntosh v Groomes*, 227 Mich 215, 218 (1924): "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate."

Similarly, Michigan contract jurisprudence needs no reminder that the parties' intentions need be ascertained in context. See, *e.g.*, *Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 201 (2005) (citations omitted) (prescribing "due regard" for a contract's "purpose" as shown by its "language," "read in the light of the attendant facts and circumstances," and by its "context," including any "extrinsic evidence" showing and resolving ambiguity).

3.

Tackett brought the Sixth Circuit into line with other federal circuits and earlier Supreme Court decisions applying ordinary contract principles and federal labor policy to

CBA enforcement, considering "record evidence" and "context" to ascertain the parties' intentions without "magic words" presumptions.

See *e.g.*, *USWA v American Mfg Co*, 363 US 564, 567 (1960) ("special heed should be given to the context in which [CBAs] are negotiated"); *TCU v Union Pacific RR Co*, 385 US 157, 161 (1966) (to interpret CBAs, "it is necessary to consider" the "practice, usage and custom pertaining to all such agreements"); *Litton Financial Printing v NLRB*, 501 US 190, 203 (1991) (CBA promises may be "express or implied"); *Consolidated Rail Corp v Railway Labor Exec Assn*, 491 US 299, 311 (1989) (CBAs "may include implied, as well as express, terms"); *Tackett*, 135 SCt at 938, *concur*, quoting *Litton* (CBA rights may be "explicit" or "implied"; no rule requires "'clear and express' language"); and *Tackett* III, 811 F3d at 209 ("No rule requires 'clear and express' language in order to show that parties intended health-care benefits to vest").

Again, the Supreme Court's most recent rejection of a "magic words" requirement was in March 2018 in *Reese*, 138 SCt at 766 (emphasis added): vested healthcare obligations may be proved by "explicit terms, implied terms, *or* industry practice."

4.

Despite *Tackett*'s rejection of presumptions, some Sixth Circuit panels and some employers—Macomb County among them—champion an anti-vesting presumption. They argue—and here Macomb County's central argument is—that absent "explicit" CBA terms—"magic words" like *lifetime* or *vested*—retirees cannot overcome general CBA duration clauses. But the County's argument is inconsistent with *Tackett* and is contrary to Michigan contract jurisprudence spanning three centuries.

5.

As to federal law, Macomb County ignores that *Tackett* abrogated all presumptions, including the Sixth Circuit's pro-vesting "*Yard-Man* inference" *and* the Seventh Circuit's anti-vesting presumption. See *Underwood v Chicago*, 779 F3d 461, 462-463 (CA7 2015) (after *Tackett*, there are no presumptions "for or against vesting").

The County also ignores the federal law—stated most recently in *Reese*, 138 SCt at 765—that vesting obligations may be proved with "implied terms" or "practice." See also *TCU*, *American Mfg*, *Consolidated Rail*, and *Tackett* itself, which prescribe giving effect to "practice, usage and custom," the "context" in which CBAs "are negotiated," and "implied" intentions and terms.

While some post-*Tackett* Sixth Circuit decisions may—like the County—prefer the rigidity of an anti-vesting "magic words" rule—those decisions have no support in *Tackett* or in Supreme Court decisions defining "federal labor policy" dating back to the 1960 *Steelworkers Trilogy* (discussed in Argument III).

To the extent that the County finds support in post-*Tackett* Sixth Circuit anti-vesting decisions, it is relying on decisions that ignore *Tackett*'s rejection of a rigid "explicit"-only rule by elevating general duration clauses despite the parties' intentions. Indeed, as Judge Helene White wrote in disapproving concurrence in *Cole v Meritor Inc*, 855 F3d 698, 702 (CA6) (emphasis added), *cert denied* 138 SCt 477 (2017), the Sixth Circuit has now "installed" general duration clauses as the "new absolute determiner of intent *regardless of the intent of the parties*." This Court should not do the same.

Those Sixth Circuit anti-vesting decisions conflict with Michigan contract jurisprudence. Michigan courts give effect to the parties' "intention" and "purpose" shown by contract language "read in light of the attendant facts and circumstances" and "context," including evidence "extrinsic" to the contract which demonstrates latent ambiguity and which resolves latent and patent ambiguity. See Argument II, citing *McIntosh*, 227 Mich at 218, *Grosse Pointe*, 473 Mich at 201, and other Michigan contract cases.[2]

6.

Ultimately, the "record evidence"—as *Tackett* prescribes (135 SCt at 935)—reveals the County's argument to be untenable abstraction, with no application here.

Here, the CBAs promise healthcare for retirees who "receive" County pension, *i.e.*, for life. The CBAs promise continued healthcare for the retiree's surviving spouse "following the death of the retiree." The CBAs are durationally clear: healthcare ends at "death." Further, for decades the County kept its promises. As the Court of Appeals held

[2] The County mistakenly relies on *Arbuckle v GM LLC*, 499 Mich 521 (2016), asserting that basic contract principles "set forth" in *Tackett* "are consistent with Michigan law." This is distortion by omission. First, *Arbuckle* was "controlled by federal, rather than state, substantive law." At 538. Second, *Arbuckle* addressed agreements which limited the employer's commitment—to refrain from coordinating pension and workers' compensation benefits—to the "specific period" of the agreement and did so in an "express durational clause" specific to the coordination question. At 542. Third, *Arbuckle* cites selected principles from *Tackett* and its progeny, but does not (and had no need to) address the Michigan latent and patent ambiguity principles discussed in Argument II or the context principles addressed in Argument III. *Arbuckle* provides no support for the County's disregard for Michigan law and does not undo the County's MRE 801(d)(2) admissions to promising healthcare for the retirees' lifetimes.

(74A), the "unrefuted" record proves lifetime healthcare with—as *Reese* puts it (138 SCt at 765)—"explicit terms, implied terms [*and*] industry practice."

Indeed, even if there were ambiguity—latent or patent as recognized in Michigan contract law—any ambiguity is resolved by the County's MRE 801(d)(2) admissions, represented by County Executive Hackel as quoted by the Court of Appeals, admitting that County retirees and their "eligible beneficiaries" are entitled to County healthcare "for their lifetimes." (73A).

In sum, the County disregards Michigan law and the record evidence. The County offers only abstract theory and angels-on-heads-of-pins distortion of federal law. As Mark Twain wrote: "How empty is theory in the presence of fact."

B. This Court Should Be Wary of What *Tackett* Misses

Tackett is consistent with Michigan contract law **(1)** in *Tackett*'s recognition that the parties' intentions control, **(2)** in its endorsement of practice, context, and "implied" CBA terms, and **(3)** in its rejection of presumptions and "suppositions." But *Tackett* also has flaws that should not become part of Michigan jurisprudence.

1.

Robert A. Hillman, Edwin H. Woodruff Professor of Law at Cornell Law School, finds *Tackett*'s "discussion and application of 'ordinary contract principles'" to be "quite amateurish" and "unclear" about "the appropriate judicial approach to ambiguity or omission in a contract." R.A. Hillman, "The Supreme Court's Application of 'Ordinary Contract Principles' to the Issue of the Duration of Retiree Healthcare Benefits:

Perpetuating the Interpretation/Gap-Filling Quagmire," 32 *ABA Journal of Labor and Employment Law* 299, 300 (2017) ("*Hillman*").

Despite *Tackett*'s mandate to apply "ordinary contract principles"— as they are consistent with "federal labor policy" (135 SCt at 933)—Professor Hillman says the "Supreme Court misunderstood 'ordinary contract principles.'" *Id.* at 309. He explains that *Tackett* "selectively identified" contract principles, listing some, omitting others, and producing a selection "too general and abstract to be useful." *Id.* at 314-315.

Tackett's omissions have led some post-*Tackett* Sixth Circuit panels to apply mechanical and ill-informed "suppositions" about intentions that conflict with the parties' real intentions. Macomb County's desired anti-vesting presumption suffers from these same analytical deficiencies.

2.

In particular, Professor Hillman explains that ordinary contract principles include the "'contextual' approach" by which courts "generally entertain extrinsic evidence to establish meaning, including preliminarily whether a writing is ambiguous." Under this approach, reasonable inferences are "probative." Reasonable inferences are those "based on the nature and purpose of CBAs, the meaning of retiree benefits, and the language of the CBA as a whole." Reasonable inferences are "at least relevant under ordinary contract principles" and may be essential to "complete contextual investigations." *Hillman* at 309-311, 313.

As we have shown, and further discuss ahead, "contextual" courts include **(1)** this Court and **(2)** the U.S. Supreme Court, at least when that Court applies "federal labor policy." But, as we discuss in Argument III, the County ignores context.

Worse, as we discuss in Argument II, the County wants this Court to ignore the Michigan contract principle recognized at least since 1849 that "parol evidence" *must* be considered in a Michigan court's effort to "carry into effect" the parties' intentions. *Ives v Kimball*, 1 Mich 308, 313 (1849) (applied more recently in *Shay v Aldrich*, 487 Mich 648, 651 (2010)).

3.

Context, implied terms, practice and performance, and "intentions" principles are particularly important where—as the County posits—CBAs promise retiree healthcare but are "silent" about its duration. But what the County posits is not so. The Macomb County CBAs are not "silent."

Rather, the County CBAs promise healthcare for retirees who "receive" pension (*i.e.*, for life, until "death"). And, "following the death of the retiree," the CBAs promise continued healthcare for the retiree's surviving spouse. The CBAs promise healthcare that is "fully paid" until age 65 and, after that, healthcare "supplemental" to Medicare. These terms unambiguously promise lifetime retiree healthcare.

See *e.g.*, *Bidlack v Wheelabrator Corp*, 993 F2d 603, 608 (CA7) (*en banc*), *cert denied* 510 US 909 (1993), decided pre-*Tackett* when the Seventh Circuit still applied an anti-vesting presumption. *Bidlack* holds that CBAs stating that when retirees "die their spouses will continue to receive" healthcare are "not silent" about duration, "merely

vague," and "could be thought a promise to retired employees that they and their spouses will be covered for the rest of their lives." The *Bidlack* CBAs are just like the Macomb County CBAs.

See also *Tackett*, 135 SCt at 938 *concur*, showing that "relevant" to vesting intentions are CBA terms stating **(1)** "that retirees 'will receive' healthcare benefits if they are 'receiving a monthly pension'" and **(2)** that "if a retiree dies, her surviving spouse will 'continue to receive'" healthcare "until death or remarriage."

The County CBAs have such "relevant" terms. They explicitly, *or* at least impliedly, promise healthcare for the retirees' and surviving spouses' lifetimes or, at the very least, create ambiguity which is definitively resolved by myriad County admissions to its "contract obligations" to retirees who "receive" pension—in county Executive Hackel's words—for the retirees' and their spouses' "lifetimes." (299A).

4.

In any event, imprecision does not nullify CBA promises. Professor Hillman writes that where the parties have a contract with a discernable purpose (*i.e.*, to promise retiree healthcare), a "missing duration term" should not "invalidate the entire agreement." *Hillman* at 318. He explains that one judicial approach is to apply a "fair gap-filler"—considering the "case's equities, including bargaining power, wrongful conduct, and the potential gains and losses of each party"—to "avoid creating a windfall for one party and a catastrophe for the other." *Id.* at 320.

Here, any "gap" is filled by the County's MRE 801(d)(2) "lifetime" admissions, applied under the long-standing Michigan contract law discussed in Argument II. But the

County now ignores its own admissions and asks for a "windfall"—including $270 million in bond revenue—at the expense of County retirees. This Court, however, will not ignore the County admissions if—as Michigan law requires—it discharges its "cardinal" responsibility to "carry into effect" the parties' "lifetime" intentions.

In sum, the County **(1)** misreads *Tackett*, **(2)** ignores Michigan contract jurisprudence, **(3)** wants to push this Court into what Professor Hillman calls a "quagmire," and **(4)**—in human terms—cruelly threatens the 1,600 County retirees who relied on the County's promises of lifetime healthcare.[3]

C. As the Illinois Supreme Court Held, "*Tackett* and Its Progeny" are "Inapposite" in the Public Sector

Matthews v CTA, 51 NE3d 753 (Illinois SCt 2016) upheld public-sector retirees' collectively-bargained entitlement to healthcare until each "retiree attains age 65." That

[3] Consider the Sixth Circuit's own post-*Tackett* "quagmire." The Supreme Court overturned the Sixth Circuit's 2017 decision in *Reese* because the Sixth Circuit majority applied a pro-vesting presumption despite *Tackett*'s abrogation of all presumptions (but, nonetheless, the Supreme Court reiterated that collectively-bargained healthcare vesting may be proved by "explicit terms," "implied terms," or "practices." 138 SCt at 765 and *passim*. In addition, the Supreme Court overturned and remanded *Kelsey-Hayes* for reconsideration under *Reese* standards after an *en banc* request to the Sixth Circuit produced a majority denial and Judge Griffin's dissenting observation that the inconsistent post-*Tackett* views among Sixth Circuit judges created a "mess." *UAW v Kelsey-Hayes Co*, 872 F3d 388, 390 (CA6 2017).

Here, the County's account of post-*Tackett* federal law is selective, self-interested, simplistic, and distorted. The County pushes this Court toward a fact-free, legally-bereft "quagmire," an anti-vesting "magic words" world where, "regardless of the parties' intentions," the County's obligations to retirees will be erased from memory.

promise, the Illinois Supreme Court held, "constituted an enforceable, vested right that survived the expiration" of the CBA. 51 NE3d at 770, 779.

Matthews was decided "without applying a presumption." *Id.* at 769. *Matthews* applied "traditional rules of contract interpretation" to achieve the Court's "primary goal"—to "give effect to the intention of the parties at the time the contract was formed." Among the "traditional rules" is that whether "particular benefits" vest "depends on the intent of the parties." 51 NE3d at 775-776.

The concurrence observed that "*Tackett* and its progeny" arose under federal labor law and ERISA so "those [federal] cases are inapposite." In *Matthews*, the "employer was a municipal entity" and CBA interpretation "rests, not on federal law, but on Illinois law." In Illinois, "it is the employee's rights, not the employer's rights, that are protected." 51 NE3d at 784-785.

Here, Macomb County's promises are governed by Michigan law, not by *Tackett*'s Sixth Circuit progeny. Under Michigan contract law, all interpretation factors are "subordinate" to "the intention of the parties" shown by CBA terms and context. *McIntosh*, 227 Mich at 218. And under Michigan labor contract law, it is the retirees' rights, not Macomb County's, "that are protected."

Ahead, we address two essential Michigan contract factors that were not applied in *Tackett* and that the County ignores: ambiguity (**Argument II**) and context (**Argument III**). These factors also prove that the Court of Appeals is right.

II. THE COUNTY'S DISREGARD FOR MICHIGAN AMBIGUITY PRINCIPLES

"Ambiguity may either be patent or latent." *Shay*, 487 Mich at 667. Essential to ascertaining CBA intentions is application of the ambiguity principles central to Michigan contract jurisprudence.

A. Patent Ambiguity

Patent ambiguity is where there are alternative reasonable interpretations within a contract's "four corners"—on "the face of the document." *Shay*, 487 Mich at 659, 667. See also *Rossetto v Pabst Brewing Co*, 217 F3d 539, 541 (CA7 2000), *cert denied* 531 US 1192 (2001), applying "federal common law" ambiguity principles to collectively-bargained retiree healthcare promises. *Rossetto* holds: "[M]erely suggestive language"—suggesting "a grant of lifetime benefits"—entitles retirees to trial, if not summary judgment. 217 F3d at 544-545, 547.

Here, the CBAs unambiguously promise retiree healthcare until the retiree's "death" and, "following the death of the retiree," to the retiree's surviving spouse (subject only to temporary "gainful employment" gaps and to Medicare reduction at age 65). "Death" is an *unambiguous* durational boundary. See, *e.g.*, *Bidlack*, 993 F3d at 608 (coverage for surviving spouses after retirees "die" indicates that retirees and spouses "will be covered for the rest of their lives") and *Tackett*, 135 SCt at 938 *concur* (relevant to vesting are terms promising that "if a retiree dies, her surviving spouse will continue to receive healthcare").

But *even if* there is patent ambiguity—created by some theoretical tension between *general* CBA duration clauses and the *retiree-specific* until-"death" promises—that ambiguity is resolved, as the Court of Appeals held, by the County's undisputed and "unrefuted" MRE 801(d)(2) admissions. Prominent among the admissions are those from the County's top elected official: County Executive Hackel's written admissions that "retiree health benefits" must be funded "for the next 50 years" because they are "vested" for "County retirees (and their eligible beneficiaries) for their lifetimes."

But Macomb County untenably ignores the facts and Michigan law in favor of the County's self-interested parsing of inapposite federal decisions.

In addition, at the least there is *latent ambiguity*, revealed and also resolved by the County's MRE 801(d)(2) admissions, as we discuss next.

B. Latent Ambiguity

Latent ambiguity "does not readily appear in the language of a document" but is revealed by "factors outside the instrument itself." Extrinsic evidence "is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist." *Shay*, 487 Mich at 668, quoting *Grosse Pointe Park*, 473 Mich at 198.

Extrinsic evidence is "obviously admissible." But this is lost on the County.

1.

Shay holds: "extrinsic evidence may be used to show that a latent ambiguity exists." 487 Mich at 667. Latent ambiguity analysis begins "when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts

create the 'necessity for interpretation or a choice of two or more possible meanings.'" *Id.* at 668, quoting *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575 (1964).

Shay says that a Michigan court "*must* examine the extrinsic evidence presented" to "verify the existence of" latent ambiguity. If "latent ambiguity is found," the Michigan court then "*must* examine the extrinsic evidence again to ascertain the meaning of the contract language at issue." 487 Mich at 668, citing *Goodwin Inc v Orson E Coe Pontiac Inc*, 392 Mich 195 206, 209-210 (1974) (emphasis added).

Shay points out that the "latent-ambiguity doctrine has a long history in Michigan law," citing *Ives v Kimball*, 1 Mich 308, 313 (1849). In *Ives*—almost 170 years ago—this Court "explained that a latent ambiguity may be shown by parol evidence"—including "surrounding circumstances and collateral facts"—to "carry into effect" the contracting parties' intentions. But this, too, is lost on the County.

2.

Unlike this Court, some Sixth Circuit panels do not understand the latent-ambiguity exception to the general rule restricting parol and extrinsic evidence in contract cases. But, like this Court since 1849, now-retired Seventh Circuit Judge Richard Posner understands ambiguity principles.

In *Rossetto*, Judge Posner applies federal ambiguity principles in a retiree healthcare class action. *Rossetto* explains that latent ambiguity—"sometimes called, an extrinsic, ambiguity"—is present where a contract—although "clear on its face" to an "uninformed reader"—is the subject of objective extrinsic evidence that would cause one "knowledgeable about the real-world context of the agreement" to "realize" it is "possible

to interpret" the contract in "more than one way." 217 F3d at 542-545, 547 (citations omitted).

Rossetto demonstrates that the "federal common law" ambiguity principles applied to CBAs are virtually identical to Michigan contract ambiguity principles—even if that fact is lost on the County and some Sixth Circuit panels.

Michigan ambiguity principles are not lost on all Sixth Circuit panels, however, only those cited by Macomb County in opposition to its retirees. Compare, *e.g.*, *Stryker Corp v Natl Union Fire Ins Co*, 842 F3d 422, 427 (CA6 2016) (Michigan citations omitted) (the latent-ambiguity exception to the parol evidence rule is "justified" because it permits courts to determine contracting parties' intentions); *Consolidated Rail Corp v GTW RR Co*, 607 FedAppx 484, 494 (CA6 2015) (Michigan citations omitted) (the "cardinal rule" is to "ascertain the intention of the parties" and to "this rule all others are subordinate," such as the general rule restricting "parol" consideration of "factors outside the instrument"); and *Wonderland v CBC Mortg*, 274 F3d 1085, 1092 (CA6 2001) (Michigan citations omitted) ("courts may use extrinsic evidence" to "dispose of" or "prove the existence" of "potential ambiguity" or discern the parties' "actual intent").

3.

Macomb County ignores *Shay* and *Ives* and all the Michigan contract ambiguity decisions in between. The County lawyers also pretend that the County's MRE 801(d)(2) admissions do not exist.

Here, the County wants this Court to ignore its "vested" and "lifetime" admissions because—the County says, disregarding Michigan law—they are "extrinsic" and "parol."

The County wants every Justice on this Court to be—in *Rossetto* terms—an "uninformed reader"—in the dark about the "real-world context" of the County CBAs.

To justify a $270 million "windfall" at the retirees' expense, the County ignores latent ambiguity principles that have been central to Michigan contract jurisprudence at least since *Ives* in 1849.

In sum, the County ignores Michigan law and the County admissions precisely because they *prove* the County's vested healthcare obligations.

Indeed, knowing the "surrounding circumstances" and the "real-world context," informed readers—like Judges Jansen, Fort Hood, and Hoekstra—must reject the County's effort to betray 1,600 retiree families by reducing or eliminating the County-paid healthcare that—in County Executive Hackel's words—the County promised to "vested" retirees "for their lifetimes."

III. THE COUNTY'S DISREGARD FOR CONTRACTUAL CONTEXT AND HISTORY

The County also disregards all context and history, *e.g.*, "the type of agreement, its purpose, and its circumstances." *Hillman* at 314. Appropriate in all contract settings, context is *essential* when addressing CBAs.

1.

"Federal labor policy"—endorsed by *Tackett* (135 SCt at 929)—is expressed in U.S. Supreme Court decisions. The Supreme Court holds that a CBA "is not an ordinary contract." *Wiley and Sons v Livingston*, 376 US 543, 550 (1964). Rather, a CBA "calls

into being…the common law of the shop which implements and furnishes the context of the agreement." A court "is not confined to the express provisions of the contract," because "the practices of the industry and the shop" are "equally a part of the collective bargaining agreement although not expressed in it." *USWA v Warrior & Gulf Nav Co*, 363 US 574, 578-582 (1960) (one of the *Steelworkers Trilogy*). In short, federal labor law and policy expose Macomb County's cramped distortion of *Tackett*.

2.

Michigan labor law and policy embodies similar principles. Michigan courts rigorously enforce collectively-bargained promises made by municipalities, like the County's promises here. See *e.g.*, *County of Ottawa v Jaklinski*, 423 Mich 1, 23 (1985) (addressing arbitrability, "An employee should not be deprived of already accrued or vested rights on the fortuity that they become ripe for enjoyment following the expiration of the agreement; "an employee remains entitled to such rights"; "already accrued or vested" rights "extend beyond contract expiration") and the other Michigan cases discussed at 526-530b and 98-104A.

The Public Employment Relations Act (PERA), MCL 423.201 *et seq*—the basic Michigan labor law governing County employees and public sector collective bargaining—is patterned on the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq*—the basic federal labor law governing private sector collective bargaining. Michigan courts take "guidance" from "federal precedents developed under the NLRA" when interpreting public employees' collective bargaining rights conferred by PERA. *Gibraltar Sch Dist v Gibraltar MESPA-Transp*, 443 Mich 326, 335 (1993) .

PERA was signed by Governor George Romney in 1965 to give public employees the "greater voice in their own working conditions" that they "deserve." Governor Romney is quoted in Richard N. Parker, "Introduction to Public Sector Labor Relations: Overview and History," chapter 1 of J.H. Willems, ed.-in-chief, *Michigan Public Employment and Labor Relations Law* (Michigan Public Employer Labor Relations Association 1994) at 16.

If PERA has meaning, County retirees must be able to enforce their collectively-bargained rights to lifetime healthcare. Likewise, *if* PERA has meaning, the County must be required to keep its promises made at the bargaining table.

Here, as in Illinois, under public-sector labor law "it is the employee's rights, that are protected." 51 NE3d at 784-785. In Michigan, as Governor Romney put it, this is what public-sector workers—and the Macomb County retirees—"deserve."

3.

Along with its disregard for County officials' admissions, the County lawyers ignore the decades of County practices and performance of its "contract obligations" to retirees. As Hackel admitted, "Historically, Macomb County has offered retiree healthcare to vested employees as part of their benefit package" and retirees who receive pension and the retirees' surviving spouses are entitled to County healthcare for "their lifetimes." (272-299A). This context—common to formerly union-represented County retirees of all classifications (see note 1)—shows MRE 801(d)(2) admissions by conduct, *i.e.*, by past County performance of its CBA "obligations."

Judicial determination of intentions from performance has long been one of the "ordinary principles." See *Brooklyn Life Ins Co v Dutcher*, 95 US 269, 273 (1877) ("There is no surer way to find out what parties meant, than to see what they have done."); *Old Colony Trust v City of Omaha*, 230 US 100, 118 (1913) (the "practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy" is of "great, if not controlling, influence"); and *Alabama v North Carolina*, 560 US 330, 346 (2010) (the parties' "course of performance" is "highly significant" evidence of their contractual intentions).

More particularly, context is *essential* to ascertaining collectively-bargained retiree healthcare rights. Again, see *TCU*, 385 US at 161 (to construe CBAs "it is necessary" to consider the "practice, usage, and custom pertaining to all such agreements") and *American Mfg Co*, 363 US at 567 ("special heed should be given to the context in which [CBAs] are negotiated").

Here, until recently, the County's practice, as the saying goes, was to back up its words with its wallet (or, more accurately, the taxpayers' wallets). Warned by its actuaries in 1993 that to keep its "benefits promises" it "must" fund retiree healthcare in a "regular, orderly manner" to avoid turning the CBA commitments into "empty promises," the County created the Macomb County Retiree Health Care Fund, a VEBA trust, and between 1993 and 2003 put over $65 million into that fund. (277-278A).

In 2007, concerned about growing "unfunded liability," and observing that "people live longer and retire earlier," County Finance Director David Diegel—the "chief financial officer for the County, under the direction of the Board of Commissioners"—

testified that "we currently do have an obligation" to "fund retiree health care," that "an obligation is an obligation," that "we have to fund that liability," that "we need to get to 100 percent," but did not need "100 percent tomorrow," that it took the County "50 years to fully fund our retirement program," and that he "wouldn't mind taking 50 years to fund our health care liability for retirees." (575-580b).

The County actuaries persistently warned Execuitve Hackel and the Commissioners—*e.g.*, in 2006, 2008, and 2010—that retiree healthcare commitments are "benefits which must be paid for" and that "each member of the retirement program" was "in effect, handed an 'IOU' which reads: 'The employer recognizes that you are earning eligibility for retiree health benefits when you retire.'" The actuaries warned that these "retirement benefits" needed to be paid for "in a regular, orderly manner" to ensure "the benefits promises were not empty promises" and to avoid any "financial 'surprises'" that might occur if "financing is put off until retirement." (569b, 572b, and 574b).

Later, warned again by its actuaries that it must do more to fund the healthcare promised to County retirees "for their lifetimes," the County continued to back up its words with its wallet by selling the $270 million in bonds in 2015 to fund the healthcare "for the next 50 years," *i.e.*, until 2065—when a 55-year-old 2015 County retiree—if he or she beat the actuarial mortality rate—would turn 105. (269A *ff*).

The County's past performance, payments, and practices, undertaken by County officials at the highest levels, *prove* the County's lifetime retiree healthcare obligations, belying the County's current cruel and shameful effort to evade those obligations.[4]

4.

The County also omits the historical context of collectively-bargained retiree healthcare, a history in which Michigan was prominent. The County's promises and performance did not emerge *ex nihilo*. See S.M. Israel and R.J. McClow, "Retiree Health Care and *Reese v CNH America*: The Beginning of the End of Contract Law As We Know It?" 59 *Wayne L Rev* 417, 418-419 (Fall 2013) (footnotes omitted, emphasis added):

> During the 1960s and early 1970s, coincident with the 1965 enactment of Medicare, private sector employers and industrial unions, the UAW and the Steelworkers prominent among them, negotiated lifetime, employer-paid retirement healthcare promises in collective bargaining agreements (CBAs). *Over the years, cities, counties, and states made similar CBA promises to public sector workers.*
>
> * * *
>
> The promises helped attract and retain qualified employees; retiree healthcare benefits were not costly; employers traded them for reduced wage proposals from union bargainers; there were many more active workers than retirees; and retirements did not start as early or last as long. That was then; this is now. Globalization, technology, increased life expectancy, FASB and GASB OPEB (other post-employment benefits) accounting requirements, mergers and acquisitions,

[4] Compounding its bad conduct, the County violated the law and its own procedures by deleting four years of County emails—from the 2008-2012 period—relating to retiree healthcare. The County's spoliation of evidence was the basis for the retirees' "adverse inference" request, which was not decided by the trial court or the Court of Appeals. See 107-108A and 543-544b.

> medical inflation, financial exigencies, and other systemic factors have made healthcare promises harder to keep and have increased employer incentives to break those promises.
>
> The result has been litigation. Employers unilaterally change or eliminate retirement healthcare. Retirees sue.
>
> * * *
>
> In the public sector, hourly retirees and unions sue in state court for CBA breach and sometimes make constitutional and tort claims, and salaried and non-union retirees sue in state court making constitutional, contract, and tort claims.

As retiree healthcare obligations became more expensive, some employers eliminated them in collective bargaining for future retirees. Some employers unilaterally broke their promises, prompting litigation. This began in the 1980s, leading to *Yard-Man* in 1983. But some employers kept their promises to existing retirees *and* extended them to new retirees. Macomb County was one of those faithful employers.

As County Finance Director Provenzano told the County Commission Finance Committee in 2014, speaking in support of the $270 million bond issue, "another option would be to *break contracts* with existing retirees and current employees," an option which Provenzano said was "not realistic." (584b, emphasis added). Macomb County issued the bonds. But Macomb County did "break contracts," first by unilaterally reducing promised retiree healthcare (which prompted this class action) and later, as this action progressed, by declaring that it had the unilateral right to end the healthcare promised to 1,600 retirees in the bilateral CBAs.

The County *negotiated* an end to retiree healthcare for employees retiring as of and after January 2016, County Executive Hackel said in 2014, but needed the $270

million in bonds to help fund the County's existing "contract obligations" to already "vested" retirees for their "lifetimes." But now the County lawyers say the County has no obligations. They ignore context and their client's admissions. They seek to relegate the County's promises and history to the Orwellian "memory hole."

Macomb County's ahistorical arguments give new life to the dark joke about the Soviet Union, where "the future was certain, but the past kept changing."

5.

Here, the context—the "surrounding circumstances," practice, performance, and the "common law" of the County workplace—shows that for decades the County kept its promises, made in multiple County CBAs with multiple unions. All the CBAs promise healthcare until the retiree's death and, continued after that, for the retiree's surviving spouse. As County Executive Hackel wrote, the County "historically" provided "vested" retirees and their surviving spouses healthcare "for their lifetimes." (272A, 299A).

As shown in our summary of the "record evidence," there are multiple other written and oral admissions by senior County officials *proving* that retiree healthcare is a "contractual obligation" which "must" be funded for the retirees' "lifetimes."

But the County ignores context *and* the Michigan law mandating consideration of context. The County's allegiance is not to Michigan jurisprudence. Or to the County's contractual commitments. Or to the public trust. Rather, the County is committed only to its self-interested effort to put almost $350 million—earmarked for retiree healthcare—into the County's unrestricted general funds. The County wants a "windfall"—at the expense of its retirees, the public trust, and the rule of law. The

County wants to put those millions into the unfettered control of the very same County politicians who now are betraying 1,600 County retiree families.

CONCLUSION

County Executive Hackel, the County actuaries, successive County Finance Directors Diegel and Provenzano, County Corporation Counsel Brumbaugh, County Commission Chair Flynn, County labor negotiator Cwiek, the County Human Resources department, and other County officials, over the course of four decades, spoke and wrote to County retirees, to retirees' spouses, to the County Board of Commissioners, to the Michigan Department of Treasury, to the unions, to the public, and to the purchasers of $270 million in County retiree healthcare bonds.

The officials *admitted* the County's retiree healthcare "contract obligations," that retirees are "vested," that the retirees and their surviving spouses are entitled to County healthcare "for their lifetimes," that the County gave an "IOU" to the retirees, making "benefit promises" "which must be paid for," that "regular, orderly" funding is needed to ensure "the benefit promises will not be empty promises," that the County has "an obligation to fund retiree healthcare" at "100 percent" and that "an obligation is an obligation," and that County Executive Hackel's bond proposal, implemented in 2015, meant—in then-retired County Corporation Counsel Brumbaugh's assuring words: "the promise made to retirees concerning healthcare will be a promise kept!"

But the County now has promisor's remorse. The County lawyers ask this Court to approve County betrayal of the retirees and to nullify the County's contractual commitments. But "Courts do not sit to relieve contract parties of their improvident

commitments." *Bidlack*, 993 F2d at 609. The sole "material injustice" here is that which would result from permitting the County to evade its obligations to 1,600 retiree families.

If the rule of law has meaning, the Court of Appeals decision is right. *If* the public trust has meaning, the County will be directed to keep its promises. *If*, in the County's own words—"an obligation is an obligation"—the County effort to betray its retirees will end now, in this Court.

For these reasons, and those summarized in our original opposition to leave, based on the CBAs and the County's admissions by word and deed, we ask the Court to deny leave or to peremptorily affirm the Court of Appeals and return this case to the trial court to **(1)** enter judgment for the retirees and **(2)** issue the permanent injunction safeguarding vested lifetime retiree healthcare.

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March 27, 2018

Class Counsel and Attorneys for
Plaintiffs-Appellees Retirees

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2018, I caused the foregoing paper to be electronically filed with the Clerk of the Court using the ECF system which will send notification of such filing to all parties of interest participating in the CM/ECF system.

/s/ *Christopher P. Legghio*
Christopher P. Legghio