STATE OF MICHIGAN
IN THE SUPREME COURT

Rita Kendzierski, Bonnie Haines, Greg Dennis, Louis 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-Appellee,

v.

County of Macomb,

Defendants-Appellants.
_____/

Supreme Court No. 156086

COA Case No. 328929

Lower Court: Macomb County

Circuit Court Case No. 10001380 CK

SUPPLEMENTAL AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE, MICHIGAN ASSOCIATION OF COUNTIES, MICHIGAN TOWNSHIPS ASSOCIATION AND STATE BAR OF MICHIGAN, PUBLIC CORPORATION LAW SECTION

Miller, Canfield, Paddock and Stone, PLC
Clifford W. Taylor (P21293)
Richard W. Warren (P63123)
Brian M. Schwartz (P69018)
150 W. Jefferson, Suite 2500
Detroit, MI 48226
Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Rules

STATEMENT OF QUESTIONS PRESENTED

The Michigan Court of Appeals held that, even though collective bargaining agreements between the County of Macomb and its unions contained no language expressly stating that County employees would be entitled to vested lifetime health benefits upon retirement, those collective bargaining agreements somehow obligated the County to provide vested health benefits for life to those employees upon their retirement. To reach that conclusion, the Court of Appeals relied upon impermissible inferences in favor of vesting that have previously been rejected by the United States Supreme Court, the United States Court of Appeals for the Sixth Circuit, United States District Court for the Eastern District of Michigan and the Michigan Court of Appeals.

Are Michigan Courts permitted to re-introduce the doctrine of reasonable expectations, thereby permitting courts to substitute what a particular judge believes is reasonable in place of what the parties to the contract actually agreed to?

May the courts utilize retiree-friendly inferences to find a promise to provide vested, lifetime health benefits? In the absence of express vesting language, are Michigan Courts permitted to ignore, and fail to apply, general durational clauses in collective bargaining agreements stating that the agreements (and by definition, all promises contained within those agreements) terminate within three years? Or, should Michigan Courts instead decide questions of contract interpretation based on the plain meaning of the contract?

Should the Michigan Supreme Court grant leave to appeal to resolve all of these important questions of Michigan retiree health benefit law?

I. INTRODUCTION

On January 24, 2018, this Court entered an Order scheduling Oral Argument on whether the Court should grant the Application for Leave to Appeal the Court of Appeals' April 18, 2017 opinion. In that Order, this Court also invited the Michigan Municipal League, Michigan Association of Counties, Michigan Townships Association, State Bar of Michigan Public Corporation Law Section,[1] and the State Bar of Michigan Labor Law Section to file briefs amicus curiae.

As set forth more fully below, the Michigan Municipal League, Michigan Association of Counties, Michigan Townships Association, State Bar of Michigan Public Corporation Law Section, and the State Bar of Michigan Labor Law Section demonstrate that the Michigan Court of Appeals' April 18, 2017 opinion is in derogation of *Wilkie v Auto-Owners Ins Co*, 469 Mich 41 (2003), contrary to the recent body of retiree health benefit law issued by the United States Supreme Court and Sixth Circuit Court of Appeals and must be overturned. Since the filing of initial briefs by the Appellant, Appellees and Amici, the United States Supreme Court has issued yet another decision – *CNH Industrial N.V. v. Reese*, 138 S.Ct. 761 (2018) – eviscerating the method of analysis and conclusions reached by the Court of Appeals here (and favored by Appellees), and confirming that courts shall not erroneously presume lifetime vesting from silence, or distort the text of a contract. *CNH Industrial N.V.* demonstrates that the Michigan Court of Appeals' analysis is an incorrect way to read and interpret a contract. Further, the Michigan Court of Appeals' decision flies directly in the face of *Studier v. Michigan Public School Retirement Board*, 472 Mich. 642 (2007), and therefore must be overturned.

[1] Amici note that the State Bar Section is now entitled the "State Bar of Michigan Government Law Section."

The *amicus curiae* respectfully request that this Court: (a) grant Macomb County's Application for Leave and overturn the Michigan Court of Appeals' flawed decision, (b) direct lower courts to avoid the use of inferences, and the rule of reasonable expectations, which ignore the intent of the contracting parties, (c) require parties advancing claims of lifetime, vested health benefits to identify express language in the contract supporting those claims, and (d) restore the use of ordinary contract interpretation principles in cases involving collectively-bargained retiree health benefits.

II. STATEMENT OF INTEREST OF AMICUS CURIAE

Amici adopt the Statement of Interest of Amicus Curiae set forth in their initial brief.

III. STATEMENT OF FACTS

Amici adopt the Statement of Facts set forth in the Application for Leave to Appeal submitted by Defendant-Appellant County of Macomb.

IV. STANDARD OF REVIEW

Amici adopt the Standard of Review set forth in their initial brief.

V. LAW AND ARGUMENT

A. The Michigan Court of Appeals' Decision, and Appellee-Retirees, Ignore Controlling Precedent, Champion a Return to the Rejected Rule of Reasonable Expectations, Mis-apply the Rules regarding Ambiguity and Fail to Give Effect to MCR 7.215.

In its initial brief, the Amici demonstrate that the Michigan Court of Appeals' decision below violates the mandatory principles and holdings set forth in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52 (2003)(finding that the rule of reasonable expectations, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American law that parties are free to contract as they see fit, and that courts

are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy).

The Court of Appeals' decision failed to recognize and apply *Wilkie* when it ignored both: (1) the absence of language in the relevant collective bargaining agreements promising either "vested" or "lifetime" retiree health benefits, and (2) that each collective bargaining agreement's general durational clause provided that the agreement, and all benefits contained within it, terminates at the end of three years. The Michigan Court of Appeals did precisely what *Wilkie* prohibits – it examined extrinsic evidence and inferences, and then utilized those to effectively re-write years of unambiguous collective bargaining agreements that neither promised "vested" nor "lifetime" benefits to retirees. The Court of Appeals' analysis and findings are in direct opposition to a party's freedom to contract.[2] As crisply explained in *Wilkie*:

> The expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable. If a person signs a contract without reading all of it or without understanding, under some circumstances that person can avoid its obligations on the theory that there was no contract at all for there was no meeting of the minds. But to allow such a person to bind another to an obligation not covered by the contract as written because the first person thought the other was bound to such an obligation is neither reasonable nor just.

Wilkie, 469 Mich. at 56-57 (emphasis added), *quoting Raska v. Farm Bureau Insurance Co.*, 412 Mich. 355, 362-363 (1982). Accordingly, the rule of reasonable expectations has no application when, as here, interpreting an unambiguous contract because one cannot be said to have reasonably expected something different from the clear language of the contract. *Wilkie*, 469 Mich. at 62. In its final analysis, this Court held in *Wilkie* that "the rule of reasonable

[2] As the United States Supreme Court has long held, the general rule of contracts is that "competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in courts." *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931).

expectations has no application in Michigan, and those cases that recognized this doctrine to that extent are overruled." *Id.* at 63. Given that the Michigan Court of Appeals effectively applied the rule of reasonable expectations here, it should also be overruled and its opinion peremptorily reversed in favor of Appellant.

Along these lines, Amici note that, although Appellee-Retirees accuse the Appellant of ignoring Michigan law, they completely fail to address or even mention *Wilkie*, nor do they attempt to explain how the Michigan Court of Appeals' decision does not violate the prohibitions announced in *Wilkie*. The Appellees' silence, and failure to address these arguments on appeal, effectively amounts to an abandonment of a contrary position. *See Woods v. SLB Property Management, LLC*, 277 Mich App 622, 626-27 (2008).

The Michigan Court of Appeals' decision also misapplied precedent concerning ambiguity. In *Hall v. Equitable Life*, 295 Mich 404 (1940), this Court considered a dispute that resulted when an application for a life insurance policy named the beneficiary as "Emma H. Foote (guardian)" and the issued policy named "Emma H. Foote" as the beneficiary. *Hall*, 295 Mich at 406. The administrator of the relevant estate contended that a latent ambiguity existed because Emma H. Foote was never appointed guardian of the deceased. *Id.* at 407-08. This Court correctly held that:

> An ambiguity is properly latent...from the ambiguous or obscure state of extrinsic circumstances to which the words of the instrument refer…without altering or adding to the written language or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words made use of.

Id. at 409 (emphasis added), *citing* 20 Am.Jur p. 1010. Along these lines, this Court also mandated that parol evidence may be admitted to correct, identify or explain, but is not admissible "to pervert the written instrument….." *Id.* at 410. In holding that the parties intended that Ms. Foote would take in the capacity of a guardian, this Court warned that parol evidence is

only to be used *if* the particular words or phrases in a contract are doubtful as to meaning or reasonably capable of having more than one meaning. *Id.* at 410. Neither the Michigan Court of Appeals nor the Appellee-Retirees have applied this analysis to the contracts in question, all of which are unambiguous because they have general duration clauses providing for expiration of all terms of the agreement, and none of which contain language suggesting that retiree health benefits were intended to last for life or to vest. Instead, the Michigan Court of Appeals impermissibly added language to the labor agreements to reach its conclusion.

Nor have the Appellee-Retirees attempted to explain how the Michigan Court of Appeals' decision does not violate the "first out" rule, given contrary precedent in the form of *Harper Woods Retirees Ass'n v City of Harper Woods*, 312 Mich App 500, 511-12 (2015). In *Harper Woods*, the Michigan Court of Appeals acknowledged the overruling of *UAW v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1983) and concluded that *M&G Polymers, USA, Inc. v. Tackett*, 135 S.Ct. 926 (2015)(rejecting the unwarranted *Yard-Man* inferences and presumptions) was fully consistent with Michigan's contract jurisprudence. *Harper Woods Retirees Ass'n*, 312 Mich App at 511-12. Accordingly, *Harper Woods* directed courts to: cease using retiree-friendly inferences and presumptions; avoid construing ambiguous writings as creating lifetime commitments; require a "clear manifestation of intent" before conferring a benefit or obligation; and to avoid finding a lifetime promise where collective bargaining agreements are silent regarding duration or vesting. *Harper Woods Retirees Ass'n*, 312 Mich App at 512.

Although the Michigan Court of Appeals, below, acknowledged the existence of *Harper Woods* in passing, it did exactly what *Harper Woods* directed courts not to do – it found the existence of a lifetime promise notwithstanding the lack of "lifetime" or "vested" language, and did so by relying on gratuitous inferences favoring the retirees. (Slip Opinion at pp 3-4). In

other words, the Michigan Court of Appeals behaved as if *Harper Woods* had not existed. This directly violates the "first out" rule of MCR 7.215(J), which requires a Court of Appeals panel to either follow a prior published Court of Appeals decision, or declare a conflict. *See Romain v Frankenmuth Mut Ins Co*, 483 Mich 18 (2009). Under that Court rule, Appellate panels that disagree with a prior decision issued by another panel must follow that decision, but have the option of indicating in writing their disagreement with the prior decision. Once that occurs, the Chief Judge of the Court must poll all Court of Appeals judges to determine whether the question at issue is outcome-determinative and warrants the convening of a special panel. *See* MCR 7.215(J)(3)(a).

By ignoring and failing to apply *Harper Woods Retirees Ass'n*, and instead issuing a contrary decision in *Kendzierski*, the Michigan Court of Appeals ignored the defined procedure set forth in MCR 7.215 and denied a special panel the opportunity to resolve any conflict.

For these reasons alone, the Michigan Court of Appeals' decision requires vacature, and *Harper Woods Retirees Ass'n* should have controlled the result below. *See Romain*, 483 Mich. at 20; *Horace v. City of Pontiac*, 456 Mich. 744, 754-55 (1998).

B. The United States Supreme Court's February 20, 2018 decision in *CNH Industrial N.V. v. Reese,* 138 S.Ct. 761 (2018) demonstrates, again, that the Michigan Court of Appeals applied a flawed and inappropriate analysis in *Kendzierski* that must be corrected on appeal

Barely concealing their frustration with Amici's citation to relevant Federal case authority, the Appellee-Retirees censoriously chide that "federal law occupies most of amici's attention" (Appellee-Retirees' Supplemental Brief, p. 1). While "most" is an overstatement, as to the rest of the charge, Amici plead guilty – precisely because the Federal cases are persuasive if for no other reason than that they are United States Supreme Court cases themselves, or have their genesis in United States Supreme Court cases. Yet there is another reason, and that is that

these very cases have been declared by the Michigan Court of Appeals in *Harper Woods Retirees Ass'n* to be valid and consistent with Michigan law. *Id.* at 512. Thus the Federal discussion is on point and appropriately placed before this Court. Indeed, one might query why Appellee-Retirees have ignored so many of these very cases that shoot big holes in their arguments. Perhaps it is because there is no answer and they make the proper outcome here unmistakable.

With that behind us, let's first take up the recent Federal case of *CNH Industrial N.V. v. Reese*, 138 S.Ct. 761 (2018), in which the United States Supreme Court, just like in *Tackett*, pulls apart the very theories and arguments that Appellee-Retirees advocate for here. In 2004, several former union employees of CNH Global N.V. and CNH America, LLC filed a retiree health benefit lawsuit against their former employers, contending that their employers denied them, and a class of retirees, vested, lifetime retiree health benefits as provided for in decades worth of collective bargaining agreements. *Reese v. CNH Global, N.V*, 2007 WL 248989 (E.D. Mich. Aug. 29, 2007). As here, none of the collective bargaining agreements at issue expressly promised to provide retirees with health benefits "for life" or "until death." The *Reese* District Court ignored that, instead focusing on inferences and extrinsic evidence, much like the Michigan Court of Appeals did in *Kendzierski*. For example, it noted that the relevant language tied eligibility for retiree health care benefits to eligibility for a pension, and relied on testimony from UAW negotiators. *Reese*, 2007 WL at *8-9. The District Court also placed heavy emphasis, as Appellee-Retirees do here, on the fact that the company's representatives "understood that retirees and their surviving spouses were entitled to lifetime medical insurance benefits…." *Id.* at *9. In light of this extrinsic evidence, the District Court in *Reese* concluded that the "plain language of the relevant agreements, as further supported by extrinsic evidence,"

demonstrated the parties' intent to grant lifetime retiree health insurance coverage to retirees and their surviving spouses who were eligible for or are receiving a pension. *Id.* On appeal, the Sixth Circuit acknowledged the existence of a general durational clause in the labor agreements, but did not apply that clause and determined that the agreements were ambiguous because: (a) certain benefits, like life insurance, were carved out with different durations in the labor agreements; and (b) health care benefits were tied to pension eligibility suggesting, in the Sixth Circuit's view, that health benefits lasted for life. *CNH Industries, N.V. v. Reese*, 138 S.Ct. 761, 764 (2018).[3]

Following a long history of appeals, the United States Supreme Court granted certiorari to review *Reese*. In its opinion, the United States Supreme Court noted the existence of the Sixth Circuit's long history of applying inferences and presumptions in favor of vesting following *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (1983), the rejection of those inferences and presumptions by *M&G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926 (2015) and – more importantly – that the Sixth Circuit acted improperly in *Reese* when it used inferences to render a collective bargaining agreement ambiguous as a matter of law, thereby allowing the consideration of extrinsic evidence. *CNH Industries, N.V.*, 138 S.Ct. at 762-63.

The United States Supreme Court rejected both the refusal to give meaning to general durational clauses in collective bargaining agreements, and the presumption of lifetime benefits where a collective bargaining agreement is silent as to the specific duration of retiree health

[3] Judge Sutton dissented, correctly indicating that a collective bargaining agreement containing a general durational clause was unambiguous because the clause limited *all* benefits contained within the agreement, and the agreement never promised lifetime or vested benefits. *CNH Industries, N.V.*, 138 S.Ct. at 765. In Judge Sutton's words, "ambiguity…requires 'two competing interpretations, both of which are fairly plausible'…'and [a] forbidden inference cannot generate a plausible reading.'" *Id.* at 765, *citing Tackett*, 854 F.3d at 891.

benefits. *Id.* at 763-64. Instead, the United States Supreme Court held, Courts must recognize that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* at 763, *quoting Litton Financial Printing Division v. NLRB*, 111 S.Ct. 2215 (1991). Further, contracts that are silent as to their duration will ordinarily not be treated as operating into perpetuity. *Id.*

Regarding the supposed tie-in between pension benefit status and retiree health benefits, the United States Supreme Court held that utilizing pension receipt status to justify lifetime or vested health benefits is "contrary to Congress' determination" in ERISA because ERISA specifically distinguishes between plans that result in deferral income (i.e., pensions) and plans that offer medical benefits. *Id.* at 764.

With these principles in mind, the United States Supreme Court reversed the Sixth Circuit's decision, finding that it failed to comply with *Tackett's* direction that only when a contract is ambiguous can a court consult extrinsic evidence to determine the parties' intentions, and that a collective bargaining agreement is "not ambiguous unless it could reasonably be read as vesting health care benefits for life." *CNH Industries, N.V.*, 138 S.Ct. at 765. The Sixth Circuit ran afoul of those controlling principles – as the Michigan Court of Appeals did here – by failing to point to any terms in the agreement promising vested or lifetime status, and instead by using *Yard-Man* inferences (*i.e.*, failure to apply the general durational clause, inferring vesting from the presence of language regarding other benefits and tying pension status to health care benefits) to create an ambiguity. *Id.* at 765. As the United States Supreme Court explained:

> *Tackett* thus rejected these inferences not because of the *consequences* that the Sixth Circuit attached to them – presuming vesting versus finding ambiguity – but because they are not a valid way to read a contract. They cannot be used to create a reasonable interpretation any more than they can be used to create a presumptive one.

Id. at 766. The Supreme Court correctly observed that "shorn of *Yard-Man* inferences" the *Reese* case was actually straightforward, given that the agreement at issue contained a general durational clause, and no other provision specified that retiree health benefits lasted for life or until death. *Id.* at 766. Given this, the United States Supreme Court held that "the only reasonable interpretation of the 1998 agreement is that the health benefits expired when the collective-bargaining agreement expired in May 2004." *Id.* (holding that "if the parties meant to vest health care benefits for life, they easily could have said so in the text. But they did not").

Setting aside that *CNH Industrial, N.V. v. Reese* was issued by the highest court in the country, it does nothing more than apply the principles first announced in *Tackett*, a decision that is fully "consistent with Michigan's contract jurisprudence regarding [collective bargaining agreements], which applies with equal force in both the public and private sectors." *Harper Woods Retirees Ass'n v City of Harper Woods*, 312 Mich App 500, 513 (2015).

Given this, the Michigan Court of Appeals should have applied the same principles endorsed by *CNH Industrial, N.V. v. Reese*, and committed reversible error when it failed to do so. Even though the Michigan Court of Appeals found that the collective bargaining agreement contained no vesting language (*Kendzierski*, 319 Mich. App. at 286), it nonetheless: (a) created an alleged ambiguity by inferring that the fact that surviving spouses could receive coverage must have meant that the parties intended lifetime benefits; (b) conjured an inference that benefits are lifetime because it might be possible for a retiree to turn age 65 beyond the three year term of the collective bargaining agreement; (c) identified the pension tie-in as supporting a finding of vested benefits; and (d) considering extrinsic statements made years later by county employees who had no involvement in negotiating collective bargaining agreements, and

therefore lacked personal knowledge, about the hope to continue providing those benefits.[4] *Kendzierski*, 319 Mich. App. at 286 – 87. It was only though the use of this judicially created language that the Michigan Court of Appeals was able to conclude that retiree health benefits were vested. *Id.* at 287-88.

In other words, the Michigan Court of Appeals engaged in the exact same prohibited analysis that the United States Supreme Court corrected in *Tackett* and *CNH Industrial, N.V.* As occurred in both of those cases, this Court should peremptorily reverse the Michigan Court of Appeals' *Kendzierski* decision, apply the correct analysis and conclude that Appellee-Retirees have not shown the existence of a contract to provide lifetime or vested benefits. Any other result would cause *Yard-Man*, and its unwarranted inferences and presumptions that existed contrary to Michigan law regarding interpretation of agreements, to be "re-born, re-built and re-purposed for new adventures." *CNH Industrial, N.V.*, 138 S.Ct. at 763.

C. The Michigan Court of Appeals' Finding that Tying Retiree Health Benefits to Pension Eligibility Implies Vested Retiree Health Benefits Violates *Studier v. Michigan Public School Retirement Board*, 472 Mich. 642 (2005)

In *Studier v. Michigan Public School Retirement Board*, 472 Mich. 642 (2005), this Court evaluated whether the Retirement Board's decision to increase prescription drug copayments and deductibles under the applicable health plan violated the State Constitution. The Constitutional provision at issue provided that the "accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." *Studier*, 472 Mich. at 649. Studier

[4] As noted by the Sixth Circuit Court of Appeals in *Cole v Meritor, Inc.*, 855 F.3d 695, 702 (6th Cir 2017), such extrinsic statements are not evidence of a lifetime promise, but instead merely reflect that individuals simply assumed that the benefits would continue for life because neither side had any reason to think that any future labor agreement would alter that pattern.

contended that health care benefits met the definition of "accrued financial benefits of each pension plan" and therefore could not be diminished by the state through the imposition of additional costs and payments.

Construing this provision, this Court focused on the fact that the term "benefits" was modified by the terms "financial" and "accrued." *Id.* at 652-653. Regarding the term "accrue," the Court found that the ratifiers of the State Constitution would have commonly understood accrued benefits to mean benefits that grow over time, such as pension payments or retirement allowances. *Id.* at 654. Health care benefits, however, "are not benefits of this sort. Simply stated, they are not accrued" because neither the amount of health care benefits a public school employee receives nor the amount of fees that the Retirement Board pays increase due to the number of years of service a retiree has performed. *Id.* This Court likewise found that the ratifiers of the State Constitution would have commonly understood "financial" benefits to include only monetary payments, and not benefits of a nonmonetary nature such as health care benefits. *Id.* at 655. As a result, this Court found that, unlike pension benefits, "we hold that health care benefits are not protected by" the Constitution "because they neither qualify as 'accrued' benefits nor 'financial' benefits as those terms were commonly understood…." *Id.* at 658-59.[5]

By concluding that tying a retirees' eligibility for pension benefits to retiree health care benefits meant that those health care benefits were somehow vested, the Michigan Court of

[5] At page 19 of their Supplemental Brief, the Appellee-Retirees contend that *Matthews v. CTA*, 51 NE3d 753 (Illinois S.Ct. 2016) has held that *Tackett* and its progeny are not applicable to public sector retiree health benefit cases. *Matthews*, however, has no applicability at all to Michigan retiree health benefit law, given that Illinois – unlike Michigan – provides constitutional protection to health insurance benefits for public retirees. *Kanerva v. Weems*, 2014 IL 115811 (Illinois S.Ct. 2014). Nor does it control the precedential value of *Tackett*.

Appeals violated the principles of *Studier*, and impermissibly elevated retiree health care benefits to a protected status that the ratifiers of the State Constitution, and this Court, have never intended or condoned. For this independent reason, the County's application for leave to appeal should be granted, and the Court of Appeals' decision should be reversed.

D. Allowing *Kendzierski* to stand will Encourage the Resurrection of the Rule of Reasonable Expectations, and will Mislead Other State Courts into Substituting Judicially Created Language for Actual Negotiated Contract Language

The Michigan Court of Appeals' decision has ramifications that go far, far beyond the interpretation of collective bargaining agreements in retiree health benefit disputes. If the decision is allowed to stand, courts will be on one hand be confused, and on the other hand emboldened, to begin re-applying the rule of reasonable expectations that was previously struck down by *Wilkie*. Courts will view the Michigan Court of Appeals' use of judicially created language and presumptions as a signal that they too may arrive at a preferred interpretation of a private agreement, and then impose that interpretation on the parties to that agreement notwithstanding the actual contract language.

Allowing the Court of Appeals' decision to stand will also call into question the "first out" rule which demands a common-sense approach towards disagreements between panels of the same Court. Appellate courts may interpret *Kendzierski* as a signal that, so long as an opinion names a prior inconsistent decision, it need not be applied and no conflict need be declared. Correcting this potential misconception is paramount.

Even more concerning, the Michigan Court of Appeals' finding that retiree health benefits can become vested merely by giving those benefits to individuals who also happen to be pension recipients completely upsets the distinct differences between pension and health benefits announced in *Studier*. If left uncorrected, *Kendzierski* could be used by future courts as

justification for awarding – contrary to the intent of the ratifiers of the State Constitution – constitutionally-protected status to retiree health benefits.

Finally, the Michigan Court of Appeals' decision places every municipality across the state at risk of being found liable to provide its retirees with lifetime, vested health benefits even though the municipality never contractually agreed to do so. Given that most municipalities have far more retirees than actual employees, and the cost of providing health care continues to increase exponentially, a lifetime, vested finding will often mean a financial emergency, and perhaps emergency management, for municipalities who never agreed to provide such benefits in the first instance.

This case demands that the Supreme Court intervene to reaffirm the application of ordinary principles of contract interpretation to collective bargaining agreements and provide clear governing rules to lower courts as to how they should, and should not, evaluate claims seeking vested, lifetime retiree health benefits. It also provides the Supreme Court with an opportunity to head off the resurrection of the rule of reasonable expectations, and to direct courts to follow the "first out" rule.

VI. CONCLUSION

For the foregoing reasons, the Michigan Municipal League, Michigan Association of Counties, Michigan Townships Association, and State Bar of Michigan, Public Corporation Law Section, respectfully request that the Court grant leave to appeal and reverse the decision of the Court of Appeals.

Respectfully submitted,

/s/Clifford W. Taylor (P21293)
Richard W. Warren (P63123)
Brian M. Schwartz (P69018)
Miller, Canfield, Paddock and Stone, P.L.C.
Attorneys for Amicus Curiae
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
taylorc@millercanfield.com

Dated: April 18, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I electronically filed the foregoing paper with the Clerk of the Court using the TrueFiling system which will send notification of such filing to all counsel of record.

/s/Clifford W. Taylor (P21293)
Miller, Canfield, Paddock and Stone, P.L.C.
Attorneys for Amicus Curiae
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
taylorc@millercanfield.com

31191532.1\107546-00030